

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

ANTIGUA AND BARBUDA

ANUHCVP2025/0005

BETWEEN:

ULTRAMARINE (ANTIGUA) LIMITED

Appellant

and

PETER COCHRAN

Respondent

Before:

The Hon. Mde. Esco L. Henry

Justice of Appeal

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal [Ag.]

The Hon. Mr. Brian Cottle

Justice of Appeal [Ag.]

Appearances:

Dr. David Dorsett for the Appellant

Mr. Ian Clarke KC with him Mr. Septimus Rhudd for the Respondent and

Ms. Loreal Wilson

2025: November 24;

2026: January 13.

Interlocutory appeal - Exercise of judicial discretion - Whether the learned judge was plainly wrong - Appeal against decision of the learned judge dismissing an application for an adjournment in a contempt hearing - Whether the learned judge erred in dismissing the application to adjourn the hearing of a contempt of court application, such application arising solely from the sudden illness of leading counsel Whether the learned judge erred in the exercise of discretion by not having no any proper regard to the relevant factors and principles that fall for consideration so that there can be a proper exercise of judicial discretion - Whether the learned judge erred in wrongly exercising his discretion to not adjourn the hearing of the contempt application and subsequently dismissing the contempt application for want of prosecution, such decision being plainly wrong and wholly unjust in all circumstances - Whether the learned judge erred in striking out the contempt application for want of prosecution by failing to have regard to the relevant factors that fall for consideration in the exercise of judicial discretion – Whether the learned judge contrary to CPR 26.2(2) erred in striking out the contempt of court application without the appellant being given a reasonable opportunity to make representations contrary to CPR 26.2(2)

Before the learned judge in the court below was an application to have the respondent punished for breach of three court orders dated 26th November 2007, 24th June 2009 and 22nd October 2009. Those orders had been discharged by Michel J, as he then was, on 29th August 2012. The hearing of the application was set before Williams J on 22nd and 23rd January 2025. On the morning of the trial, the respondent was present in court in person after having travelled along with his counsel from the UK at significant expense. Counsel for the appellant/applicant, in the court below, Dr. Dorsett was absent as he had fallen suddenly ill the previous day. As he was unable to attend trial, King's Counsel, Mr. Justin Simon appeared on his behalf to request an adjournment of the matter and the vacation of the fixed trial date.

The application to vacate the trial date was filed by Dr. Dorsett on 21st January 2025. When the matter came on for hearing the following day, the learned judge was reluctant to adjourn a matter that had been pending for over a decade. He proposed to advance the matter and therefore stood the matter down for several hours to allow Mr. Simon KC to obtain instructions. When the matter was re-called Mr. Simon, KC indicated that he was unable to proceed with the contempt application as he did not have sufficient time to familiarize himself with all the contents of the record.

The only witness for the appellant in the contempt proceedings was Mr. Andrew Moleta who appeared via video link. The learned judge proposed to have Mr. Moleta testify and be cross-examined. The rest of the proceedings could then be adjourned to await the recovery of Dr. Dorsett. However, Mr. Moleta refused to testify on the days allotted for trial and offered to do so on 24th January 2025; a date on which he was aware that the respondent and his counsel were due to return to the UK. The learned judge therefore concluded that there was nothing to stop Mr. Moleta from giving evidence and being cross examined on 23rd January 2025. There would have been very little prejudice to Mr. Moleta as he had been involved in the litigation from the inception and would be very familiar with all the material. The learned judge therefore refused the application for an adjournment. As Mr. Moleta was unwilling to testify on the scheduled trial days, the judge dismissed the applications for want of prosecution.

Dissatisfied with this decision, the appellants appealed on 8th April 2025 citing 4 grounds of appeal. However, the main issue for the determination by the Court was whether the learned judge, in the circumstances wrongly exercised his discretion in refusing the adjournment application and simultaneously dismissing the substantive contempt of court application.

Held: dismissing the appeal, affirming the orders of the learned trial judge and awarding costs to the respondent to be agreed within 21 days of the date of this order or to be assessed upon application by the respondent if there is no agreement, that:

1. The test to be applied to a decision on the adjournment of proceedings is not whether it lay within the broad band of judicial discretion but whether in the judgment of the appellate court, it was unfair. i.e., whether if the trial goes ahead, it will be fair in all the circumstances. If the refusal of an adjournment would make the resulting trial unfair, an adjournment should ordinarily be granted, regardless of inconvenience to the other party or other court users, unless this were outweighed by injustice to the other party that could not be compensated for. The assessment of what is fair is a fact-sensitive one and not one to be

judged by the mechanistic application of any particular checklist. The facts of the present matter thus bear emphasis.

Terluk v Berezovksy [2010] EWCA Civ 1345 followed; **Bilta (UK) Ltd. (in liquidation) v Traditional Financial Services Ltd.** [2021] EWCA Civ 221.

2. The facts demonstrate that Mr. Simon, KC was not the only legal representative of the appellant in his matter. Dr. Dorsett had appeared with Mr. Jarid Hewlett who would have been intimately familiar with this matter. There is no reason why he, with the assistance of Mr. Simon KC, would not have been able to ensure that Mr. Moleta was not unfairly treated during cross examination. Additionally, the learned judge was aware that the orders allegedly breached by the respondent had long been discharged. While there is a public interest in ensuring that court orders be obeyed, in the circumstances of this case it could be said that there was no pressing public interest reason to allow yet another adjournment with the consequent wastage of court resources. In the circumstances, this Court is not prepared to say that the refusal to allow the application to vacate was not one of the possible fair outcomes in this matter, particularly in the light of the overriding objective of the Eastern Caribbean Supreme Court Civil Procedure Rules (2023) Revised Edition.
3. The power to strike out for want of prosecution should be exercised only where the court is satisfied that either (1) the default has been intentional and contumelious disobedience to a peremptory order of the court or conduct amounting to an abuse of the court's process or, (2)(a) that there has been inordinate and inexcusable delay on the part of the claimant or his lawyers and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the claimant or between them and a third party.

Icebird Ltd. v Winegardner [2009] UKPC 24 applied.

4. Although it is arguable that the respondent did not show inordinate delay nor demonstrate that the delay would carry a substantiable risk to the fairness of the trial of the contempt application, the conduct of the applicant could reasonably have been viewed by the learned judge as an abuse of the court's process. The issue was not the absence of Dr. Dorsett on account of his illness. The concern of the learned judge was the refusal of Mr. Moleta to proceed along the sensible lines which had been proposed. The learned judge correctly noted that it was for the appellant to satisfy the court beyond reasonable doubt that the respondent was in contempt of orders of the court. Mr. Moleta offered no evidence at all. The learned judge was left with no option but to strike out and dismiss the contempt application for want of prosecution in the absence of any evidence to discharge the burden which rested on the appellant. Further the argument that the learned trial judge erred in striking out the applications without giving the applicant an opportunity to make representations cannot be sustained. First, the appellant was represented at all times by legal counsel. Second, the appellant had opportunity to make representations to prove its case. When offered this opportunity to prove the allegations, the appellant offered no evidence. For these reasons the appeal must be dismissed.

JUDGMENT

- [1] **COTTLE JA [AG.]:** This is an appeal against the decision of the learned judge Williams J dated 22nd January 2025. Before the judge was an application to have the respondent punished for breach of three court orders dated 26th November 2007, 24th June 2009 and 22nd October 2009 respectively. Those orders had subsequently been discharged by Michel J, as he then was, on 29th August 2012. After a long and tortured procedural history which I do not recount, the matter was scheduled for hearing before Williams J on 22nd and 23rd January 2025. I refrain from going into the history of this matter as at the trial stage the record had already surpassed 7000 pages, and it would serve no useful purpose for me to add to such a record in what at its heart is a simple matter.
- [2] On the morning of the trial the respondent was present in court in person. He had travelled from the UK along with King's Counsel who was leading two able juniors. Not surprisingly he had incurred significant costs in preparing to defend the contempt applications. This was not the first time he had been compelled to travel from abroad to deal with the matter. Dr. Dorsett, learned counsel for the applicant was absent. He had fallen suddenly ill the previous day. He had developed a frozen shoulder. This painful affliction rendered him unable to attend at the trial. He therefore had local King's Counsel, Mr. Justin Simon KC, appear on his behalf to request an adjournment of the matter and a vacation of the fixed trial dates.
- [3] Mr. Simon KC led Mr. Jarid Hewlett who has been co-counsel with Dr Dorsett in this matter. Dr. Dorsett filed the application to vacate the trial date on 21st January 2025 at 11.40 am. When the matter came on for hearing the following morning, the learned trial judge was reluctant to adjourn a matter that had been pending for over a decade. He offered a proposal to advance the matter. He stood the matter down for several hours to allow Mr. Simon KC to get instructions. When the matter was called again at noon Mr. Simon indicated that he was unable to proceed with the contempt application. He did not have sufficient time to familiarize himself with all of the contents of the record.

- [4] The main witness for the appellant/applicant on the contempt proceedings was Mr. Andrew Moleta. He had sought and been granted permission to appear via live video link. He was present via the Zoom platform. The judge proposed to have Mr. Moleta testify and be cross-examined. The rest of the proceedings could then be adjourned to await the recovery of Dr. Dorsett. Two days had been set aside to deal with the contempt applications. The days were 22nd and 23rd January 2025. Mr. Moleta refused to testify on the days allotted for trial. He offered to do so on Friday 24th January 2025. He knew that the respondent and counsel were due to travel back to the UK on Friday 24th in the afternoon. There would then be no time for a full day's hearing. The judge concluded: 'In the court's view there was nothing to stop Mr. Moleta from giving evidence on the 23rd January and being cross-examined. There would have been very little prejudice to Mr. Moleta as he has been involved with this litigation from inception and most likely very familiar with all the material'.
- [5] The learned judge refused the application for an adjournment. As Mr. Moleta, the only witness in support of the contempt applications, was unwilling to testify on the scheduled trial days the judge then dismissed the applications for want of prosecution.
- [6] In his submissions in support of the appeal to this court Dr. Dorsett argued that it would have been unfair to expose Mr. Moleta to cross examination by Kings Counsel in the absence of his leading Counsel. He likened it to throwing Mr. Moleta to the wolves. He envisioned the unfortunate lay client may have been torn apart by unfair cross-examination in the absence of counsel to protect him from such cross examination. Dr. Dorsett further submitted that 'the pith and substance of the Appellant's complaint is that the learned judge, in the circumstances, wrongly exercised his discretion in refusing the adjournment application and simultaneously dismissing the substantive contempt of court application.'
- [7] The law in this area is well settled. The Court of Appeal will be slow to overturn the exercise of a judicial discretion. This has been restated many times. It is

accepted by both sides that the judge had a discretion as to whether to grant the application for an adjournment or to refuse it.

- [8] In **Terluk v Berezovsky**¹ Sedley LJ in giving the judgment of the English Court of Appeal at [18] held:

“[18] Our approach to this question is that the test to be applied to a decision on the adjournment of proceedings is not whether it lay within the broad band of judicial discretion but whether, in the judgment of the appellate court, it was unfair.”

- [9] In **Bilta (UK) Ltd (in liquidation) v Tradition Financial Services Ltd**.² at [30] it was stated:

“[30] ... it may be helpful if I indicate my conclusions on the relevant principles at the outset. These are that Mr. Scorey is right that the guiding principle in an application to adjourn of this type is whether if the trial goes ahead it will be fair in all the circumstances; that the assessment of what is fair is a fact-sensitive one, and not one to be judged by the mechanistic application of any particular checklist; that although the inability of a party himself to attend trial through illness will almost always be a highly material consideration, it is artificial to seek to draw a sharp distinction between that case and the unavailability of a witness; and that the significance to be attached to the inability of an important witness to attend through illness will vary from case to case, but that it will usually be material, and may be decisive. And if the refusal of an adjournment would make the resulting trial unfair, an adjournment should ordinarily be granted, regardless of inconvenience to the other party or other court users, unless this were outweighed by injustice to the other party that could not be compensated for.”

- [10] The facts of the present matter bear emphasis. This is not a matter in which there is an effort to vindicate any peculiar civil rights of the applicant. The applicant is not a criminal defendant who was denied an adjournment of his trial when one of his chosen counsels was absent on account of sudden illness. The orders for which punishment for contempt is being sought have long since been discharged. The application for contempt was filed a dozen years before Williams J ultimately refused yet another application for adjournment by the applicant. The learned judge observed at paragraph 13 of his decision that ‘Further, from my observations most requests for adjournments have been at the behest of the Claimant/Applicant’. This finding of the learned judge was not

¹ [2010] EWCA Civ 1345, [2010] All ER (D) 270 (Nov.).

² [2021] EWCA Civ 221.

challenged on appeal. In this case the applicant seeks to impugn the exercise of his discretion by the learned judge. It is arguable that it is the respondent who is prejudiced by the delay an adjournment would entail. He has had this application to punish him for contempt hanging over him for many years. There are several reasons why the effort of the applicant fails.

[11] Firstly, Mr. Simon KC was not the only legal representative of the appellant/applicant in this matter. Dr. Dorsett had appeared with Mr. Jarid Hewlett. Mr. Hewlett would have been intimately familiar with this matter. There is no reason why he would not have been able to ensure that Mr. Moleta was not unfairly treated during cross examination. It is not unlikely that very experienced King's Counsel, Mr. Simon KC with the input of Mr. Hewlett would have been more than ample protection for Mr. Moleta from any attempt at unfair cross examination. Additionally, the learned judge knew that the orders allegedly breached by the respondent had long been discharged. While there is a public interest in ensuring that court orders be obeyed, in the circumstances of this case it could be said that there was no pressing public interest reason to allow yet another adjournment with the consequent wastage of the resources of the court to allow for the contempt proceedings to consume another two trial days.

[12] This Court is not prepared to say that, in all the circumstances, the refusal to allow the application to vacate the trial dates was not one of the possible fair outcomes in this matter. The learned Judge correctly kept in mind Part 1 of the **Eastern Caribbean Supreme Court Civil Procedure Rules (2023) Revised** ("CPR"). He considered all the matters outlined in the overriding objective. He did single out the question of dealing with matters expeditiously, but he did not disregard the rest of the rule. It bears repeating that the reason proffered for seeking the adjournment was not because the applicant or the applicant's witness were absent. The reason was said to be because of the absence of one of the attorneys who represented the applicant.

[13] Dr. Dorsett also complained about the decision of the learned judge to dismiss the contempt application for want of prosecution. He filed very helpful written submissions on the point. I set them out verbatim.

- [14] The approach to be taken by the court in dismissing and striking out proceedings for want of prosecution is to be gleaned from the dicta of the Privy Council in **Icebird Ltd v Winegardner**:³

“[8] Birkett v James [1978] AC 297, [1977] 2 All ER 801, [1977] 3 WLR 38 remains, in their Lordships' opinion, the leading authority for the approach to be taken to an application to strike-out an action for want of prosecution. The House of Lords endorsed the principles set out in the then current Supreme Court Practice, namely, that the power to strike-out should be exercised only where the court was satisfied –

‘...either (1) that the default has been intentional and contumelious e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the court, or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the Defendants either as between themselves and the plaintiff or between them and a third party” (per Lord Diplock at 318).”

- [15] Dr. Dorsett relied on the second limb. He argued that the respondent has not shown inordinate delay on the part of the applicant coupled with a demonstration that such delay would carry a substantial risk to the fairness of the trial of the contempt application or expose the respondent to serious prejudice. Dr. Dorsett did not advert to the first limb. In this case the applicant's conduct could reasonably have been viewed by the learned judge as an abuse of the process of the court. The issue was not the absence of Dr. Dorsett on account of his illness. What concerned the judge was the refusal of Mr. Moleta to proceed along the sensible lines proposed. He could have used the trial days to testify and be cross examined. His proposal that he do so immediately after the days fixed for trial on a date that he knew the respondent and his counsel were scheduled to fly back to the UK was no more than a fig leaf to thinly disguise a renewed application to vacate the trial dates.

- [16] The judge correctly noted that it was for the applicant to satisfy the court beyond reasonable doubt that the respondent was in contempt of orders of the court. Mr. Moleta was offering no evidence at all. Absent any evidence to discharge

³ [2009] UKPC 24, [2009] All ER (D) 41 (Nov) at [8].

the burden which rested on the applicant the judge was left with no option but to strike out and dismiss the contempt application for want of prosecution.

[17] Dr. Dorsett further submitted that the learned trial judge erred in making the order to strike out and dismiss the applications to punish the respondent for contempt of his own motion without giving the applicant an opportunity to make representations.

[18] CPR 26.2(2) provides:

“(2) If the court proposes to make an order of its own initiative, it must give any party likely to be affected a reasonable opportunity to make representations.”

[19] As I understand the argument, Dr. Dorsett says that Mr. Moleta was not represented by counsel of his choice due to the sudden absence of Dr. Dorsett because of illness. Mr. Simon KC was only in court “holding papers” for Dr. Dorsett for the purpose of seeking an adjournment. To all intents Mr. Moleta was effectively unrepresented and had no opportunity to have counsel make any representations. This argument is only superficially attractive. What was before the court was an application to have the respondent punished for contempt. Mr. Moleta was the only witness who was to lay the evidential foundation to establish the contemptuous conduct beyond reasonable doubt. The applicant company was represented at all times by legal counsel. Once the application to adjourn had been refused it was for the applicant to lead evidence to prove its case. For failure to lead any evidence on the days fixed for trial the matter was dismissed. While there was no application by the respondent to have the matter dismissed this was the only option open to the judge in the circumstances. It cannot then be said that the applicant had no opportunity to make representations. The applicant had sought to have the respondent punished for contempt. When offered the opportunity to prove the allegations the applicant offered no evidence.

Disposition

[20] For the reasons set out above the appeal is dismissed and the orders of the learned trial judge are affirmed. Costs are awarded to the respondent to be

agreed within 21 days of the date of this order or if there is no agreement between the parties, to be assessed upon application by the respondent..

I concur.
Esco L. Henry
Justice of Appeal

I concur.
Davidson Kelvin Baptiste
Justice of Appeal (Ag.)

By the Court

Chief Registrar