

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

ANTIGUA AND BARBUDA
Tuesday, 20th August 2024

JUDGMENTS

Case Name:

Eghan Modeste

v

Nagico (St. Lucia) Limited

[SLUHCMAP2023/0004]
(Saint Lucia)

Date:

Tuesday, 20th August 2024

Coram for
Delivery:

The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Eddy D. Ventose, Justice of Appeal
The Hon. Mr. Gerard St. C Farara, Justice of Appeal [Ag.]

Appearances:

Appellant: In person

Respondent: No appearance

Issues:

Commercial appeal – Summary Judgment – Medical insurance policy – Termination of a policy before expiry date – Increase of policy premium – Whether the judge erred in interpreting clause 3 of the policy as meaning that there was no automatic right of renewal of the policy, nor was the policy intended to be insulated from non-renewal until 2048 since it was open to NAGICO, once adequate notice was given, not to renew the policy – Whether the judge erred in interpreting clause 10 as demonstrating that there is provision for periodic renewal of the policy and that payment must accord with NAGICO's rates in effect at the date of each renewal, and that such payment must be accepted by

NAGICO for there to be a renewal or continuation of the policy – Whether the judge erred in holding that the expiry date of 28 th October 2048 is simply the date beyond which the policy could no longer be renewable on each anniversary of the policy date

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal is dismissed.**
- 2. The orders of the learned judge are affirmed.**
- 3. The appellant shall pay the respondent's costs of the appeal to be assessed if not agreed within 21 days of delivery of this judgment.**

Reasons:

- 1. A claimant's properly pleaded case may be exposed as hopeless when viewed in the light of the defence or a defence, when pitted against the claimant's pleaded case, may be seen as holding out no real prospect of successfully defending the claim or issue. Either scenario would justify the entry of summary judgment. However, cases where the disputed issues of material fact or where material facts need to be ascertained by the court which cannot be resolved on the affidavits or where judgment can only properly be rendered after a full consideration of the evidence, are ill-suited and inappropriate for the summary judgment procedure.**

Dr. Martin Didier et al v Royal Caribbean Cruises Ltd. SLUHCVAP2014/0024 (delivered 6th June 2016, unreported) followed.

- 2. Generally, an insurer has the right to terminate a policy of insurance where the express terms of the policy so provide. A contract of insurance normally contains provisions relating to the renewal of the policy, usually by mutual consent. Save where in some special forms of insurance there is an express condition of the policy that the insured and the insurer are obliged to renew, the insurer is not bound to accede to an application**

by the insured for renewal or to accept a premium tendered by the insured for renewal. The insurer may issue a notice of renewal, though it is not obliged to. If the insurer does send a renewal notice and it stipulates a higher rate of premium, and the insured refuses to pay it, the offer has lapsed and cannot be revived later. Where the policy is renewed each renewal is in law a fresh contract.

3. Clause 3 of the policy provides that the appellant had a grace period of 31 days beyond the premium due date to make payment, except where written notice of intention not to renew beyond the period for which he has already paid has been served on him 30 days prior to the next premium due date. If no such notice has been given, the presumption is that the policy will continue so that when the due date for the payment of the premium arrives the appellant will have a grace period of 31 days to make payment of the premium. The difficulty with the appellant's interpretation of clause 3 as meaning that NAGICO could only serve notice of intention not to renew if the premium is still not paid at the end of the grace period, is that, to yield the construction urged one would have to read the words 'for failure to pay the premium' into the clause to limit NAGICO's entitlement to serve notice of intention not to renew to circumstances where the premium is unpaid. No such limitation is expressed in clause 3. In fact, clause 3 contemplates that the premium has been paid as it makes plain that what the notice conveys to the appellant is that NAGICO does not intend to renew the policy beyond the period for which premium had been accepted. Clause 3 therefore expressly gave a right to NAGICO not to renew, effectively terminating, the policy for reasons other than non-payment of premium. The fact that this provision is not under the section of the policy captioned 'Eligibility For and Termination of Coverage' does not alter its plain meaning. For this and the additional reasons summarised below, it follows that the appellant's argument that NAGICO could not terminate the policy

before its expiry date of 28th October 2048, other than for non-payment of premium must be rejected.

4. In relation to the expiry date, the policy page of the policy bears the endorsement: Expiry date: 10.28.2048. While this endorsement might suggest that the life of the policy extended to that date, to understand the meaning of that term it is necessary to examine the policy terms and not merely look at what is stated on the face of the policy. Under the rubric 'Eligibility For and Termination of Coverage' the policy provides that this policy shall not be renewable beyond the anniversary date on or after the Insured's 65th birthday, on which date it will expire. What it does not say is that the policy shall remain in force until 28th October 2048 as suggested by the appellant. Indeed, there exist several references within the policy that are inconsistent with the appellant's suggested interpretation. For example, clause 10 states that 'All premiums are payable in advance to the Company, in accordance with the Company's premium rates in effect on the date of each renewal...'. The renewal here cannot mean some time in 2048, by which time the policy was not renewable in any event. The renewal date must therefore refer to each occasion on the policy anniversary when premiums are paid by the appellant and accepted by NAGICO. Each such occasion continues the policy in force. Thus, NAGICO was not obliged to accept the appellant's premiums of \$81.31 as there is no term in the policy to that effect either expressly or impliedly. The expiry date was simply the date when the policy automatically lapsed and beyond which the policy could not automatically renew upon payment and acceptance of the premium. The judge was therefore correct in her interpretation of the policy and did not err when she held that the appellant had no real prospect of succeeding on the claim based on the filed defence.
5. Grounds (iii), (v) and (vi) of the appeal lack merit and have little bearing on whether the judge was

right to hold that the appellant had no real prospect of succeeding on the claim. Similarly, ground (xii) is devoid of merit as it was patently obvious from the judgment that the judge had carefully examined the respondent's defence.

Case Name:

**[1] Lam Wo Ping
[2] Lam Kin Chung**

v

**[1] Chen Jian Yun
[2] Zhong Da Mining Holding Limited**

**[BVIHCMAP2023/0006]
(Territory of the Virgin Islands)**

Date:

Tuesday, 20th August 2024

**Coram for
Delivery:**

**The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Eddy D. Ventose, Justice of Appeal
The Hon. Mr. Gerard St. C Farara, Justice of Appeal [Ag.]**

Appearances:

Appellants: Mr. Alex Hall Taylor KC

**Respondents: Ms. Nina Roheman and Mr. Stuart Cullen holding papers
for Mr. Terry Mowschenson KC**

Issues:

Commercial appeal – Service of court process out of the jurisdiction – Part 7 of the Civil Procedure Rules 2000 (“CPR”) – Jurisdictional gateways – Rules 7.3(2)(a), 7.3(7)(a) and (b) of the CPR – Whether the appellants established a good arguable case that the claim fell within one or more of the classes of cases in which permission to serve out may be given in relation to a jurisdictional gateway – Forum conveniens – Burden of proof – Whether the appellants demonstrated that the forum being seised must clearly or distinctly be the appropriate forum for the trial of the dispute – Connecting factors – Whether the judge weighed the

appropriate connecting factors that demonstrated the most real and natural connection with the action – Appellate interference – Appellate interference in a judge’s finding on the relative merits of trial in an instant jurisdiction and trial abroad – Whether the judge made a significant error of principle, or in the considerations taken or not taken into account, such that the decision exceeded the generous ambit within which reasonable disagreement is possible – Application to adduce fresh evidence – Ladd v Marshall test – Whether the evidence could not have been obtained with reasonable diligence for use at trial – Whether the evidence would have an important influence on the result of the case

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal is dismissed.**
- 2. The appellants shall pay the respondents’ costs of the fresh evidence application to be assessed by a judge of the Commercial Court if not agreed within 21 days of delivery of this judgment.**
- 3. The appellants shall pay the respondents’ costs in the appeal fixed at two-thirds of the costs assessed in the court below.**

Reasons:

- 1. In determining an application to adduce fresh evidence, it is well settled in this jurisdiction that the Court is guided by the principles in Ladd v Marshall which comprise the following three limb test: (1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and (3) the evidence must be such as is presumably to be believed, or in other words it must be apparently credible, though it need not be incontrovertible. Ultimately, the core consideration is whether it is in the furtherance of**

the overriding objective to do justice between the parties to permit the applicant to rely on evidence not relied on in the lower court. The Court considered that, with the exception of the PRC appellate court judgment, all the other evidence that the appellants sought to adduce existed since June 2022, that is, well before the hearing and ruling of the BVI commercial court. With reasonable diligence, this evidence could have been deployed at the BVI commercial court, but the appellants failed to do so. Consequently, the appellants did not satisfy limb one of the Ladd v Marshall principles.

Ladd v Marshall [1954] 1 WLR 1489 applied; Geminis Investors Limited v Goods Technology Starting International Limited BVIHCMAP2022/0020 (delivered 23rd August 2023, unreported) considered.

2. The Court does not agree with the appellants' interpretation of Staray Capital Limited and another v Cha, Yang (also known as Stanley), that on an application to adduce fresh evidence, the court is not limited to permitting an applicant to rely only on documents that existed at the time of the first instance judge's decision. Staray's case did not decide that evidence that did not exist before the trial would be accepted. In fact, the reasoning in Staray's case is that evidence in the form of opinions was admissible on a fresh evidence application because the information or evidence used to generate those opinions existed well before the trial took place. In this case, the PRC appellate court judgment was not in existence at the time of the BVI commercial court's decision. The purpose for which the appellants were seeking to deploy it was to prove the findings or conclusions of the PRC appellate court; not to prove the underlying facts giving rise to the judgment, which were in existence at the time of trial and well known. Additionally, the PRC appellate court judgment did not consider and make determinations on the legal or

beneficial ownership of the Company and consequently, the issues before that court did not bear upon the present matter.

Staray Capital Limited and another v Cha, Yang (also known as Stanley) BVIHCMAP2013/0009 (delivered 14th July 2014, unreported) distinguished; WWRT Limited v Carosan Trading Limited and Boris Kaufman BVIHCMAP2022/0002 (delivered 20th July 2022, unreported) applied.

3. The Court was overall satisfied that the evidence the appellants sought to adduce was irrelevant and would not have an important influence on the result of the case. Accordingly, the application to adduce fresh evidence was dismissed.

Ladd v Marshall [1954] 1 WLR 1489 applied.

4. On an application for service out of the jurisdiction, the following three requirements must be satisfied: (1) there must be a serious issue to be tried on the merits as is the test for summary judgment, meaning that the claimant must show that there is a real as opposed to a fanciful prospect of success; (2) there must be a good arguable case that the claim falls within one or more classes of cases in which permission to serve out may be given in relation to a jurisdictional gateway; and (3) in all the circumstances, the forum which is being seised must clearly or distinctly be the appropriate forum for the trial of the dispute. In the present case, if the claim against the Company was bound to fail then that would be relevant to the question of whether, as between the appellants and Mr. Chen, there was a serious issue to be tried. The Court considered whether the appellants had established a good arguable case that the claim fell within one or more of the classes of cases in which permission to serve out may be given in relation to a jurisdictional gateway – which meant in the context of the present case – a gateway through which an application for service out must pass before permission may be granted. Three jurisdictional gateways were engaged in this

case: rules 7.3(2)(a), 7.3(7)(a), and 7.3(7)(b) of the CPR.

Nilon Limited and another v Royal Westminster Investments S.A. and others [2015] UKPC 2 applied; AK Investment CJSC v Kyrgyz Mobile Tel Limited and Others [2011] UKPC 7 applied; Part 7 of the Civil Procedure Rules 2000 applied.

5. The Court found that the jurisdictional gateways for service out under rules 7.3(2)(a) and 7.3(7)(a) of the CPR were not open to the appellants. In relation to rule 7.3(2)(a), the question engaged was whether there was a real issue to be tried between the appellants and the Company. The Court noted that the claim was made under section 43(2) of the Business Companies Act for rectification of the Company's register of members ("rectification proceedings"). The jurisdiction of the court in rectification proceedings is ill-suited to cases where substantial matters are in dispute. Considering that the appellants commenced rectification proceedings in circumstances where there was a substantial dispute concerning the validity of both purported share transfers, and the terms of the 2017 agreement, their claim for rectification against the Company was bound to fail. Accordingly, there could be no claim to which Mr. Chen could be a necessary and proper party. Regarding the jurisdictional gateway under rule 7.3(7)(a), the Court considered the nature of the claim and found that the crux of the dispute was competing claims of two parties in relation to the entitlement to the Company's sole share, and therefore, a good arguable case had not been made out because the subject matter of the claim did not relate to the constitution, administration, management or conduct of the affairs of a BVI company.

Rules 7.3(2)(a) and 7.3(7)(a) of the Civil Procedure Rules 2000 applied; Sections 41(1), 42, and 43 of the Business Companies Act No.16 of 2004 of the Revised Laws of the Virgin Islands applied; Nilon Limited and another v Royal Westminster

Investments S.A. and others [2015] UKPC 2 applied; Re North British Australasian Company (Limited), Ex p Robert Swan (1859) 7 C.B. (N.S.) 400 distinguished; Re Diamond Rock Boring Co Ltd, Ex p Shaw (1877) 2 QBD 463 distinguished.

- 6. The Court found however that the jurisdictional gateway available under rule 7.3(7)(b) of the CPR was available to the appellants. In determining the relevant question of whether the subject matter of the claim related to the ownership or control of a company incorporated within the jurisdiction, the Court noted that the claim was against the Company for rectification of its register to reflect Mr. Lam Jnr as its registered shareholder and to remove Mr. Chen as a member of the Company. The Court found that in this case, the claim for rectification was directly concerned with the question of who is entitled to be registered as the legal owner of the share and concomitantly, ownership of the Company.**

Rule 7.3(7)(b) of the Civil Procedure Rules 2000 applied; Nilon Limited and another v Royal Westminster Investments S.A. and others [2015] UKPC 2 applied; Re London, Hamburgh and Continental Exchange Bank, Ward and Henry's Case (1867) LR 2 Ch App 431 applied.

- 7. The Court then addressed the judge's finding that, in any event, the appellants did not demonstrate that the BVI court was clearly and distinctly the most appropriate forum for the trial of the dispute so as to move the court to permit service out. Firstly, the Court agreed with the judge that the primary application was to set aside the order for service out and accordingly, the appellants bore the burden of establishing that the BVI court was clearly and distinctly the most appropriate forum.**

Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460 applied; Livingston Properties Equities Inc and Others v JSC MCC Eurochem and Another [2020] UKPC 31 applied; Thornton Tomasetti Inc v Anguilla Development Corporation Ltd

AXAHCVAP2014/0008 (delivered 15th September 2015, unreported) applied.

- 8. The Court held that in determining whether there is another available foreign court with competent jurisdiction more appropriate than the local court to try the claim, the court must perform a balancing exercise in weighing “connecting factors,” meaning factors which demonstrate the most real and natural connection with the action. In considering whether the commercial court weighed the appropriate connecting factors, the Court disagreed with the appellants’ contention that the judge failed to take into account the governing law, location and language of the witnesses, and documents. Even though the Court acknowledged that paragraphs 67 and 69 of the Nilon case were irrelevant insofar as they contained no reasoning on the appropriate forum, the judge never expressly said that those paragraphs contained the factors which she considered. The Court found that the judge, by incorporating paragraph 66 of the Nilon case into her decision, made it pellucid what connecting factors she considered. The relevant connecting factors were that: (1) the 2017 agreement was made in the PRC between Chinese nationals resident there, and related to the beneficial ownership of underlying assets comprising six mining companies situated in the PRC; (2) the language of the parties is mandarin Chinese; and (3) the law governing the 2017 agreement is PRC law. The Court noted that even though the BVI was where the rectification remedy must be sought, it would be the same situation if the underlying dispute was dealt with in the PRC because the situs of the share is the BVI.**

IPOC International Growth Fund Ltd v LV Financial Group Ltd et al BVIHCVAP2003/0020 and BVIHCVAP2004/0001 (delivered 22nd November 2004, unreported) applied; Nilon Limited and another v Royal Westminster Investments S.A. and others [2015] UKPC 2 applied; VTB Capital plc v Nutritek International Corp [2013] UKSC 5 applied; Spiliada Maritime

Corp v Cansulex Ltd [1987] AC 460 applied.

- 9. Lastly, the Court highlighted that the solution of disputes about the relative merits of trial in an instant jurisdiction and trial abroad is pre-eminently a matter for the trial judge. An appeal, therefore, should be rare and the appellate court should be slow to interfere. Accordingly, having regard to the foregoing conclusions, the Court did not find that the judge made a significant error of principle, or a significant error in the considerations taken or not taken into account, such that her decision exceeded the generous ambit within which reasonable disagreement is possible.**

VTB Capital plc v Nutritek International Corp [2013] UKSC 5 applied; Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460 applied; Lubbe and Others v Cape PLC [2000] UKHL 41 applied; Tibit Limited v The Federal Republic of Nigeria BVIHCMAP2021/0042 (delivered 24th March 2024, unreported) applied; Anjie Investments Limited and Tian Li Holdings Limited v Cheng Nga Yee and Cheng Nga Ming Vincent BVIHCMAP2016/0003 (delivered 24th November 2016, unreported) applied; WWRT Limited v Carosan Trading Limited and Boris Kaufman BVIHCMAP2022/0002 (delivered 20th July 2022, unreported) applied.

Case Name:

Nam Tai Property Inc

v

West Ridge Investment Limited

[BVIHCMAP2022/0046]

(Territory of the Virgin Islands)

Date:

Tuesday, 20th August 2024

**Coram for
Delivery:**

The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Eddy D. Ventose, Justice of Appeal
The Hon. Mr. Gerard St. C Farara, Justice of Appeal [Ag.]

Appearances:

Appellant: Ms. Arabella di Iorio

Respondent: Mrs. Kimberly Crabbe-Adams

Issues:

Application for conditional leave to His Majesty in Council – Section 3(2)(a) of the Virgin Islands (Appeals to Privy Council) Order 1967 – Great general or public importance limb of section 3(2)(a) - Whether question of great general or public importance raised in proposed appeal – ‘Or otherwise’ limb of section 3(2)(a) – Whether appeal ought to be submitted to His Majesty in Council – Whether Court erred in finding that Nam Tai had no realistic prospect of succeeding in its claims of unlawful means conspiracy and dishonest assistance against West Ridge – Whether Court erred in finding that Nam Tai had no realistic prospect of demonstrating that the Deed of Indemnity was ineffective or void or not binding on it

Result/Order:

IT IS HEREBY ORDERED THAT:

The Application for conditional leave to appeal to the Privy Council is dismissed with costs to West Ridge to be assessed, if not agreed within 21 days of the date of this judgment.

Reasons:

1. Section 3(2)(a) of the 1967 Order provides two bases upon which the Court of Appeal may exercise its jurisdiction to grant conditional leave. Under the ‘great general or public importance’ limb, the Court would look for matters which involve a serious issue of law, a constitutional provision which has not been settled, an area of law in dispute, or a legal question, the resolution of which, poses dire consequences to the public. This list is non-exhaustive and generally the matters under this limb would involve a difficult

question of law. As to the 'or otherwise' limb, an applicant would have to satisfy the Court that there is some other compelling reason why the appeal ought to be referred to His Majesty in Council. Such a reason would include where there was reasonable doubt as to the correctness of the Court of Appeal's decision if, for example, where the decision was based on a principle which has been overruled by a higher authority or where it was based on a statute or statutory provision which has been repealed prior to such decision being rendered. What is clear is that the Court will not grant leave under section 3(2)(a) where the real question on the proposed appeal is: (i) the way the Court has applied settled and clear law to the facts; or (ii) whether a judicial discretion was properly exercised.

Section 3(2)(a) of the Virgin Islands (Appeals to Privy Council) Order 1967 Statutory Instrument No. 234 of 1967 applied; *Multibank FX International Corporation v Von Der Heydt Invest SA* BVIHCVAP2022/0008; BVIHCVAP2021/0009 (delivered 7th July 2023, unreported) followed; *Martinus Francois v The Attorney General* Civil Appeal No. 37 of 2003 (delivered 7th June 2004, unreported) followed; *Renaissance Ventures Ltd et al v Comodo Holdings Ltd* BVIHCMAP2018/0005; BVIHCMAP2018/0008 (delivered 18th October 2018, unreported) followed.

2. The elements of the tort of unlawful means conspiracy are: (i) a combination, agreement or understanding between two or more people; (ii) an intention to injure another individual or separate legal entity; (iii) use of unlawful means as part of the concerted action; and (iv) loss being caused to the target of the conspiracy. As to the intent to injure, there must be an intent to inflict damage on the claimant as an end in itself, or to inflict it as a means to some other end. Merely resulting or incidental damage will not do, even if foreseeable. As to proof of loss, in unlawful means conspiracy, the loss must be pecuniary.

E D & F Man Capital Markets Ltd v Come Harvest Holdings Ltd and others [2022] EWHC 229 (Comm.) applied; Grant & Mumford (1st Edition: 2018) at para. 2-007 considered. Lonrho plc. and others v Fayed and others (No. 5) [1993] 1 W.L.R. 1489 considered; OBG Ltd. and another v Allan and others; Douglas and others v Hello! Ltd and others (No 3); Mainstream Properties Ltd v Young [2008] 1 AC 1 considered.

- 3. On a reading of this Court's 2023 judgment, it is evident that this Court, in its assessment of the decisions in Lonrho plc. and others v Fayed and others (No. 5) and OBG Ltd. and another v Allan and others, fell into error and conflated two elements of the tort of unlawful means conspiracy; that is, the intent to injure and proof of loss/damage. A proper reading of Lonrho and OBG confirmed that the intention in an unlawful means conspiracy need not be an intention to specifically cause pecuniary harm. Whilst the loss or harm suffered must be pecuniary, the intention to injure need not be. Consequently, in so far as this Court conflated the two elements of the tort, it erred. However, this Court's decision did not ultimately turn on this finding. The judge, whose understanding of the law of intent and loss accorded with the principles in Lonrho and OBG, concluded that on the material before him, Nam Tai did not have a realistic prospect of showing that West Ridge intended to harm it. This Court accepted and left undisturbed this finding of the trial judge. The appeal on this ground did not turn on the Court's finding of a failure to plead a specific intention to cause pecuniary damage but an acceptance of the judge's finding that Nam Tai's pleadings failed to show an intention to harm. Consequently, Nam Tai did not meet the threshold for the grant of leave to appeal on this ground.**

Lonrho plc. and others v Fayed and others (No. 5) [1993] 1 W.L.R. 1489 considered; OBG Ltd. and another v Allan and others; Douglas and others v Hello! Ltd and others (No 3); Mainstream

Properties Ltd v Young [2008] 1 AC 1 considered.

- 4. An application to set aside a Tomlin order is to be treated as if it were an application for summary judgment. Thus, the relief sought ought to be granted where the court considers that a party has no realistic prospects of succeeding on or defending the claim. When dealing with such applications, the court must examine the pleadings and the evidence critically, to see if, when properly assessed, they disclose a realistic prospect of defending or succeeding on a claim. The word “realistic” here carries some degree of conviction beyond being merely arguable. However, the court must take care not to conduct a mini trial at this stage. Even so, this does not mean that the court must take at face value and without analysis everything that a claimant says in their statements before the court. On the facts, this Court reminded itself of these principles and conducted an evaluation of the defence and counterclaim, the evidence before the Court and the lower court’s assessment of the evidence. The Court found that there was no basis to disturb the trial judge’s finding that the conspiracy claim failed as Nam Tai did not plead a proper case of intent to injure. Nam Tai’s challenge on this ground did not give rise to a genuine dispute on the approach a court should take in the enforcement or setting aside of a Tomlin order. Leave therefore cannot be granted on this ground.**

Flat Point Development Limited v Canisby Limited ANUHC VAP2016/0006 (delivered 7th December 2017, unreported) followed; Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste SLUHC VAP2009/008 (delivered 11th January 2010, unreported) followed; Heritage Travel and Tourism Ltd et al v Lars Windhorst et al [2021] EWHC 2380 (Comm) applied; Easyair Ltd (t/a Openair) v Opal Telecom Ltd [2009] EWHC 339 (Ch) considered.

- 5. In a claim for dishonest assistance there must be:
(i) a trust or fiduciary obligation owed by the**

trustee/fiduciary to the claimant; (ii) a breach by the trustee/fiduciary which need not be dishonest since it is the dishonesty of the third party that matters; and (iii) the third party must have assisted in, induced or procured the breach and must have done so dishonestly. In the 2023 judgment, this Court found that the judge fell into error by concluding that Nam Tai had to prove that West Ridge assisted and procured the breach of duty by the Kaisa directors. The Court therefore considered the matter afresh and considered the test set out in *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* and the dictum of Cockerill J in *FM Capital Partners Ltd v Frederic Marino and others*. Having defined the appropriate test, the Court then applied it to the facts. An examination of Nam Tai's submissions reveals that they do not dispute the Court's identification of the elements of dishonest assistance as articulated in *FM Capital Partners Ltd*. Moreover, Nam Tai does not assert that the Court erred in its statement of the law as set out in *Ivey v Genting Casinos*. In reality, Nam Tai is merely asserting that the Court misapplied the test to the facts. This does not rise to the level that there is some genuine dispute on the test to be applied to determine dishonest assistance since the real question on this ground is the way this Court has applied settled and clear law to the facts. Even if this Court were to find that there were inconsistent findings by the Court as to the facts, for Nam Tai's submissions to rise to the level of significance so as to be submitted to His Majesty in Council, they had to have shown that the inconsistent findings created some reasonable doubt as to the correctness of the decision of the Court. This, they did not do and leave to appeal would not be granted on this ground.

FM Capital Partners Ltd v Frederic Marino and others [2018] EWHC 1768 (Comm) applied; *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] AC 391 applied.

6. In relation to the Deed of Indemnity, the thrust of

Nam Tai's argument was that favourable terms were given to West Ridge in exchange for its agreement not to give evidence or disclosure in the Main claim and so the indemnity was given for an improper purpose in breach of the then Kaisa directors' duties under the BC Act. In the 2023 judgment, the Court found that there was no pleading of the actual evidence West Ridge would have given and as such, there was no way of knowing if the evidence would have helped or hurt Nam Tai. Having so found, the Court was reluctant to attribute any improper purpose to Nam Tai (under the direction of the then Kaisa directors). The Court concluded that Nam Tai's allegation was speculative and did not meet the low threshold of showing a realistic prospect that the Kaisa directors acted in breach of their duties under sections 120(1) and 121 of the BC Act. Contrary to Nam Tai's assertions, the issue of whether a breach of section 120(1) and/or 121 of the BC Act resulted in a transaction being void or voidable did not arise on the appeal. Nam Tai never overcame the hurdle of establishing that there was, in fact, a breach of the Act. This issue is therefore entirely academic and Nam Tai, on this ground, has failed to satisfy the threshold for the grant of leave to appeal.

Case Name:

Frederick Henry

v

Marie Ketra Albert

**[SLUHCVAP2023/0012]
(Saint Lucia)**

Date:

Tuesday, 20th August 2024

**Coram for
Delivery:**

**The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Eddy D. Ventose, Justice of Appeal
The Hon. Mr. Gerard St. C Farara, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. Horace Fraser

Respondent: Mr. Henry Joseph

Issues:

Civil appeal – Order for reimbursement of cost of improvements to property – Article 372 of the Civil Code of Saint Lucia – Article 372 neither pleaded nor relied on in the court below – Whether the order made by the judge for reimbursement of the cost of the improvements to the property was open to him on the respondent's pleaded case – Whether the learned judge erred or committed a miscarriage of justice in making the order for reimbursement pursuant to Article 372 – Failure of the judge to invite parties to make submissions on the issue and elements of Article 372 – Good faith and necessity requirement – Whether the judge's failure to consider and to make findings of good faith and necessity undermines the order for reimbursement of cost of improvements

Result/Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is allowed.
2. The orders made by the learned judge at subparagraphs (3) and (4) of paragraph [83] of the judgment below are set aside.
3. The respondent shall pay the appellant's costs of the appeal and in the court below to be assessed by a judge or master if not agreed by the parties within 21 days of the date of delivery of this judgment.

Reasons:

1. It is common ground that the respondent did not plead or rely on Article 372 of the Civil Code in her claim in the court below. Likewise, there was no mention of Article 372 in the pleadings nor in the closing submissions of either party. Moreover, there was no pleading that the improvements had been carried out in 'good faith'

or that the said improvements were necessary, each of which are key elements which must be pleaded in order to found any remedy, primary or alternative, for an order of compensation or reimbursement under Article 372. Consequently, in the face of no pleaded case for reimbursement of the cost of improvements whether under Article 372 or otherwise, the learned judge, however well-intended, assisted the respondent in an impermissible manner when he embarked upon a consideration of Article 372 and made the order for reimbursement of the costs of the improvements in favour of the respondent. Furthermore, it was not open to the judge to do so without, at minimum, first inviting written submissions from the parties on the issue of compensation for the improvements and on the application of Article 372 and the elements of 'good faith' and 'necessity' to the evidence or to the facts of the case. In failing to do so, the learned judge committed a serious breach of the rules of natural justice as to a fair trial and decided the case on an issue which was not pleaded or relied on by the respondent, leading to a miscarriage of justice. Accordingly, the appeal ought to be allowed and the order discharged.

Chen v Ng [2017] UKPC 27 applied; George W. Bennett Bryson's and Co Ltd trading as Bryson Shipping v. George Purcell trading as Hortico Landscaping and Nursery ANUHC VAP2011/0033 (delivered 28th February 2018, unreported) followed.

2. Notwithstanding the wide jurisdiction and powers granted to the High Court by section 17 of the Supreme Court Act essentially to grant and to fashion such remedy as a party appears to be entitled to in respect of their claim, so as to completely and finally determine all matters in controversy between the claimant and the defendant to the proceedings, in this matter the judge erred in making the order for reimbursement. The main thrust of the respondent's claim was that she was entitled to

ownership of the property or alternatively she had an equitable proprietary interest therein, subject to which equitable interest, the appellant took title to the property by virtue of the Deed of Donation. All these claims and causes of action were dismissed by the court below and the respondent did not appeal against any of these orders. There could therefore be no basis for the court below to invoke its undoubted jurisdiction and powers under section 17 of the Supreme Court Act. Moreover, even where it is permissible for a court to resort to its powers and jurisdiction under section 17, they must be exercised in a manner which is fair to both parties to the litigation and in full observance of the foundational principles of natural justice and due process which underpin our system of justice. This the learned judge had failed to do rendering the reimbursement order a miscarriage of justice which order ought, in the circumstances, to be discharged.

Section 17 of the Eastern Caribbean Supreme Court (Saint Lucia) Act Cap 2.01 of the Revised laws of Saint Lucia considered.

3. It is crucial for the assessment and determination by a court when applying or seeking to apply Article 372 that it considers, on the evidence before it, whether the 'improvements' made were carried out in good faith and whether they were necessary. In the instant case, the learned judge, having set out in full the provisions of Article 372, did not undertake any analysis of its provisions and, most importantly, did not identify and consider the crucial elements of 'good faith' versus 'bad faith', or of necessity. There was no attempt made to analyse the evidence or the facts as found by him and to apply them to either of these two elements. There was also no mention and no consideration of the provisions of Article 2066 whereby 'good faith' is to be presumed, or any consideration of the burden of proof and whether it had been discharged to the requisite standard in a civil case. The approach to this issue by the learned judge falls short of the standard required of a court when considering the

application of a statutory provision such as Article 372, and in reasoning to a conclusion and making an order affecting the rights of a party to civil litigation. The effect of this failure is that the findings and order for reimbursement of the cost of the improvements cannot stand and must be set aside.

George St. Ville v Editon Francis Civil Appeal No.13 of 1967 (delivered 16th March 1968, unreported) considered.

4. The conclusion of this Court that the order cannot stand is further reinforced by the fact that the scope of the order made is much wider than the findings of the judge with regard to the agreed-upon improvements to the property. The order for reimbursement was not limited in its scope to specific improvements which the respondent had carried out at her expense as agreed with or permitted by either the deceased, Fredrica Henry, or the appellant as the then owner of the property, or both. Instead, the order made was so broad in its terms so as to encompass, on any reasonable reading, all 'the improvements to the house'. This is contrary to the judge's findings that the improvements were made gratuitously; exceeded what had been agreed; and those actually made by agreement were nothing more than 'minor renovations'. Specifically, the order made lacks in particularity and specificity which improvements the respondent actually made, which of those improvements she is to be reimbursed pursuant to the order, and for which the quantity surveyor is to conduct an assessment of their 'value'. This rendered the order made too wide and so lacking in specificity as to be unfair to the appellant, and unworkable and impractical for any sensible and accurate assessment of value by a quantity surveyor. Accordingly, the said order is inaccurate and unworkable to such an extent as to lead to further litigation and the reopening of factual and other issues which should have been dealt with at the trial.

Case Name:

Greater Sail Limited

v

**[1] Nam Tai Property Inc
[2] Nam Tai Group Limited
[3] Nam Tai Investment (Shenzhen) Co Ltd**

**[BVIHCMAP2023/0027]
(Territory of the Virgin Islands)**

Date:

Tuesday, 20th August 2024

**Coram for
Delivery:**

**The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Eddy D. Ventose, Justice of Appeal
The Hon. Mr. Gerard St. C Farara, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. Andrew Emery

Respondents: Mr. Nicholas Burkhill

Issues:

Interlocutory appeal – Appeal against decision of learned trial judge granting an adjournment of contempt proceedings – Award of costs on adjournment - Whether the learned trial judge failed to give the appellant an opportunity to address the court on the issue of costs before making her costs order – Whether the respondents could not be considered the successful party since the contempt application remains undetermined – Whether the learned trial judge erred in awarding the respondents the costs of the contempt proceedings to date – Whether the learned trial judge erred in ordering an interim payment of all of counsel's fees and disbursements on the contempt application

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal is allowed.**
- 2. The order by the learned trial judge for the**

appellant to pay the respondents' costs of the contempt application up to and including the date of the hearing on 28th November 2023 is set aside.

- 3. The order by the learned trial judge for the appellant to pay the respondents GBP125,300 by 4 pm on 19th December 2023 by way of an interim payment is set aside.**
- 4. The appellant shall pay, in any event the costs of the respondents thrown away by the adjournment of the hearing on 28th November 2023, to be assessed by a judge of the Commercial Court, if not agreed within 21 days of this judgment.**
- 5. The respondents shall pay the appellant's costs of this appeal to be assessed by a judge of the Commercial Court, if not agreed within 21 days of the date of this judgment.**

Reasons:

- 1. It is inappropriate for an appellate court to interfere with a judge's exercise of discretion unless it is plainly wrong in that it was outside the generous ambit within which reasonable decision makers may differ. To succeed on this ground the appellant must satisfy the court that the judge in the exercise of her discretion had committed an error of principle in the approach that she adopted. It is clear that the trial judge was most swayed by the pending applications before this Court and the fact of her impending departure. Undoubtedly, the trial judge also took a very dim view of the lateness of the appellant's skeleton argument and the application for the adjournment. Accordingly, the appellant has not satisfied this Court that the learned trial judge failed to consider any of the factors about which it now complains.**
- 2. A ground relied on by a judge in the judge's exercise of discretion to award costs must be connected to the case, i.e. a matter leading to and relating to the litigation and the parties' conduct in that litigation. To rely on counsel for a party's tardiness in other matters would be to rely upon**

extraneous grounds. The appellant's argument appears to be that the trial judge had not previously presided over the second contempt proceedings, not the claim *per se*. The transcript reveals that the judge expressed dissatisfaction with the fact that she had had on four previous occasions to bring to the attention of counsel for the appellant the late filing of submissions by him. It is not clear whether the trial judge was referring to previous proceedings within the claim. If the judge was, she could not be faulted for making that observation as past conduct and the degree of responsibility accepted by the appellant's legal representatives were relevant considerations when she was considering an application for an adjournment in which the late filing of submissions again featured. To the extent that the Court is unclear whether the past conduct referred to by the trial judge had taken place during the hearing of the claim the Court is left unsatisfied that this ground of appeal has been made out.

Scherer v Counting Instruments Ltd [1986] 2 All ER 529 applied.

3. It is reasonable to order costs in favour of the successful party without hearing the other side, the general rule being that costs follow the event. The position is different however following the adjournment of an application, The judge should give the party responsible for an adjournment the opportunity to be heard before making an order for costs thrown away. Therefore the trial judge erred in principle in making an order for costs against the appellant without first affording the appellant an opportunity to make representations on the incidence of costs.

Tetley Tea Co Ltd v Alderson [1969] 1 All ER 675 applied.

4. There was no error in principle on the part of the judge in awarding costs on the adjournment. That exercise of discretion had nothing to do with the success or otherwise of the underlying contempt

application. Additionally, the award of costs on an adjournment is not dependent upon the success, in the face of opposition, of the application for the adjournment. It is a recognition by the court that the party responsible for the adjournment has unduly caused the other to incur the cost of the attendance of their witnesses and legal representatives, being an expense which, in fairness, ought to be recouped.

5. When an application is adjourned the usual order is for the payment, in any event, of costs thrown away by the adjournment. It is quite a different thing to order costs of the application to date, as the trial judge did. Costs incurred by way of preparation for the hearing cannot properly be regarded as wasted costs since they bear fruit when the application comes up again for hearing. Upon the determination of the application the applicant may win or lose. To award an ultimately unsuccessful applicant costs on his application to the date of a particular earlier hearing would be unfair since this would, at the end of the day, prove to be an undeserved windfall to him. Consequently, the trial judge was plainly wrong to award the costs of the contempt proceedings to date to the respondents instead of ordering the payment, in any event, of costs thrown away by reason of the adjournment. It follows that to order interim payment of such costs was also wrong and must be set aside.

APPEALS

Case Name:

Yulia Gurieva-Motlokhov

v

**[1] The Port Manager of Port Authority of
Antigua and Barbuda**

**[2] The Director of the Antigua and Barbuda
Department of Marine Services and Merchant
Shipping**

[3] The Attorney General of Antigua and Barbuda

**[ANUHCVAP2024/0017]
(Antigua and Barbuda)**

Date: Tuesday, 20th August 2024

Coram: The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Eddy D. Ventose, Justice of Appeal
The Hon. Mr. Gerard St. C Farara, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Robin Barclay KC with him Dr. David Dorsett and Ms. Leandra Smith

Respondents: Mr. Anthony Astaphan SC with him Mrs. Carla Brookes-Harris, Ms. Alicia Aska, Ms. Joy Dublin, Ms. Rose-Ann Kim and Mr. Zachary Phillips

Issues: Interlocutory appeal - Disclosure - Appeal against refusal of application for specific disclosure - Whether the learned judge applied the incorrect test in considering the application for specific disclosure - Duty of candour in public law cases - Whether the learned judge erred in addressing the application on the basis of what was 'necessary' instead of applying the relevant standard of candour - Legal privilege - Whether the learned judge erred in refusing disclosure on grounds of a claim to legal privilege that was not made and if made would fail

Type of Order: Oral Judgment

Result/Order: IT IS HEREBY ORDERED THAT:

1. The appeal is allowed.
2. The respondents shall disclose to the appellant, within 14 days of today's date, true copies of the following:
 - i. The documents marked "A-C" referred to in the

affidavit of Captain Lewis dated 16th March 2023 (“CL1”) which Mr. Telemaque stated that he relied on when he took the decision to seize the Alfa Nero on 11th April 2023.

ii. Any document, for example, emails or contemporaneous notes recording any information provided by Captain Lewis to any of the respondents after the arrival of the Alfa Nero in Falmouth Harbour in March 2022 and prior to his swearing CL1.

iii. All documents recording the information presented by Captain Kostar to Mr. Telemaque at the time he made his decision to issue the Notice of Intention to Sell (“the Removal Notice”) on 21st March 2023 and to seize the Alfa Nero on 11th April 2023.

iv. All documents and information considered by Mr. Telemaque when he made his decisions to issue the Removal Notice on 21st March 2023 and to seize the Alfa Nero on 11th April 2023.

v. Any contemporaneous written record that Mr. Telemaque made of his decision-making process when he made the decision to seize the Alfa Nero on 11th April 2023, and if he did not make such a record, any explanation as to why he did not.

3. Disclosure by the respondent shall be by way of affidavits with exhibits and it shall be certified by the deponent that all reasonable and proportionate searches have been carried out for any document which it is reasonable to suppose may contain information required to be disclosed by this order, and all the documents in the possession and control of the respondents in respect of this order have been disclosed.

4. Costs to the appellant to be paid by the respondents to be assessed if not agreed within 21 days of today’s date.

Reason:

Before the Court were two appeals against the decisions

of the learned trial judge dated 6th June 2024 in which he refused the application dated 10th November 2023 for specific disclosure by the appellant in ANUHC VAP2024/0017 and the application dated 12th September 2023 for disclosure by the appellant in ANUHC VAP2024/0019. The Court agreed with the principle stated by Fordham J in R (Police Superintendents' Association) v Police Remuneration Review Body [2003] EWHC 1838, that Judicial Review is conducted 'with all cards face upwards on the table'. Consequently, this means that full and fair disclosure of all relevant material must be provided so the court can decide whether the public authority acted lawfully. This is based on an underlying principle that public authorities are engaged in a common enterprise with the court to fulfill the public interest in upholding the rule of law. In that case Fordham J also explained that candid disclosure is required of: (a) those materials reasonably required for the court to arrive at an accurate decision; (b) full and accurate explanations of all facts relevant to the issue that the court must decide; and (c) a true and comprehensive account of the way in which the relevant decisions in the case were arrived at including the underlying reasoning. The Court also agreed with those statements.

The Court considered the documents filed in the substantive proceeding in both actions in the court below. The Court also considered the written and oral submissions of the parties and the affidavit evidence of the parties both in support and in opposition to both applications for disclosure in the court below. In particular, the Court considered the affidavit evidence of the Port Manager filed on 30th May 2023 at paragraphs 17 to 19. The Court noted that counsel for the respondent in claim number ANUHC VAP2024/0017 considered that the documents that were the subject of the appeal in respect of specific disclosure except for 2 (2) should be disclosed. The Court also considered the terms of the order of the court below dated 26th February 2024 and the supplemental affidavit of the Port Manager filed on 15th March 2024 in purported compliance with the said order.

Consequently, the Court was satisfied that the two applications for disclosure met the test of necessity to

enable the court to resolve the matters in the substantive proceedings fairly and justly. The documents, except for document 2(2) in claim number ANUHC VAP2024/0017 which did not satisfy that test which was the subject of the two applications for disclosure, must therefore be disclosed in accordance with the order of the Court.

Case Name:

**[1] Flying Dutchman Overseas Limited
[2] Vita Felice Limited**

v

**[1] The Port Authority
[2] The Attorney General**

**[ANUHC VAP2024/0019]
(Antigua and Barbuda)**

Date:

Tuesday, 20th August 2024

Coram:

**The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Eddy D. Ventose, Justice of Appeal
The Hon. Mr. Gerard St. C Farara, Justice of Appeal [Ag.]**

Appearances:

Appellants: Mr. Thomas Roe KC with him Mr. Andrew O’Kola

Respondents: Mr. Anthony Astaphan SC with him Mrs. Carla Brookes-Harris, Ms. Alicia Aska, Ms. Joy Dublin, Ms. Rose-Ann Kim and Mr. Zachary Phillips

Issues:

Interlocutory appeal - Disclosure - Appeal against refusal to require respondents to disclose certain documents pursuant to the duty of candour in public law proceedings - Whether the learned judge erred in finding that the information requested would not advance the substantive claim in any regard - Whether the learned judge erred in finding that ordering disclosure of the wide class of documents requested would flood the proceedings with documents which were not relevant to the live issues in the matter -

Whether the learned judge erred in refusing the application for disclosure on the basis of an application for specific disclosure under the CPR brought by Yulia Gurieva-Motlokhov in a separate action arising out of the same facts without addressing the question of whether the duty of candour in public law proceedings required the production of the different documents

Type of Order:

Oral Judgment

Result/Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is allowed.
2. The respondents shall disclose to the appellants, within 14 days of today's date, true copies of all documents in their possession or control evidencing the considerations taken into account by the Port Authority and/or the Government of Antigua and Barbuda in connection with and the timing of the following decisions:
 - (i) the decision to take possession of and to sell the Alfa Nero; and
 - (ii) the decision that the net proceeds of the sale of the Alfa Nero would be retained by the State.
3. Disclosure by the respondents shall be by way of affidavit or affidavits with exhibits and it shall be certified by the deponent that all reasonable and proportionate searches have been carried out for any document which it is reasonable to suppose may contain the information required to be disclosed by this order, and that all documents in the possession and control of the respondents in respect of this order have been disclosed.
4. Costs to the appellants to be paid by the respondents to be assessed if not agreed within 21 days of today's date.

Reason:

Before the Court were two appeals against the decisions of the learned trial judge dated 6th June 2024 in which he refused the application dated 10th November 2023 for specific disclosure by the appellant in ANUHC VAP2024/0017 and the application dated 12th September 2023 for disclosure by the appellant in ANUHC VAP2024/0019. The Court agreed with the principle stated by Fordham J in R (Police Superintendents' Association) v Police Remuneration Review Body [2003] EWHC 1838, that Judicial Review is conducted 'with all cards face upwards on the table'. Consequently, this means that full and fair disclosure of all relevant material must be provided so the court can decide whether the public authority acted lawfully. This is based on an underlying principle that public authorities are engaged in a common enterprise with the court to fulfill the public interest in upholding the rule of law. In that case Fordham J also explained that candid disclosure is required of: (a) those materials reasonably required for the court to arrive at an accurate decision; (b) full and accurate explanations of all facts relevant to the issue that the court must decide; and (c) a true and comprehensive account of the way in which the relevant decisions in the case were arrived at including the underlying reasoning. The Court also agreed with those statements.

The Court considered the documents filed in the substantive proceeding in both actions in the court below. The Court also considered the written and oral submissions of the parties and the affidavit evidence of the parties both in support and in opposition to both applications for disclosure in the court below. In particular, the Court considered the affidavit evidence of the Port Manager filed on 30th May 2023 at paragraphs 17 to 19. The Court noted that counsel for the respondent in claim number ANUHC VAP2024/0017 considered that the documents that were the subject of the appeal in respect of specific disclosure except for 2 (2) should be disclosed. The Court also considered the terms of the order of the court below dated 26th February 2024 and the supplemental affidavit of the Port Manager filed on 15th March 2024 in purported compliance with the said order.

Consequently, the Court was satisfied that the two

applications for disclosure met the test of necessity to enable the court to resolve the matters in the substantive proceedings fairly and justly. The documents, except for document 2(2) in claim number ANUHCVAP2024/0017 which did not satisfy that test which was the subject of the two applications for disclosure, must therefore be disclosed in accordance with the order of the Court.

Case Name:

**[1] Flying Dutchman Overseas Limited
(a company incorporated in the Territory of the
Virgin Islands)
[2] Vita Felice Limited
(a company incorporated in the Territory of the
Virgin Islands)**

v

**[1] The Port Authority
(a body corporate established by the Port
Authority Act)
[2] The Attorney General**

**[ANUHCVAP2023/0030]
(Antigua and Barbuda)**

Date: Tuesday, 20th August 2024

Coram: The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Eddy D. Ventose, Justice of Appeal
The Hon. Mr. Gerard St. C Farara, Justice of Appeal [Ag.]

Appearances:

Appellants: Mr. Thomas Roe KC with him Mr. Andrew O’Kola

Respondents: Mr. Anthony Astaphan SC with him Mrs. Carla Brookes-Harris, Ms. Alicia Aska, Ms. Joy Dublin, Ms. Rose-Ann Kim and Mr. Zachary Phillips

Issues: Civil appeal - Appeal against refusal to grant the appellants leave to bring proceedings for judicial review

against certain decisions taken by the Port Authority in relation to the motor vessel, Alfa Nero - Whether the Port Authority's decision to seize and to purport to offer the Alfa Nero for sale under section 38A of the Port Authority Act was unlawful - Retroactivity - Whether the learned judge erred in rejecting the appellants' argument that the criterion for the operation of section 38A did not apply because the Alfa Nero was not 'abandoned' within the meaning of section 38A as set out in subsection (10) since the words 'was seized or detained' do not on their true construction apply to a seizure or detention occurring before section 38A entered into force - Whether section 38A of the Port Authority Act operated retroactively - Whether the learned judge erred in rejecting the appellants' argument that the criterion for the operation of section 38A did not apply, because the Alfa Nero was not 'abandoned' within the meaning of section 38A as set out in subsection (10) since it had not been 'detained' by the mere making of a court order that forbade its crew to take it outside Antigua & Barbuda's territorial waters but otherwise imposed no restriction on its movements - Whether the proposed claim has a realistic prospect of success such that leave ought to have been granted to the appellants to seek judicial review

Type of Order:

Oral Judgment

Result/Order:

IT IS HEREBY ORDERED THAT:

1. The decision of the learned trial judge refusing leave to the appellants to apply for judicial review on ground 5(a) as stated in the application for leave to apply for judicial review is set aside.
2. The appellants are granted leave to apply for judicial review in respect of ground 5(a) as stated in the application for leave to apply for judicial review.
3. Costs to the appellants to be paid by the respondents to be assessed if not agreed within 21 days of today's date.

Reason:

This appeal was against the decision of the learned trial judge dated 8th June 2023 in which he declined to grant the appellants leave to bring judicial review proceedings against certain decisions taken in relation to the motor vessel, the Alfa Nero, on the ground stated at paragraph 5(a) of the application for leave to apply for judicial review filed on 22nd May 2023, namely that the 1st respondent's decision to seize and purport to offer the vessel for sale under section 38A of the Port Authority (Amendment) Act 2023 was and is unlawful because the conditions stipulated in section 38A for the powers thereunder to arise had not been met.

In the court below the appellant sought leave for judicial review, among other grounds, on the basis that:

“5. Even if section 38A constitutes a law validly enacted under the Constitution (which it does not for the reasons stated above), the First Respondent's decision to seize and to purport to offer the vessel for sale pursuant to section 38A is unlawful because:

a. The conditions stipulated in section 38A for the powers thereunder to arise have not been met because the vessel is not abandoned within the meaning of that section...”

At paragraphs 18-19 of his written judgment, the learned trial judge correctly referred to the relevant principles established by the Privy Council decisions of Sharma v Browne-Antoine [2006] UKPC 57 and Maharaj v Petroleum Company of Trinidad and Tobago [2019] UKPC 21 for the threshold test for the grant of leave to apply for judicial review.

Having considered the appellants' application for leave to apply for judicial review in the court below, the submissions in support of the appeal, and the submissions made by the respondents in opposition to the appeal, the Court was of the view that the appellants had satisfied the Court in respect of the test for the grant of leave on the ground that was rejected by the learned trial judge. The Court was of the view that the ground that was rejected by the learned trial judge was an arguable ground for judicial review having a realistic

prospect of success.

Accordingly the decision of the learned trial judge refusing leave to the appellants to apply for judicial review on ground 5(a) as stated in the application for leave to apply for judicial review was set aside and the appellants were granted leave to apply for judicial review in respect of ground 5(a) as stated in the application for leave to apply for judicial review.