

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCOM 2021/0214

IN THE MATTER OF THE VIRGIN ISLANDS CONSTITUTION ORDER 2007

**IN THE MATTER OF THE CONSTITUTION OF THE VIRGIN ISLANDS FOR REDRESS PURSUANT TO
SECTION 31 THEREOF FOR CONTRAVENTION OF SECTION 16(9) (RIGHT TO A FAIR HEARING)**

BETWEEN:

- (1) ANDREY TITARENKO**
- (2) ROMOS LIMITED**
- (3) GOLDFORT LIMITED**

Claimants

AND

- (1) THE ATTORNEY GENERAL OF THE VIRGIN ISLANDS**
- (2) THE HON. JUSTICE ADRIAN JACK**
(a High Court Judge)
- (3) THE HON. JUSTICE GERHARD WALLBANK**
(a High Court Judge)

Defendants/Applicants

- (1) VIKTOR VEKSELBERG**
- (2) PAO T PLUS**
- (3) OOO RENOVA HOLDING RUS**
- (4) RENOVA INDUSTRIES LTD**
- (5) LAMESA HOLDINGS SA**
- (6) ZAPANCO LIMITED**
- (7) INTEGRATED SYSTEMS LIMITED**
(a company incorporated under the laws of Belize)
- (8) WEDGWOOD MANAGEMENT LIMITED**
- (9) ODVIN FINANCIAL INC**
- (10) STARLEX COMPANY LIMITED**

- (11) SUNGLET INTERNATIONAL INC.
- (12) FLOPSY OVERSEAS LIMITED
- (13) INTEGRATED ENERGY SYSTEMS LIMITED
(a company incorporated under the laws of Cyprus)
- (14) VLADIMIR KUZNETSOV
- (15) ALEXANDER KOLYCHEV
- (16) MIKHAIL SLOBODIN
- (17) MAKSIM MAYORETS
- (18) CLERN HOLDINGS LIMITED
- (19) ANDREY BURENIN
- (20) EVGENY OLKHOVIK
- (21) YAKOV TESIS
- (22) IGOR CHEREMIKIN
- (23) IRINA MATVEEVA
- (24) WITEL AG
- (25) ALEXEI MOSKOV
- (26) PAVLINA TSIRIDES
- (27) IRINA LOUTCHINA SKITTIDES
- (28) PHOTINI PANAYIOTOU
- (29) ARTEMIS ARISTEIDOU
- (30) A.B.C. GRANDESERVUS LIMITED
- (31) EMMERSON INTERNATIONAL CORP.
- (32) MIKHAIL ABYZOV
- (33) FRESKO FINANCIAL LIMITED

Interested Parties

Appearances: Mr. Andrey Titarenko, appearing in person and unrepresented
Dr. Hickman QC, Mrs. Jo-Ann Williams-Roberts, Solicitor General and Ms. Nicosie
Dummett, Principal Crown Counsel, for the Defendants

2022: May 6th
2022: July 29th

JUDGMENT

- [1] **ELLIS J:** At the conclusion of the trial of this matter on 6th May 2022, the Court rendered an oral judgment in this matter and indicated that written reasons will follow once the Parties had provided written legal submissions on the issue of costs. These are the reasons.
- [2] The Claimants have initiated this constitutional motion seeking inter alia quashing relief in respect of a number of judgments and/or orders made by Justices Adrian Jack and Gerhard Wallbank in proceedings before the Commercial Court.
- [3] The litigation history/background which preceded this Claim are protracted but has been helpfully summarized by the Claimants in Annex A and B to the Fixed Date Claim Form. In the interest of brevity, the Court will not repeat them here.
- [4] After acknowledging the Claim, the Defendants filed a Notice of Application on 3rd March 2022 supported by the Affidavit of Ms. Maya Barry in which they seek to strike out the Claim on the basis that it is hopelessly misconceived and should not be allowed to proceed (“the Application”). The Application is advanced on the following grounds:
- i. The claim as an abuse of process,
 - ii. The claim is actually an application for judicial review and that leave to apply for such relief has not been obtained,
 - iii. In any event, leave to apply for judicial review should be refused,
 - iv. The claim is wholly unmeritorious, has no real prospects of success and/or it does not disclose reasonable grounds for bringing a claim.
- Pursuant to CPR 15.2(1) (a) and/or 26(1)(b), the Defendants also seek summary judgment.
- [5] The Defendants have filed no evidence in response to the Application. Instead, on 5th May 2022 (the day before the hearing of the matter) the First Claimant filed legal submissions which purported to be a response to the Defendants’ Application but which also contained a number of applications including:
- i. An application seeking the recusal of this coram from these proceedings.

- ii. An application seeking the removal of Solicitor General, Mrs. Jo-Ann Williams-Roberts and Dr. Hickman QC as counsel representing the Defendants in these proceedings.

These applications were entertained, considered and disposed of in oral reasons delivered during the course of the hearing of 6th May 2022.

GENERAL PRINCIPLES - STRIKE OUT APPLICATIONS

[6] Under Part 26.3 of the Civil Procedure Rules, a court is empowered to dismiss an action in a summary way without a trial where the statement of claim discloses no cause of action, or is shown to be frivolous and vexatious or is otherwise an abuse of the process of the court. Part 26.3(1) provides that:

“(1) ... the court may strike out a statement of case or part of a statement of case if it appears to the court that –

- (a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;
- (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
- (c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;”

[7] It is now well settled that the jurisdiction of the Court to strike out a claim pursuant to Part 26.3 is only to be used in clear and obvious cases, when it can clearly be seen, on the face of it, that a claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court. Recent case law demonstrates that courts have not deviated from this approach. The rationale for this narrow approach has been explained by Mitchell JA in **Tawney Assets Limited v East Pine Management**¹ in the following way:

“The exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The court must therefore be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial.” Emphasis mine

¹ Civil Appeal No. 7 of 2012, Territory of the Virgin Islands unreported judgment

[8] In **Partco Group Ltd v Wragg**,² Potter LJ attempted to prescribe the cases where striking out would be appropriate. Those include: (a) where the statement of case raises an unwinnable case so that continuing the proceedings is without any possible benefit to the defendant and would waste resources on both sides; (b) where the statement of case does not raise a valid claim or defence as a matter of law; (c) if the facts set out do not constitute the cause of action or defence alleged; or (d) if the relief sought would not be ordered by the court.

[9] It is also now established that when dealing with such applications, a court's function is limited to the scrutiny of the particular statement of case. The court must test the particulars which have been given in each averment to see whether they are sufficient to establish a reasonable cause of action which is simply stated as "*a factual situation the existence to which entitles a party to obtain from a Court a remedy against another person*". The court must also bear in mind that ... "*so long as the statement of claim or the particulars disclose some cause of action, or raises some question fit to be decided by the judge of jury, the mere fact that the case is weak and not likely to succeed is no ground for striking out*".³

[10] It follows that there is a burden which rests on all litigants who come before a court. That burden has been iterated in the following terms in by Lord Diplock in **Letang v Cooper**⁴:

"A person who wishes to move the court must state a case that is known to, or created by law. The case as stated must disclose sufficient facts that are material to the issue to render the claim viable and which would permit the person who has to answer the case to know what case he has to meet it must disclose a reasonable cause of action."⁵

What then is the Claimants' Case?

[11] The essence of the Claimants' case is that certain decisions made by the learned Justice Adrian Jack in **BVIHCOM2013/0160 Renova Industries Ltd et al v Emmerson International Corp. et al** and Justice Gerhard Wallbank in **BVIHCOM2020/0035 Emmerson International Corp. v Romos Limited et al**, have operated to deprive them of their right to a fair trial as guaranteed under section 16(9) of the Virgin Islands Constitution Order 2007 ("the Constitution").

² [2002] EWCA Civ. 594

³ Per Lord Pearson in *Drummond Jackson -v- British Medical Association* [1970] 1 ALL ER 1094 CA

⁴ [1965] 1 QB 232

⁵ *Letang v Cooper* [1965] 1 QB 232 per Lord Diplock at p 242

[12] The Orders which the Claimants seek to quash are as follows:

- i. The Order of Justice Jack dated 16th March, 2020, restraining the Claimants from imparting certain information (referred to by the Claimants as “the Injunction Order” or “the Interim Injunction Order”), in relation to BVIHCOM2013/0160 Renova Industries Ltd et al v Emmerson International Corp. et al (referred to by the Claimants as “the Vekselberg/Abyzov Proceedings”) and BVIHCOM2020/0035 Emmerson International Corp. v Romos Limited et al (referred to by the Claimants as “the Satellite Proceedings”).
- ii. The ex-parte judgment delivered orally by Justice Jack at the hearing on 27th February, 2020 and the Order made on 27th February, 2020 for the removal of Walkers Global LLP from the Court record as legal practitioners acting for Romos Limited and Goldfort Limited (referred to by the Claimants as “the Removal Judgment” “the Removal Order”).
- iii. The Order of Justice Wallbank made on 14th June, 2021 for unsealing part of the Transcript of the ex-parte judgment delivered by Justice Jack at the hearing on 27th February, 2020 (referred to the Claimants as “the Unsealing Order”).
- iv. The Order of Justice Wallbank on 20th July 2021 for fixing dates for a trial for a part of the claims brought by way of the BVIHCOM2013/0160 Renova Industries Ltd. et al v Emmerson International Corp. et al (referred to as “the Fixing of Trial Order”).
- v. The directions Order of Justice Wallbank made on 11th November, 2021 for the listing of certain applications related to service and jurisdiction challenges of Vekselberg Parties (referred by the claimants as “the Directions Order”).

[13] Additionally, the Claimants seek orders that Jack J and Wallbank J or, alternatively the Crown pay the costs of the Claimants and those of the relevant Interested Parties of an incidental to the relevant proceedings.

[14] Surprisingly, the claim also seeks a declaration that the “High Court express to Mr. Titarenko” —the First Claimant—“their gratitude and appreciation for his kind assistance in improving the integrity of the judiciary”.

[15] Finally, the Claimants also seek an order staying the Vekselberg/Abyzov Proceedings and the Satellite Proceedings pending the determination of this Claim and legal costs.

COURT'S ANALYSIS AND CONCLUSIONS

i. Joinder and representation

[16] Before this Court can proceed to deal with the substantive issues which arise on the Application, the Court must first deal with a matter which caused significant concern during the preliminary stages of this action and which had significant implications for the outcome of this matter.

[17] At the first hearing of the Fixed Date Claim Form, the appearance and representation of the Second and Third Claimants came into question. It became clear that the Second and Third Claimants who are registered corporate entities were unrepresented by Counsel. The First Claimant represented (as is reflected in his affidavit filed in support of the Claim) that he is the director of the Second and Third Claimants and that he was duly authorized to act on their behalf in filing the evidence in support of the Claim and in representing them.

[18] This brought into focus the provisions of **CPR Part 22.3** which provides as follows:

Bodies corporate

- (1) Subject to any statutory provision to the contrary, a duly authorised director or other officer of body corporate may conduct proceedings on its behalf.
- (2) A body corporate must be represented by a legal practitioner at any hearing in open court unless the court permits it to be represented by a duly authorised director or other officer.
- (3) Permission to represent the body corporate at the trial should wherever practicable be sought at a case management conference or pre-trial review.
- (4) In considering whether to give permission the court must take into account all the circumstances including the complexity of the case.
- (5) In paragraphs (1) and (2) –
“duly authorised” means authorised by the body corporate to conduct the proceedings on its behalf.

- [19] In his first affidavit filed in support of this claim, the First Claimant averred that he is a director of the Second and Third Claimants and that he is duly authorised to advance this evidence on their behalf. No written application seeking permission pursuant to CPR Part 22.3(3) was however advanced.
- [20] During the course of the First Hearing on 8th March 2022, the provisions of CPR Part 22.3 were considered and the First Claimant was ordered to provide written proof of his directorship in the Second and Third Claimants on or before 29th April 2022. Such proof would support the First Claimant's permission to have conduct of the proceedings on behalf of the Second and Third Claimants under CPR Part 22. 3(2).
- [21] However, the First Claimant failed to provide this evidence. Moreover, the First Claimant failed to explain or otherwise address this failure but instead purported to file legal submissions on behalf of all the Claimants, presumably on the basis that he was entitled to do so.
- [22] In light of the First Claimant's failure to comply with the Court's Order of 8th March 2022, the Court can only infer that the First Claimant is unwilling or unable to provide the relevant proof as to his purported role in Second and Third Claimant companies. The Court therefore cannot be satisfied that the First Claimant has the requisite authority to conduct litigation on behalf of the Second and Third Claimants to represent them in open court.
- [23] In circumstances where the Second and Third Claimant would not have secured the Court's permission under CPR Part 22.3, it follows that these companies would not have anyone capable of conducting proceedings on their behalf and would not be permitted to appear without the benefit of a legal practitioner in these proceedings. Further, it follows that having advanced no evidence or legal submissions in response, the Application would have been undefended by the Second and Third Claimants.

ii. A claimant's burden of proof in constitutional claims

- [24] Turning now to the substantive issues which arise in this application, the Court notes that it is settled law that a claimant who seeks to claim breach of constitutional provisions must show on the

face of the pleadings, the nature of the alleged violation or contravention that is being asserted.⁶ In the case at bar, it is clear that the gravamen of the Claimant's case is that the decisions made by the learned Judges have operated to deprive them of their right to a fair trial as guaranteed under section 16(9) of the Virgin Islands Constitution Order 2007 ("the Constitution").

[25] As the subject proceedings before the Virgin Islands Commercial Division are not criminal but instead are in the realm of civil proceedings, the full remit of that relevant subsection is as follows:

"For the determination of the existence or extent of his or her civil rights and obligations, every person shall have the right to a fair hearing within a reasonable time before an independent and impartial court or other authority established by law."

[26] In order to succeed in his claim for relief under section 31 of the Constitution, the Claimants' case must not only allege but provide cogent evidence that the Defendants have through action or inaction disproportionately interfered with the essential elements which are embodied in this right.

[27] Ultimately, the right to a fair trial must be construed in the light of the rule of law, which requires that litigants should have an effective judicial remedy enabling them to assert their civil rights.⁷ Where there exists a "*dispute*" concerning "*civil rights and obligations*", section 16 (9) secures to the person concerned, the right to have any claim relating to his civil rights and obligations brought before a court or tribunal and determined within a reasonable time. The right embodies the "*right to a court*", which involves the right of access, that is, the right to institute proceedings before courts in civil matters.⁸ For the right of access to be practical and effective⁹, an individual must "*have a clear, practical opportunity to challenge an act that is an interference with his rights*" see: **Bellet v. France 4 December 1995, Series A no. 333-B; Nunes Dias v. Portugal (dec.) nos. 2672/03 and 69829/01, ECHR 2003-IV.**

[28] Within the civil context, what constitutes a fair hearing will require recognition of the interests of all parties in a civil proceeding. The procedures followed in a hearing should respect the principle of 'equality of arms', which requires that all parties to a proceeding must have a reasonable opportunity

⁶ Operation Dismantle v The Queen (1985) 1 SCR 441 and Amerally and Bentham v Attorney General (1978) 25 WIR 272

⁷ Beles and others v. the Czech Republic

⁸ Golder v. the United Kingdom

⁹ Bellet v. France 4 December 1995, Series A no. 333-B

of presenting their case under conditions that do not disadvantage them as against other parties to the proceedings.

- [29] The section also contemplates that the “*court or other authority established by law*” must be independent and impartial. Under the Virgin Islands Constitution, the requirement of an independent and impartial court is underpinned by the principle of judicial independence which mandates that disputes between people, and between people and governments, are resolved by courts and judges who are impartial and who are not subject to improper control or pressure, whether governmental or private. The requirement of impartiality also means that proceedings must be free from bias or the objective perception of bias.
- [30] It is also well established that the right to a fair hearing is concerned with procedural fairness, rather than with the substantive decision of the court or tribunal. This is an important distinction which cannot be overlooked in the case at bar where the principal relief sought by the Claimants is the quashing of orders/decisions made by Judges of the Commercial Division of the High Court. It is clear that these decisions would be binding on all of the parties to the subject litigation, whether regular or irregular, unless and until they are set aside by a court on appeal or upon an appropriate application in the proceedings in which they were made.¹⁰
- [31] Courts have repeatedly made it clear that a right of a fair hearing is not concerned with a litigant’s dissatisfaction with a judge’s substantive ruling. Indeed, Lord Diplock in **Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No. 2)**¹¹ put the position quite rigorously where he stated that:

“In the first place, no human right or fundamental freedom recognised by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by section 1(a); and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error

¹⁰ R (Majera Formerly SM (Rwanda)) v Secretary of State for the Home Department 3 WLR 1075 at paragraphs [44] – [45] (per Lord Reed PSC)

¹¹ [1979] A.C. 385

must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event... In the third place, even a failure by a judge to observe one of the fundamental rules of natural justice does not bring the case within section 6 unless it has resulted, is resulting or is likely to result, in a person being deprived of life, liberty, security of the person or enjoyment of property. It is only in the case of imprisonment or corporal punishment already undergone before an appeal can be heard that the consequences of the judgment or order cannot be put right on appeal to an appellate court. It is true that instead of, or even as well as, pursuing the ordinary course of appealing directly to an appellate court, a party to legal proceedings who alleges that a fundamental rule of natural justice has been infringed in the course of the determination of his case, could in theory seek collateral relief in an application to the High Court under section 6(1) with a further right of appeal to the Court of Appeal under section 6(4). The High Court, however, has ample powers, both inherent and under section 6(2), to prevent its process being misused in this way; for example, it could stay proceedings under section 6(1) until an appeal against the judgment or order complained of had been disposed of.” Emphasis mine

- [32] The rationale for this was succinctly explained in the Privy Council decision in **Patrick Chokolingo v The Attorney General of Trinidad and Tobago**¹² where Lord Diplock for the Judicial Committee explained:

“It is fundamental to the administration of justice under a constitution which claims to enshrine the rule of law (preamble to the Constitution, paragraphs (d) and (e)) that if between the parties to the litigation the decision of that court is final (either because there is no right of appeal to a higher court or because neither party has availed himself of an existing right of appeal), the relevant law as interpreted by the judge in reaching the court's decision is the “law” so far as the entitlement of the parties to “due process of law” under section 1 (a) and the “protection of the law” under section 1 (b) are concerned. Their Lordships repeat what was said in *Maharaj v. Attorney-General of Trinidad and Tobago* (No. 2) [1979] A.C. 385. The fundamental human right guaranteed by section 1 (a) and (b), and section 2, of the Constitution is not to a legal system which is infallible but to one which is fair. (p.111 B-C).”

- [33] In **Chokolingo**, the applicant was the editor of a newspaper and the author of a short story attacking the judiciary which he published in a newspaper. The Trinidad and Tobago Law Society applied to the High Court for an order committing the applicant to prison for contempt and “scandalising the court.” At the hearing the applicant conceded that the story and its publication had been a contempt and the court ordered that he be committed to prison for 21 days. He served 12 days of that term. The applicant then applied to the High Court under section 6 of the Constitution for a declaration that the order of 17th August was unconstitutional and that the imprisonment was illegal and a violation

¹² [1981] 1 WLR 106

of his fundamental rights and freedoms guaranteed by section 1(a) of the Constitution. On the application, the High Court considered whether the story and its publication had constituted a criminal contempt, decided that it had and dismissed the application. The Court of Appeal later dismissed the applicant's appeal.

- [34] On the applicant's appeal to the Privy Council, the Judicial Committee held that the "law" referred to in section 1 of the Constitution was the law as interpreted or declared by the judges in the exercise of the judicial power of the state and since the Constitution enshrined the rule of law, it was fundamental that the decision of the court was final as between the parties to the litigation. Accordingly, even if there had been an error of substantive law in the decision, the applicant had been deprived of his liberty by due process of law in accordance with the provisions of section 1 of the Constitution. Having considered the applicants' arguments, at page 112 [B-C] of the judgment, the Judicial Committee concluded that:

"Acceptance of the applicant's argument would have the consequence that in every criminal case, in which a person who had been convicted alleged that the judge had made any error of substantive law as to the necessary characteristics of the offence, there would be parallel remedies available to him: one by appeal to the Court of Appeal the other by originating application under section 6 (1) of the Constitution to the High Court with further rights of appeal to the Court of Appeal and to the Judicial Committee. These parallel remedies would be also cumulative since the right to apply for redress under section 6 (1) is stated to be "without prejudice to any other action with respect to the same matter which is lawfully available." The convicted person having exercised unsuccessfully his right of appeal to a higher court, the Court of Appeal, he could nevertheless launch a collateral attack (it may be years later) upon a judgment that the Court of Appeal had upheld, by making an application for redress under section 6 (1) to a court of co-ordinate jurisdiction, the High Court. To give to Chapter I of the Constitution an interpretation which would lead to this result would, in their Lordships' view, be quite irrational and subversive of the rule of law which it is a declared purpose of the Constitution to enshrine."

- [35] In 2001, the Privy Council maintained this position in **Hinds v Attorney General of Barbados**.¹³ In that case the appellant had been tried and convicted of arson in Barbados. He had applied for, and been denied, legal aid by the trial judge. He appealed against conviction and was represented by counsel. On appeal, it was argued inter alia, that his constitutional rights had been infringed, and that he had been denied representation at trial. The appeal was dismissed. The appellant then brought proceedings pursuant to section 24 of the Barbados Constitution, seeking a declaration, inter

¹³ [2002] 1 AC 854

alia, that he had been entitled to legally-aided representation at trial, and that his right to a fair trial, enshrined in section 18 of the Barbados Constitution, had been breached.

- [36] The Judicial Committee ultimately held that the ordinary process of appeal offered the appellant an adequate opportunity to vindicate his constitutional right to a fair trial. Moreover, while it was undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief was established, and relief was unavailable or not readily available through the ordinary avenue of appeal, a claim for constitutional relief did not generally offer an alternative means of challenging a conviction or judicial decision. At paragraph 24 of the judgment, Lord Bingham of Cornhill delivering the judgment stated that:

“On the facts of this case there is, in the opinion of the Board, no answer to Mr Guthrie's submissions. It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so must the Constitution be an effective, instrument. **But Lord Diplock's salutary warning [in *Maharaj Attorney General of Trinidad and Tobago (No 2)* [1979] AC 385] remains pertinent: a claim or constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision, nor an additional means where such a challenge, based on constitutional grounds, has been made and rejected. The applicant's complaint was one to be pursued by way of appeal against conviction, as it was; his appeal having failed, the Barbadian courts were right to hold that he could not try again in fresh proceedings based on section 24.**” Emphasis mine

- [37] In that case, the Judicial Committee also noted the consistent dicta in the following judgements: ***Attorney General of Trinidad and Tobago v McLeod* [1984] 1 WLR 522, 530; *Boodram v Attorney General of Trinidad and Tobago* [1996] AC 842, 854; and *Director of Public Prosecutions v Tokai* [1996] AC 856, 870.** In the Court's judgment, the cumulative dicta which are consistent and authoritative is equally applicable in the context of civil proceedings where there are obvious parallel remedies.

- [38] The seriousness with which the Judicial Committee viewed is made evident in the repeated warnings against abuse of the constitutional motion where there was a parallel remedy. This is evident in the judgment of the Judicial Committee in ***Jaroo v Attorney General of Trinidad and Tobago***¹⁴ in which Lord Hope emphasised that the right to apply to the High Court under the Constitution of

¹⁴ [2002] 1 A.C. 871

Trinidad and Tobago should be “*exercised only in exceptional circumstances where there is a parallel remedy*”. At paragraph 29 of the judgment, their Lordships reiterated and applied the dictum in **Harrikissoon v Attorney General of Trinidad and Tobago**¹⁵:

“The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. **The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action.**”

[39] It is therefore clear that the mere allegation that a human right or fundamental freedom of an applicant has been or is likely to be contravened is not of itself sufficient to entitle an applicant to invoke the jurisdiction of the court under the Constitution. Indeed, if it is apparent that the allegation is being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy, then that may lead a court to conclude that the action is an abuse of the process of the court.

[40] In consistent and prodigious numbers and at the highest levels of our legal system, courts have made it clear that before an applicant can resort to this procedure, he must “*consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it.*”¹⁶

[41] Counsel for the Respondents have submitted that the claim is clearly an abuse of process as the orders under challenge can only properly be challenged by way of an appropriate appeal or application to set aside made within the context of the proceedings in question. Counsel further

¹⁵ [1980] AC 265, 268

¹⁶ Jaroo v A-G of Trinidad and Tobago at paragraph 39

submitted that none of the parallel remedies have been exhausted or pursued by the Claimants herein. In the absence of the same, he submitted that the orders are unimpeachable.

[42] When the Court has regard to the Claimants' case and to the submissions filed in response to this Application, the Court finds much force in these arguments. A breakdown of the Claim filed on 8th December 2021 discloses the following issues:

- i. Issue 1 – The Claimants complain generally about what is described as unprofessional conduct on the part of Walkers attorneys but more importantly they complain about Jack J's conduct of proceedings in which Walkers law firm sought to come off record as legal representative for the Second and Third Claimants. The Claimants objected to that application and they take issue with the fact that the hearing was conducted in their absence when it was clear that the application was opposed; the fact that not sufficient time was ascribed by Jack J to deal with their objections; that Jack J failed to adjourn the hearing in order to afford them an opportunity to be separately represented; considered privileged material which had been provided by Walkers. They conclude that Jack J therefore abused the Second and Third Claimant's right to a fair hearing.
- ii. Issue 2 – Further to the order of Jack J removing Walkers as counsel for the Second and Third Claimants, the Claimants complain that Jack J failed to determine the status of an appearance of the Second and Third Claimants in the Vekselberg/Abyzov proceedings. This arises because of the application of CPR Part 69B.4 (4) which provides that bodies corporate must be represented by a legal practitioner in all commercial matters. The First Claimant frankly contends that in subsequent hearings he was permitted by Wallbank J to appear on behalf of the Second and Third Claimants as parties acting in person without any serious objections by Wallbank J.
- iii. Issue 3 – That CPR Part 69B.4 (4) should have no application to corporate counter claimants or to respondents to ancillary proceedings or applications especially those commenced under CPR Part 63.6 for removal of a legal practitioner from the record. As a counterclaim is an ancillary claim made together with the defence and counterclaim, the Claimants contend that the right to a fair hearing of a legal person in its work as defendant cannot be separated from the right to a fair hearing of the same legal person in its role as a counterclaimant. The Claimants further contend that as the First Claimant is an experienced litigant, he should be given a right of audience to represent the Second and Third Claimants in person in courts in the Virgin Islands as long as the First Claimant is a director of the Second and Third Claimants.
- iv. Issue 4 – The Claimants contend that the order of 6th March 2020 was forged when the return date "20" was struck through and "16" was inserted in manuscript. The Claimants contend that this change was intentionally made by Jack J in contravention of CPR Part 17.4. They say that this was detrimental to them as they were not given sufficient time for preparation to and appear at the hearing of the 16th March 2020. They therefore contend that this violated their rights to a fair hearing.

- v. Issue 5 – The Claimants take issue with the restrictions imposed by the Order of 16th March 2020 which restrains the parties from disclosing documents filed in satellite legal proceedings. The Claimants complain that this order is in contravention for their fundamental right of an owner of information to impart it without interference by a court. However, it is apparent that the source of the Claimant's concern lies in their assertion that this would obstruct the just disposal of the Vekselberg/Abyzov proceedings.
- vi. The Claimants also take issue with manner in which Wallbank J conducted case management hearings. They complain that he failed to consider and deal with issues raised by or on behalf of the Claimants during the course of these hearings. They further complain that Wallbank J failed or refused to allow the Second and Third Claimants to appear in person and so they were deprived of the opportunity to properly prepare and arrange for their legal representation; that they were only given one day's notice of the directions hearing, the purpose of which was entirely unclear to them in any event. The Claimants frankly disclose that that order is currently the subject of an appeal before the Court of Appeal.
- vii. The Claimants also complain that the fixing of a trial date for the main claims by Wallbank J was unlawful because matters related to the management of the cases, joinder of parties and legal representation and other preliminary or interlocutory issues have not been definitively or satisfactorily resolved.

[43] The Court has no doubt that the determination of these complaints will depend for the decision on the resolution of disputes as to fact, a process which is generally unsuitable for constitutional proceedings.

[44] Having considered the allegations and applied the relevant legal principles, the Court accepts the submission of the Counsel for the Respondents that to allow collateral challenges to judicial orders under the Constitution would ultimately be detrimental to the administration of justice. The Court is satisfied having regard to all the circumstances of the case there are other parallel avenues which are adequate and by which the Claimant can secure redress. It is readily apparent that save for Issue 3, all of the issues which fall to be determined in this Claim stem from case management procedures and interlocutory decisions taken by the Second and Third Defendants. By and large, the complaints concern matters which routinely arise in the context of a case management conference or in interlocutory proceedings and which are suitable for review (in an application to set aside under CPR Parts 11.16 and 11.18) or on appeal to a higher court. In the Court's judgment, either course would have been open to the Claimants.

[45] On the case as pleaded, it should have been readily apparent to the Claimants that these parallel procedures would have been more appropriate. Indeed, from all accounts the Claimants have in fact engaged these very processes in seeking to address the impugned orders while at the same time pursuing the constitutional relief claimed herein. In the Court's judgment, resort to a constitutional procedure in such circumstances would be inappropriate and is a clear abuse of the process.

iii. Issue 3 – CPR Part 69B.4(4)

[46] During the course of the hearing of this Application and at paragraphs 19 – 29 of his legal submissions, the First Claimant represented that he intended to amend the Claim to reflect a constitutional challenge to CPR Part 69B.4(4) on the basis that it conflicts with the fundamental right to a fair hearing under section 16(9) of the Virgin Islands Constitution Order. This challenge is alluded to in the claim form which was before the Court. The First Claimant was able to point the Court to PC 12 – PC 20 of the claim form which is intitled;

“Inconsistence of EC CPR r 69B(4)(4) (providing that bodies corporate must be represented by a legal practitioner in all commercial matters) with the fundamental right to a fair hearing under section 16(9) of the Constitution.”

[47] CPR Part 69B.4(4) disapplies the provisions of CPR Part 22.3 and prescribes as follows:

“Rule 22.3 shall not apply in a commercial matter and bodies corporate must be represented by a legal practitioner in all commercial matters.”

[48] CPR Rule 22.3 provides as follows:

Bodies corporate

- (1) Subject to any statutory provision to the contrary, a duly authorised director or other officer of a body corporate may conduct proceedings on its behalf.
- (2) A body corporate must be represented by a legal practitioner at any hearing in open court unless the court permits it to be represented by a duly authorised director or other officer.
- (3) Permission to represent the body corporate at the trial should wherever practicable be sought at a case management conference or pre-trial review.
- (4) In considering whether to give permission the court must take into account all the circumstances including the complexity of the case.
- (5) ...

(6) ...

(7) In paragraphs (1) and (2) –

“**duly authorised**” means authorised by the body corporate to conduct the proceedings on its behalf.

[49] At PC 12 – PC 20 of the claim, the Claimants take issue with the fact that under this procedural rule the Second and Third Claimants, who are registered corporate entities, are unable to appear before the Commercial Court without legal representation. At paragraph 20 they contend as follows:

“Since Mr Titarenko is an experienced litigant, he should be given a right of audience to represent Romos and/or Goldfort in person in courts of the Virgin Islands as long as Mr. Titarenko is a director of Romos and/or Goldfort.”

[50] Consistent with their burden, the Claimants would therefore have to not only allege, but also demonstrate by cogent proof whether and in what manner the relevant law and practice have affected them and whether this could give rise to a violation of the Constitution. In the instant case, the Court notes that on the way that the current proceedings have been drafted, the purported breach concerns the Second and Third Claimants. This presents a serious challenge for the viability of this claim for two reasons. First, for the reasons which have been set out herein at paragraphs 16 to 23 herein it is clear that neither the Second nor Third Claimants are properly before the Court. The Eastern Caribbean Court of Appeal has decisively considered the operation of CPR Part 22.3 in **Adam Bilzerian et al. v Terrence Byron et al.**¹⁷ Carrington JA in his judgment made it clear that the only persons at common law who have rights of audience are duly admitted legal practitioners or the litigants in person subject to the specific provisions of Part 22 of the CPR. This defect quite impacts the Second and Third Defendants’ ability to advance the claim herein.

[51] It is clear that in circumstances where the First Claimant has, (despite being ordered to), failed to establish his authority to represent the Second and Third Claimants (no application or cogent evidence has been produced to the Court), he does not have the authority to conduct proceedings on their behalf or to represent them. It leaves the Second and Third Claimants in the dubious position of being unable to properly advance their claim before the Court.

¹⁷ SKBHC VAP2020/0003

[52] The Claimants failure to address this issue frontally is, to say the least surprising and raises the Court's suspicion as to the true nature of the First Claimant's relationship to these companies. Certainly, as it stands this Court cannot be satisfied that the First Claimant is a director or is otherwise authorised to commence this action, to conduct proceedings or represent these companies in this claim.

[53] Second, it is fatal to that aspect of the claim which is alleged to directly impact them. On the way that the claim is drafted, it is clear that the Claimants fully appreciate that the "*right to a court*" and the "*right of access*" are not absolute. A limitation/restriction will not be incompatible with section 16 if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The Claimant's complaint is framed in a way which applies CPR Part 22.3 and there appears to be no challenge to that rule of procedure. The Claimants contend that the provisions of CPR Part 22.3 should also apply in the ongoing commercial proceedings such that the First Claimant should be permitted to represent the Second and Third Claimants "as long as Mr. Titarenko [the First Claimant] is a director of Romos and/or Goldfort respectively." Given the Claimants refusal or inability to advance actual proof of First Claimant's connection or role in these companies when order to do so, it is unlikely that the substantive claim could be maintainable in any event.

iv. Judicial Immunity from Suit/ Proper Party

[54] In this constitutional claim for relief, the Claimants have joined as defendants not only the Attorney General in her representative capacity (and presumably by virtue of the Crown Proceedings Act) but the relevant judicial officers and in related relief, they seek to have these officers pay their costs and that of the Interested Party, Emmerson International Corp. incidental to the ancillary proceedings for the interim injunctive order and the case management hearing on 19th – 22nd July 2020 and 11th December 2021. Counsel for the Applicants has objected to such joinder. They contend that the proper party to a constitutional motion alleging that judicial acts have breached a person's constitutional rights is the Attorney General and they submit that the claims against the Second and Third Defendants should be struck out.

[55] The Applicants have relied on decision in **Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No. 2)** in which Lord Diplock, giving the judgment of the Privy Council stated in respect of materially identical provisions under the law of Trinidad and Tobago. In that case it was argued for the Attorney-General that, he is not a proper respondent to the motion. Counsel in that case submitted that under section 4(6) of the State (formerly the 'Crown') Liability and Proceedings Act 1966 (which is eerily similar to section 4(5) of the Virgin Islands Crown Proceedings Act¹⁸), the Crown was not vicariously liable in tort for anything done by the appellant while discharging or purporting to discharge any responsibilities of a judicial nature vested in him.

[56] This argument was however, roundly rejected by the Judicial Committee. Their Lordships held that the redress claimed by the appellant under s 6 was redress from the Crown (now the State) for a contravention of the appellant's constitutional rights by the judicial arm of the State. By section 19(2) of the State Liability and Proceedings Act 1966 (section 13 of the Virgin Islands Crown Proceedings Act) it is provided that proceedings against the Crown (now the State) should be instituted against the Attorney-General, and this is not confined to proceedings for tort. At page 395 of the judgment Judicial Committee found that:

“The redress claimed by the appellant under section 6 was redress from the Crown (now the state) for a contravention of the appellant's constitutional rights by the judicial arm of the state. By section 19 (2) of the Crown Liability and Proceedings Act 1966, it is provided that proceedings against the Crown (now the state) should be instituted against the Attorney-General, and this is not confined to proceedings for tort.”

[57] In the Court's judgment, despite its vintage, this is still good law. The principle has been repeatedly applied in the Eastern Caribbean, most recently in **Daniel Forde and Ian Forde v The Attorney General**¹⁹ at paragraph 5:

“...it is the case in accordance with the principles espoused in **Maharaj v the Attorney General** that the State would be the proper party in this matter and could be held liable for the actions of the judiciary.”

¹⁸ Cap 21 of the Laws of the Virgin Islands

¹⁹ (delivered 27 March 2018, Unreported)

[58] It follows that the Second and Third Defendants would have to be struck out as parties to this claim in any event. This no doubt underpins the common law immunity for judges which was referenced in **Maharaj v the Attorney General** where, at page 399F. Lord Diplock restated the fundamental principle that:

“...that a judge cannot be made personally liable for what he has done when acting or purporting to act in a judicial capacity”.

[59] The rationale for this rule was succinctly summarised by the learned authors of **Judges on Trial – the Independence and Accountability of the English Judiciary**²⁰ where at page 273 they state that:

“...the exclusion of civil liability for judicial acts is granted as a matter of public policy “not so much for the [judges] own sake as for the sake of the public, and the advancement of justice, that being free from actions they may be free in thought and independent in judgment, as all who administer justice ought to be.”²¹

[60] The rule of judicial immunity also provide finality in litigation. See: **Floyd v Barker**²². A case cannot be effectively reopened by suggesting that if a judge had been more careful or prudent that the litigant would have succeeded. As indicated, such claims should properly be pursued with the appeal process. The appellate process is well suited to address and deal with any judicial wrong in the exercise of the judicial function.

[61] The Court has noted that somewhat startling allegations of impropriety which have been levied in regard to purported amendments to a court order. While the Court has some doubt as to whether this could rise to the level of misconduct on the evidence advanced, it is clear that this is also a matter which could properly be resolved on appeal.

[62] In legal submissions filed at the eleventh hour, the Claimants have advanced as follows:

“Furthermore, allegations of professional misconduct and/or tort of misfeasance in public office are expressly made against Jack J and allegations of such misconduct are implied in relation to Wallbank J. Accordingly, I will amend the Claim Form to include a claim for an order to disallow Wallbank J and Jack J conducting hearings in the Vekselberg/Abyzov Proceedings or any other proceedings related to me.”

²⁰ (Cambridge Studies in Constitutional Law, Series Number 8) 2nd Edition 2013

²¹ *Garnett v Ferrand* (1827) 6 B & C 611 at 625 adopted by the Court of Appeal in *Sirros v Moore* [1975] QB 118 at 132; *Arthur J.S. Hall & Co. v Simmons* [2002] 1 A.C. 615

²² (1607) 77 ER 1305

[63] If such an amendment were permitted, it is clear to the Court that it could afford the Claimants no assistance in defending this Application. First, allegations of professional misconduct and misfeasance in public office are not appropriate for disposal by way CPR Part 56 claims. Second, it is entirely open to an appellate court to make orders that would effectively reassign the hearing of matters where warranted.

v. Gratitude as Declaratory Relief

[64] Finally, it goes without saying that the Claimants claim for a declaration that the High Court expresses to the First Claimant its appreciation for his “*kind assistance in improving the integrity of the judiciary of the Virgin Islands*” is relief which is unknown in jurisprudence, at common law or under statute. It is unconnected to any sustainable cause of action and is therefore frivolous and improper and not maintainable.

[65] For the reasons set out herein, it is plain that the claim is an abuse of process and that there is no reasonable prospect of the Claimants succeeding in any of the matters alleged. Accordingly, the Court is satisfied that the Claim ought to be struck out. In coming to this conclusion this Court is well aware that this summary procedure should only be used in clear and obvious cases, when it can clearly be seen, on the face of it, that a claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court. The Court is satisfied that this claim meets that threshold.

vi. Is this an application for judicial review? - Is leave required?

[66] Counsel for the Applicants have submitted that the claim herein is actually an application for judicial review and that leave to apply for such relief has not been obtained. They further assert that in any event, leave to apply for judicial review should be refused. This submission caused some consternation given that it is made in the face of the following clear statement set out in the Claimants’ fixed date claim form:

“The Claimants advance a case that, with regards to claims for redress under section 31 of the Constitution of the Virgin Islands (“the Constitution”), there is no need to obtain leave under ECCPR r 56.3 since for such claims this rule is inconsistent with section 31(3) of the Constitution.”

[67] This Court has considered both the written and oral submissions of both sides and finds no basis in light of this unequivocal statement to reclassify the Claimant's claim and will decline to do so. Moreover, as a matter of principle, it is clear that judicial review is a way for the High Court to supervise the *lower or inferior* courts, tribunals and other administrative bodies to ensure that they make their decisions properly and in accordance with the law. It seems to this Court that the doubtless delay in bringing such an application would be the least of the insurmountable hurdles facing the Claimants were they to advance such an application.

vii. Costs

[68] Finally, CPR 56.13(6) provides that no order for costs may be made against a claimant for an administrative order unless the Court considers that the claimant has acted unreasonably in making the application or his conduct was in some way worthy of censure in bringing it. The Court has considered the legal submissions filed by both sides on this issue and is satisfied that the case at bar does indeed fall within that matrix.

[69] It was clearly obvious to the Claimants given their collective claims for relief that there were obvious, available and appropriate avenues by which they could seek to ventilate their complaints. From all accounts these avenues have been and are being pursued in varying degrees. It is clear that where such other procedures were available, resort to the procedure afforded by section 31 of Constitution would be inappropriate and an abuse of process, as would its continued use after it has become clear that it was no longer appropriate.

[70] The Claim herein is wholly unsuitable for securing the claims for relief sought and when taken together with the unapologetic refusal to clarify the issue of representation before this Court, it is clear to the Court that the Claimants have acted unreasonably in initiating and in maintaining this action. Among the remedies sought in the claim is a stay of the extant commercial proceedings. It follows that this action had the potential to and may in fact have caused substantial delays in the ongoing legal proceedings before the commercial court. Counsel for the Applicants have contended that this could potentially impact the rights of third parties including the Interested Parties named herein and would have been disruptive to the due administration of justice and the rule of law. In the

Court's judgment this is a plausible submission. It should have been obvious to the Claimants that this attempt to unravel long settled legal rights is inherently prejudicial.

[71] The First Claimant has contended that he is an experienced litigant who can maintain conduct of legal proceedings on behalf of himself and corporate bodies and so this Court can put no store in the fact that these Claimants were unrepresented by legal counsel in these proceedings.

[72] Despite these potentially significant consequences, the Claimants have not advanced any exceptional reasons which would justify not engaging the other recourses available but instead has embarked on a course of litigation which seeks remedies in respect of court orders which date back almost two years.

[73] Their conduct in the course of this litigation is also questionable. The late filing of evidence and submissions, the failure to seek leave of the court to do so, advancing substantial applications for seeking recusal of the coram and the removal of counsel by way of eleventh-hour submissions and the attempt to supplement their claim "on the fly" and the disregard of court orders demonstrates a disregard for the court process which warrants censure.

[74] For these reasons, the Court finds that Defendants/the Applicants herein are entitled to their costs of this Application quantified in the sum of \$1,500.00.

[75] **It is therefore ordered as follows:**

- i. **The Claimants' Fixed Date Claim is struck out.**
- ii. **The Defendants/Applicants herein will have their costs of the Application in the sum of \$1,500.00.**

**Vicki Ann Ellis
High Court Judge**

By the Court

Registrar