

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

GRENADA

Tuesday, 22nd July 2024 – Friday, 26th July 2024

JUDGMENTS

Case Name: **The Bank of Nova Scotia**

v

[1] Joyce Erin Rabess

[2] Anison Rabess

**[DOMHCVAP2016/0010]
(Commonwealth of Dominica)**

Date: **Monday, 22nd July 2024**

Coram for Delivery: **The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Trevor M. Ward, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]**

Appearances:

Appellant: **Ms. Joelle Harris**

Respondents: **Mr. David Bruney
Ms. Lisa de Freitas appearing Amicus**

Issues: **Civil appeal - Default judgment - Service of default judgment - The doctrine of stare decisis - Whether the learned master erred by finding that she was bound to follow the decision of Mitchell JA [Ag.] in Anison Rabess et al v National Bank of Dominica - Title by Registration Act - Exercise of mortgagee's rights under the TRA - Section 66 of the TRA - Conversion of equitable mortgage to legal mortgage - Appellant's failure to serve**

default judgment prior to taking steps under the TRA for conversion of the equitable mortgage to legal mortgage - Whether service of a default judgment is a condition precedent to mortgagee taking steps under section 66 of the TRA - Enforcement of judgments under the CPR - Whether proceedings under the TRA are enforcement proceedings governed by the CPR - Whether the master erred by ruling that the Bank's failure to serve the default judgment rendered all steps taken by the Bank pursuant to the TRA null and void and of no effect

Result / Order:

IT IS HEREBY ORDERED:

1. The appeal is allowed.
2. The master's decision made on 29th June 2016 which rendered all proceedings taken by the Bank consequent to the entering of the judgment on 24th September 2003 null and void and of no effect, is hereby set aside.
3. The respondents shall pay the appellant's costs on the appeal to be assessed by a judge of the high court, if not agreed, within 21 days of the date of this judgment.

Reasons:

1. A judgment under section 66 of the TRA is a judgment (obtained pursuant to CPR Part 12) which on a strict reading of CPR Part 42.6 ought to have been served on the respondents. However, it does not follow that under the provisions of the CPR or indeed the TRA, the respondents would be entitled to have the consequential proceedings set aside as of right, *ex debito justitiae*, or indeed that, if there is such a discretion it can be exercised in only one way. The court must look at the individual facts of each case. In this appeal, the proceedings which would have led to the default judgment were properly served on the respondents. The default judgment serves as a judgment under section 66 of the TRA fixing the amount owed by the respondents. It is not a money judgment and the proceedings under the TRA are not enforcement

proceedings. It simply serves as the authority to the Registrar of Titles to act to convert the bank's equitable mortgage to a legal one. Once that legal mortgage was noted on the certificate of title, the procedures prescribed under the TRA to realise the Bank's security are not dependent on any judgment. The proceedings under the TRA are an entirely fresh set of proceedings under a completely disparate statutory regime which had been properly served on the respondents.

Section 66 of the Title by Registration Act Chap 56.50 of the Laws of Dominica applied; Part 42.6 of the Civil Procedure Rules 2000 applied; SAG Motors Ltd et al v National Bank of Dominica DOMHCVAP2022/0001 (delivered 28th July 2023, unreported) followed.

2. As it pertains to sections 74-97 of the TRA, these provisions detail the legal rights of a mortgagee to sell the encumbered land. The exercise of the mortgagee's statutory and legal rights to realise his security when there has been a default under the provisions of the mortgage are not contingent on the existence of any judgment or order of the court or the service on the mortgagor/defendant of the default judgment. Sections 74-97 therefore are not enforcement proceedings within the CPR and therefore the decision in Rabess was reached without the attention of the court having been drawn to the significance of this distinction.

Sections 74-79 of the Title by Registration Act Chap 56.50 of the Laws of Dominica applied; SAG Motors Ltd et al v National Bank of Dominica DOMHCVAP2022/0001 (delivered 28th July 2023, unreported) followed.

3. The Court of Appeal is generally bound by its own decisions save in closely defined circumstances. This Court can decline to follow an earlier Court of Appeal decision if some binding authority or relevant statutory provisions, or rules of statutory force are overlooked. This Court can also decline to follow an earlier decision if based on its own special facts, the case fell within the exceptional

residual category of cases which are not strictly per incuriam as highlighted in *Young v Bristol Aeroplane Co Ltd*, but where the Court might consider itself not entitled to follow an earlier decision of its own. There is nothing in *Mitchell JA's [Ag.] decision in Rabess* to show that the learned judge gave any consideration to the totality of the legislative provisions set out in the TRA or to their effect. This is borne out when he equated the procedures under the TRA with enforcement proceedings of a judgment. This is clearly not the case. The decision in *Rabess*, (insofar as it held that the failure to serve the default judgment invalidated all subsequent proceedings under the TRA), does not correctly interpret and apply the statutory provisions of the TRA or the CPR. Consequently, the reasoning in *Rabess* cannot be sustained and this Court is not obliged to follow the judgment. The instant case is one of those rare cases which falls within that "exceptional residuary category" and consequently this Court declines to follow *Rabess*.

Nelson v Clearsprings (Management) Limited [2007] 1 WLR 962 considered; *Desnousse v Newham London Borough Council* [2006] 3 WLR 349 applied; *Young v Bristol Aeroplane Co Ltd* [1944] 2 All ER 293 applied.

Case Name:

Beaumont Park Limited

v

**Technology, Development & Investments
Limited**

**[SKBHCVAP2020/0018]
(Saint Christopher and Nevis)**

Date:

Monday, 22nd July 2024

**Coram for
delivery:**

**The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Trevor M. Ward, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. Damian Kelsick KC

Respondent:

Mr. Ruggles Ferguson KC holding papers for Ms. Jean Dyer

Issues:

Civil Appeal - Compromise and Settlement Agreement - Construction and interpretation of release and discharge clauses - Whether the learned judge erred in construing clause 9 of the Compromise and Settlement Agreement - Whether the learned judge erred in construing the 'Other Claim' limb of clauses 17-19 of the Compromise and Settlement Agreement - Whether the appellant's claim against the respondent was barred by the 'Other Claim' limb of clauses 17-19 of the Compromise and Settlement Agreement

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal on the Sums Advanced Claim and the declaration made on the Counterclaim are allowed.**
- 2. The orders made by the court below dismissing the Sums Advanced Claim, and allowing, in part, the Counterclaim by granting declaratory relief, are set aside.**
- 3. Judgment is entered for the appellant on the Sums Advanced Claim in the sum of US\$3,107,995.44 to be paid by the respondent.**
- 4. Prescribed costs on the Sums Advanced Claim in the court below shall be paid by the respondent to the appellant pursuant to CPR 65.5(1) within 30 days, the value of the Sums Advanced Claim for this purpose being US\$ 3,107,995.44.**

5. Prescribed costs to be paid by the respondent to the appellant on the Counterclaim in the court below pursuant to CPR 65.5(2)(b) within 30 days, if not agreed. The value of the Counterclaim for this purpose is EC\$50,000.00
6. Prescribed costs shall be paid by the appellant to the respondent on the Legal Fees Claim pursuant to CPR 65.5(1) within 30 days, the value of the Legal Fees Claim for this purpose being US\$84,042.03.
7. The appellant shall have and be paid by the respondent 75 percent of its costs in the appeal, such costs to be assessed by a judge or master of the High Court, if not agreed within 30 days.

Reasons:

1. In construing the terms of a release, a court should be guided by the six principles set out by the House of Lords in *Bank of Credit and Commerce International SA v Ali* and others. These six principles can be distilled into two broad planks. The first is that there are no special rules of interpretation or construction to be applied by a court when construing releases or compromise agreements which would make the approach to their interpretation any different from the ordinary rules of construction to be deployed when interpreting the words of a contract. The second is that it is not uncommon for the wording of releases to be so wide as to extend its coverage not just to existing known claims, but also to existing unknown claims of the contracting parties which might come to light later. As a corollary to this second plank, the fact that a known claim at the time of contracting was not specifically identified and expressly stated to be covered by a release clause, while an important factor in determining whether it was covered by the contractual release, does not lead inexorably to the conclusion that it was not intended to and is not, as a matter of proper construction, covered by the release clause. The judge clearly had in mind these guiding principles when embarking on the exercise of construing clauses 17-19.

Bank of Credit and Commerce International SA v Ali and others [2002] 1 AC 251 applied.

- 2. The Sums Advanced Claim related to monies already advanced by the appellant to the respondent to discharge the latter's obligation to provide funding under the SHA for the future development of the Project. On the evidence it was clear that this claim must have been known to exist at the time of entering into CASA by both the appellant and the respondent. Despite this, there is no mention whatsoever of this claim in CASA much less of the respondent being released or in some way absolved from its unquestionable liability to repay the sums advanced by the appellant.**
- 3. By clause 9 of CASA, all parties to the SHA were released from all 'unperformed obligations' under the SHA. However, it is clear from the judgment that the learned judge did not embark upon the exercise of construing clause 9 and applying it to the issue in dispute between the parties in relation to the Sums Advanced Claim. This was, perhaps, because the wording of clause 9 is clear and unequivocal. The Sums Advanced Claim is a claim relating to the sums advanced by the appellant to TDI, allegedly in breach by Mr. Kryuchkov of his fiduciary duties to the appellant, to discharge the respondent's funding obligations under the SHA. The sums advanced by the appellant and to be repaid by the respondent gave rise to a debt outside the SHA. Properly construed, this debt or obligation to repay the sums advanced did not arise under the SHA. It was therefore a discreet claim made by the appellant for the reimbursement of the money which it advanced to the respondent. Moreover, the express purpose of CASA is an agreement to settle the Three Claims, and the Sums Advanced Claim was not the subject of any of the Three Claims settled by or under the terms of CASA. Accordingly, viewed in this way, the Sums Advanced Claim, albeit a prior existing claim known to the appellant and the**

respondent, was not caught by the 'Other Claim' provisions of clauses 17 to 19 of CASA.

4. Under clauses 17-19 of CASA, the releasors are the named claimants in the Three Claims and the releasees are the named defendants in each of the Three Claims. Under clause 17, both the respondent and appellant are releasors, but neither of them are releasees. Thus, the respondent could not be the beneficiary of the release and discharge under clause 17, much less of its liability to repay to the appellant the Sums Advanced, which liability the learned judge found proven on the evidence. The 'Other Claim' limb or category of claims to be released therefore does not apply to the Sums Advanced Claim under clause 17. Pursuant to clause 18, both the appellant and respondent are releasees. Since the appellant is not named as a releasor, the 'Other Claim' limb could not be construed as releasing the respondent from the Sums Advanced Claim. Finally, under clause 19, both the appellant and respondent are named as releasees. Again, as the appellant was not a named releasor in clause 19, the respondent could not benefit from the 'Other Claim' limb and was thus not discharged from its obligation to repay the Sums Advanced. The learned judge therefore erred in his construction of clauses 17 to 19 and was wrong to find that the 'Other Claim' limb was wide and clear enough to be construed as applying to the Sums Advanced Claim.
5. The contractual Project funding obligation under the SHA was that of the respondent. The respondent's liability to repay the appellant the Sums Advanced did not arise out of any binding obligation under the SHA, even though the advances were used to discharge the respondent's funding obligation under the SHA. The judge was therefore wrong to find that the respondent's liability to repay arose out of the SHA. Furthermore, it was erroneous to say that the source of the alleged debt was clearly the SHA, when those sums were advanced out of the appellant's funds, albeit at the direction of Mr.

Kryuchkov who held offices in both the respondent and the appellant. The learned judge further erred by finding that as the respondent's funding obligation under the SHA was based directly on its shareholding in the appellant and the Sums Advanced Claim was therefore caught by the 'Other Claim' provision in clauses 17 to 19 of CASA. Whilst the respondent was a shareholder in the appellant, even at the time of entering into CASA, it did not follow that the advances did not create a debt owing by the respondent to the appellant which debt arose outside of the SHA. No obligation on the part of the appellant existed or arose under or by virtue of the SHA to step in and to advance the sums necessary to fund the Project. The judge also based his finding on what he saw as the common denominator between the appellant and the respondent, that is Mr. Kryuchkov, who was on the board of both the appellant and respondent. However, this factor was not a sound basis for concluding that the Sums Advanced Claim, which did not arise under the SHA, was caught by the 'Other Claim' limb of clauses 17 to 19.

Case Name:

Taladro Holdings

v

BOI Bank Corporation

**[ANUHCVP2023/0033]
(Antigua and Barbuda)**

Date:

Tuesday, 23rd July 2024

**Coram for
Delivery:**

**The Hon. Mde. Margaret Price Findlay, Justice of Appeal
The Hon. Mr. Trevor M. Ward, Justice of Appeal
The Hon. Mr. Eddy D. Ventose, Justice of Appeal**

Appearances:

Appellant: Dr. David Dorsett

Respondents: Ms. Talia DaCosta

Issues: Civil appeal – Summary judgment – Legal relationship between banker and customer – Whether upon making a demand upon the bank for payment, the customer of a bank may sue the banker for the balance standing to the credit of their current account – Whether by an action claiming funds held in a current account a customer had given notice of their desire to terminate their relationship with the bank according to the governing terms and conditions of the banking relationship, thereby entitling the customer a return of their funds – Whether the affidavit evidence filed in support and in opposition to the appellant's application for summary judgment was sufficient to make any assessment of the strength or weakness of the respondent's defence

Result / Order: IT IS HEREBY ORDERED THAT:

1. The appeal is allowed in part.
2. The orders made at sub-paragraphs 1-3 of paragraph 40 of the judgment of the learned master is set aside and substituted with the following:
 1. In respect of the first issue, the application for summary judgment in respect of the (1) Current Account is allowed; and (2) Deposit Account is dismissed.
 2. The application for summary judgment on the Second and Third issues is dismissed.
 3. The respondent is entitled to 75% of its costs (and the appellant 25% of its costs) in the appeal to be assessed if not agreed within 21 days of the date of this judgment.
 4. The matter shall proceed in accordance with Civil Procedure Rules (Revised Edition) 2023.

Reasons:

1. In relation to payments to be made on demand, there must be an express demand for repayment

as a condition precedent to the right to sue the banker for the amount standing to the credit of the customer's current account. In many cases in which the question is likely to arise, even if a demand is necessary to complete the cause of action, a writ is a sufficient demand. This principle, though applicable to the appellant's current account, is plainly not applicable to its time deposit account. Therefore, the appellant could have only succeeded in obtaining a declaration that the initiation of the proceedings in the court below was a sufficient and valid demand for the return of its money held by the respondent in its current account. The sums in the time deposit account would only be available to the appellant upon the date of maturity provided that the appellant cancelled the automatic renewal of the deposit account in accordance with the respondent's terms and conditions governing certificates of deposits to which the appellant had agreed. Though the master averred to an aspect of this issue in paragraph 22 of his judgment, he did not properly address and conclude as to whether summary judgment ought to be granted in favour of the appellant on this issue.

Joachimson v Swiss Bank Corporation [1921] 3 KB 110 applied

2. The initiation of the proceedings in the court below meant that the appellant had issued a sufficient and valid demand for the return of its money held by the respondent in the current account. This was sufficient notice of the termination of the banker and customer relationship pursuant to clause 30 of the Agreement and thereupon there must be settlement of the position between the parties. In the proceedings relating to its summary judgment application, the appellant cannot rely on any other notice other than the valid demand made for the return of its money that was made when it filed its re-amended claim form and statement of claim on 23rd January 2023. However, the pleadings and evidence show that there had been no settlement

as required upon the engagement of clause 30 of the Agreement.

3. Clause 19 of the Agreement did not excuse the respondent from performing any of its obligations under the Agreement. Clause 19 served to exempt the respondent from any liability for any loss suffered by a customer, including the appellant, if any of the circumstances outlined in clause 19 occurred. It also provided that if any of those circumstances occur, the respondent would take those measures that could be reasonably required of it in order to limit the adverse consequences for the customer resulting from that occurrence. The Court found that clause 19 is not a force majeure clause as suggested by the respondent, and the Court disagreed with the master's statement that clause 19 was sufficiently wide so as not to exclude the imposition of an international sanction as constituting force majeure. However, in relation to the issue of frustration, the Court agreed with the master that if the respondent's position is that its inability to perform its contractual obligation is temporary, meaning that while the sanctions are in place it cannot return the monies to the appellant and that it can only do so when circumstances permit, the respondent would not be able to rely on the doctrine of frustration which, if successful, would bring the contract to an end or discharge the contract.

Chitty on Contracts 27th Ed. Ch 14 at 14-121 applied; JP SPC 4 and another v Royal Bank of Scotland International Ltd [2023] AC 461 considered.

4. However, as it relates to the time deposit account, the sums would only be available to the appellant upon the date of maturity provided that the appellant cancelled the automatic renewal of the time deposit account in accordance with the respondent's Terms and Conditions governing Certificates of Deposits. The question of whether there was any automatic renewal of the Deposit Account is not a matter that can be determined on

a summary judgment application; it is a matter that must be determined at trial.

5. The question whether there exists a relationship between the return of the funds to the appellant and the requests for information on the two bank accounts and when this information was requested are all matters that cannot be resolved in this summary judgment application. These are matters that can only be determined at trial.
6. It follows logically that since the appellant is not to be granted the declaration that it is entitled to the return of its funds held on account as soon as possible, the appellant is likewise not entitled to an order that the funds held in the current account and the time deposit account should be paid to the appellant by the respondent.

Case Name:

The Social Security Board

v

First Caribbean International Bank (Barbados)

**[SKBHCVAP2022/0007]
(Saint Christopher and Nevis)**

Date:

Thursday, 25th July 2024

**Coram for
Delivery:**

**The Hon. Mde. Margaret Price Findlay, Justice of Appeal
The Hon. Mr. Eddy Ventose, Justice of Appeal
The Hon. Mde. Esco Henry, Justice of Appeal**

Appearances:

Appellant:

Ms. Angelina Gracey Sookoo Bobb

Respondent:

Mr. Damian Kelsick KC

Issues:

Civil Appeal – Appeal against the learned master’s decision to dismiss the appellant’s application to be added as a party in an effort to assert their statutory interest in property owned by the second respondent and sold by the first respondent – Statutory interest in property – Sale of property without payment of debt – Social Security Act Revised Laws of Saint Christopher and Nevis 2020 – Income Tax Act Cap 20.22 of the Revised Laws of Saint Christopher and Nevis 2020 – Whether the High Court or the Magistrate’s Court was the court of competent jurisdiction for any enforcement proceedings in respect of the Debt – Whether the word “property” in section 75 of the Income Tax Act includes real property – Whether the provisions of the TAPA applies to section 75 of the Income Tax Act as relevant to the recovery of social security contributions by virtue of section 44 of the Social Security Act

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal is allowed.**
- 2. The orders made by the learned master at subparagraphs 1 to 3 of paragraph 30 of his judgment are set aside and substituted with the following:**
 - 1. The application by the appellant to be added as a party to the proceedings is granted.**
 - 2. A declaration is granted that the debt owing by the second respondent to the appellant in the sum of EC\$757,697.92 shall be included in the scheme of division pursuant to section 81 of the TRA of the Sale Price as a debt in priority to the debt owed by the second respondent to the first respondent.**
 - 3. The appellant shall have its costs in the appeal to be assessed if not agreed within 21 days of today’s date.**

Reasons:

- 1. Where an employer fails to make its contribution to the Social Security Fund, the Social Security Board may pay the person the benefit of that contribution and then seek to recover summarily in a Magistrate's Court from the employer as a civil debt a sum equal to the amount of benefit so lost irrespective of the amount. The court in which the board can seek to recover such sum from the employer is the magistrate's court. This is made clear by section 49(1) of the SSA read in tandem with section 72 of the ITA as required by sections 44(1) and 44(2) of the SSA. The learned master therefore erred in his conclusion at paragraph 14 of his judgment that there was no evidence before him that either of the two processes outlined in section [72] of the ITA were followed in relation to the debt claimed by the appellant. This contradicts the uncontroverted evidence of the appellant that was accepted by the learned master at paragraph 11 of his judgment when he stated that the appellant obtained several judgments in the magistrate's court, not in the High Court, against the second respondent for outstanding Debt.**

Social Security Act Cap 22.10 of the Revised Laws of Saint Christopher and Nevis 2020 applied; Income Tax Act Cap 20.22 of the Revised Laws of Saint Christopher and Nevis 2020 applied.

- 2. Section 75(1) of the ITA provides that where a person sells any property, goods or chattels, before any such sale, that person must pay or cause to be paid to the Director all arrears of contributions which are due at the time when the property, goods or chattels are seized. While section 75 originates from the ITA, it is to be read as a stand-alone provision for the purposes of the SSA. The other provisions of the ITA cannot be used to interpret section 75 unless expressly incorporated into the SSA by section 44 of the SSA. The question of how "property" is to be defined needs to be answered since it is not defined in the SSA. Section 2(1) of the**

Interpretation Act provides the necessary assistance. It states that “property” includes money, goods, things in action, land and every description of property, whether real or personal; also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incidental to property as herein defined. The definition of “property” for section 75 must be that as defined in section 2(1) of the Interpretation Act and that definition includes real and personal property. Section 75 must be read purposively to allow for the sale in respect of all types of property that is defined in section 2(1) of the Interpretation Act.

Social Security Act Cap 22.10 of the Revised Laws Saint Christopher and Nevis 2020 applied; Income Tax Act Cap 20.22 of the Revised Laws of Saint Christopher and Nevis 2020 applied; Interpretation Act Cap 1.02 of the Revised Laws of Saint Christopher and Nevis 2020.

- 3. The Tax Administration and Procedure Act (“TAPA”) applies to “taxes” under a tax law, not “contributions under the SSA. Further, the Department of Inland Revenue does not administer “contributions” under the SSA. Section 40 of the SSA expressly states that the contributions to the Social Security fund shall be under the control and management of the Social Security Board. The argument that the TAPA has impliedly repealed section 75 of the ITA is misconceived as it does not differentiate section 75 as applied to the SSA and section 75 as a provision in the ITA. Even if section 30 of the Tapa has that effect, it would still not apply to section 75 when it is used as a part of the enforcement machinery for the recovery of contributions pursuant to section 44 of the SSA. The application of section 30 of the TAPA is unworkable for the following reasons: (1) it would require the court to engage in a complete rewrite of the law, (2) the**

Board is a body corporate and cannot be equated with the Crown for the purpose of section 30 of the TAPA and (3) if Parliament intended the entire enforcement regime under the TAPA to apply, with any subsequent modifications by future legislation, it could have simply and clearly stated that. The learned master therefore erred in his conclusion that the right of the Director to sell property is subject to the provisions of the TAPA and that section 3 of the TAPA must be read in line with section 44 of the SSA and sections 72 to 77 of the ITA.

Tax Administration and Procedures Act Cap 20.52 of the Revised Laws of Saint Christopher and Nevis 2020 considered.

Case Name:

Tarik Aaron

v

The Commissioner of Police

**[BVIMCRAP2022/0003]
(Territory of the Virgin Islands)**

Date:

Thursday, 25th July 2024

**Coram for
delivery:**

**The Hon. Mde. Margaret Price Findlay, Justice of Appeal
The Hon. Mr. Eddy Ventose, Justice of Appeal
The Hon. Mde. Esco Henry, Justice of Appeal**

Appearances:

Appellant:

Mr. Terrence Williams

Respondent:

Ms. Khadija Beddeau

Issues:

**Magisterial criminal appeal – Appeal against sentence –
Possession of a controlled drug – Spent conviction –
Whether evidence of previous spent conviction of**

appellant was wrongly placed before the learned magistrate – Whether the learned magistrate erred in taking previous spent conviction of appellant into account and determining that appellant was not of positive good character – Whether the learned magistrate erred in failing to regard the spent conviction as the appellant having no previous convictions and thus a mitigating factor in sentencing – Age and youthfulness of offender in determining sentence – Whether the learned magistrate erred in failing to take into account the youthfulness of the appellant as a mitigating factor – Whether custodial sentence appropriate – Reduction in sentence – Whether sentence should be reduced due to delay in hearing appeal

Result/Order:

IT IS HEREBY ORDERED THAT:

1. The appeal against sentence is allowed.
2. The sentence of the learned magistrate is set aside and substituted with a sentence of 40 months from the date of his original sentencing, that is 8th June 2022.

Reasons:

1. Both the Criminal Justice (Alternative Sentencing) Act (“CJAS” or the “Act”) and the Eastern Caribbean Supreme Court (Sentencing Guidelines) Rules 2019 (the “ECSC Sentencing Guidelines”) require the sentencing tribunal to consider the antecedents of an offender or the lack thereof when considering and constructing the sentence to be imposed. The court is entitled to look at and assess any relevant convictions which the offender may have. However, there is a limit as to what previous convictions a court can have regard to in sentencing an offender. Section 50 of CJAS sets out what the position is with respect to spent convictions and how the court must treat with such a conviction. Previous convictions are treated as spent convictions where the relevant period, in accordance with Schedule 4 of the Criminal Justice (Alternative Sentencing) Act, has elapsed from the date of conviction. The appellant in this matter was

convicted for illegal entry in November 2006 and was sentenced to a fine of \$1,000 or 4 months imprisonment. This conviction therefore falls within Schedule 4 (1) of the Act. For the purposes of this matter the 2006 conviction was to be considered spent by November 2011, the five-year period set out in the relevant section having passed by the time this appellant fell to be sentenced in June 2022. Thus, evidence of a spent conviction cannot be admitted before a Court exercising its sentencing jurisdiction within the Virgin Islands. Accordingly, the evidence of the appellant's spent conviction ought not to have been placed before the learned magistrate.

Section 50 and schedule 4 of the Criminal Justice (Alternative Sentencing) Act No. 10 of 2005 of the revised Laws of the Virgin Islands 2013 applied; Eastern Caribbean Supreme Court (Sentencing Guidelines) Rules 2019 applied.

2. Usually, where a court finds that an offender has previous convictions, this is treated as an aggravating factor and may result in a more severe sentence being imposed on the offender. Where, however, the offender is considered to have no relevant or recent convictions this is a mitigating factor and may lead to a less severe penalty being imposed. Though the learned magistrate considered that the appellant's spent conviction meant that he had no previous convictions, she nevertheless formed the view that he could not be treated as a person of previous good character and gave the appellant no credit for his previous good character. The learned magistrate, having the previous conviction before her, something which ought not to have been allowed, erred in taking this previous conviction into account and determining that the appellant was not of positive good character. The appellant ought to have been treated as a person without antecedents, and of good character and therefore the learned magistrate fell into error in respect of this issue.

3. The court should have rehabilitation to the forefront of its thinking in considering whether youthful offenders ought to be imprisoned. Much weight should be given to the rehabilitation prospects of the young offender, and where incarceration is required, the length of that period of imprisonment should be taken into account. When a judicial officer embarks on a sentencing exercise, they must take a holistic approach and look at all the facts and circumstances of the offence charged as well as the aggravating and mitigating factors of the offender. At the time of the commission of this offence the appellant was 22 years old. In this case there was a large quantity of cocaine, some 27.1 kg with an overall purity of 94.5%, and there was a trial after which the appellant was adjudged guilty. Determining that a custodial sentence is warranted in certain circumstances, does not undermine the principle that the appellant's age can still be a mitigating factor in sentencing in reducing the custodial sentence to be served in the appropriate circumstances. In sentencing the appellant, the learned magistrate looked at the aggravating and mitigating factors as well as the whole of the circumstances of the case and concluded that a custodial sentence was appropriate. Having considered the nature of the drug, cocaine, the amount of the drug, 27.1 kg, and all the surrounding circumstances, the learned magistrate was not clearly or blatantly wrong in arriving at a custodial sentence.

Sections 4 of the Criminal Justice (Alternative Sentencing) Act No. 10 of 2005 of the revised Laws of the Virgin Islands 2013 applied; The Drugs (Prevention of Misuse) Act No. 9 of 1988 of the revised Laws of the Virgin Islands 2020; R v Sargeant (1974) 60 Cr App R 74 applied; Desmond Baptiste v The Queen SVGHCRAP2003/0008 (delivered 6th December 2004, unreported) followed; Cosmus Bascombe v The Commissioner of Police SVGMCRAP2003/0022 (delivered 6th December 2004, unreported) followed; Winston Joseph v The Queen SLUHCRA2000/0004, 0007 and 0008 (re-issued

31st October 2001, unreported) followed; Roger Naitram et al v The Queen ANUHCRA2006/0005, 0006 and 0008 (delivered 15th December 2010, unreported) followed.

4. The Court of Appeal may, if it is of the opinion that a different sentence should have been passed, quash the sentence of the Magistrate and pass the sentence which is warranted. In this case, the Court was of the view that the spent conviction of the appellant was improperly placed before the learned magistrate and that on the face of the record played a role in the sentencing of the appellant, depriving him of the benefit of being considered of having previous good character. Thus, the Court was inclined to review the sentence imposed by the learned magistrate and accordingly substituted a more appropriate sentence. Accordingly, the Court was of the view that a period of 6 months ought to be taken off the sentence of 52 months on account of the Appellant's previous good character.

Section 175 of the Magistrate's Code of Procedure Act, Act No. 10 of 1891 of the revised Laws of the Virgin Islands 2013 applied.

5. Where there has been a delay in the appellate proceedings of approximately two years, a delay which was no fault of the appellant but not an inordinate one, the Court will further discount a period of six (6) months from the appellant's sentence. Accordingly, the Court considers that the sentence ought to be reduced as a result of the delay between the appellant's conviction in June 2022 and the hearing of the appeal in January 2024, by a further period of 6 months.

Case Name:

[1] Julian Svirsky
[2] Denis Donin

v

Arman Oyekenov

**[BVIHCMAP2023/0013]
(Territory of the Virgin Islands)**

Date: Friday, 26th July 2024

**Coram for
Delivery:** The Hon. Mr. Mario Michel, Chief Justice (Ag.)
The Hon. Mde. Margaret Price Findlay, Justice of Appeal
The Hon. Mr. Trevor M. Ward, Justice of Appeal

Appearances:

Appellants: Mr. Robert Nader

Respondent: Ms. Dainyah Mason

Issues: Interlocutory appeal – Freezing order - Insufficiency of the evidence - Cryptocurrency - Striking out - Overriding objective - Whether the judge erred by rejecting the appellants' explanation in the absence of expert evidence adduced by the respondent as to the appellants' ability to provide the information sought in the context of what is a highly technical area – Whether the judge's order was not an appropriate order given the procedural history and pending appeals – Whether there was a more appropriate relief available to the Court - Whether the sanction of striking out without any form of judicial determination was inconsistent with the overriding objective

Result / Order: IT IS HEREBY ORDERED THAT:

1. The appeal is allowed under ground 1 while grounds 2 and 3 stand dismissed.
2. The respondent shall pay the appellants on third of their costs of the appeal, such costs to be assessed by the court below, if not agreed within 21 days of the date of this judgment.

Reasons:

- 1. Where matters of a highly technical nature are set out in evidence, rebutting such evidence requires equally technical evidence. When faced with difficult (or potentially difficult) technical issues, a party should present the court with material from an appropriately experienced/knowledgeable person to explain why the evidence to which it replies is, on balance, incorrect or incredible. What may seem highly unlikely in relation to matters that are commonplace and within a judge's usual experience may easily be dealt with as a matter of judicial common sense; the more extraordinary an explanation for a given state of affairs, the less likely that may be. However, where a court is facing highly technical issues with which it is not familiar. then there is a greater need for compelling evidence from a person appropriately experienced or qualified to explain why a given explanation does not hold water.**
- 2. The world of cryptocurrency is somewhat novel; some judges may have a better understanding of it than others; and there cannot be a bright-line rule that in all cases concerning it there needs to be expert evidence. The need for such evidence will be case specific. Such evidence may be admissible on technical issues which are outside the court's knowledge or experience. It is not for this Court to second guess whether or not the learned judge had sufficient knowledge of relevant matters such that it was inappropriate for him to proceed in the absence of expert evidence. However, having read all the materials the Court was invited to read, it cannot be said that there was any compelling evidence from a person who has established sufficient technical experience such that the learned judge could have been satisfied that the explanations proffered by the appellants were, on balance, to be rejected. Consequently, there was not sufficient material before this Court to enable any reasonable tribunal to conclude that the appellants had not complied with their disclosure obligation to the best of their ability.**
- 3. Disclosure provisions are crucial aspects of orders which are to be complied with to the letter, and**

serious consequences can be expected for a failure to comply. However, where a freezing order contains a disclosure provision that relates to a relatively novel type of property or asset, the means of compliance has to be crystal clear and, if a technical argument is asserted by way of explanation as to why compliance is not possible, then such explanation has to be discounted by appropriate evidence. There was nothing in the materials that discounts that evidence.

Case Name:

RZ3262019 Limited

v

[1] Happy Lions Ventures LTD

[2] Chinex Limited

**[BVIHCMAP2023/0011]
(Territory of the Virgin Islands)**

Date:

Friday, 26th July 2024

**Coram for
delivery:**

**The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mde. Esco L. Henry, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]**

Appearances:

Appellant: Ms. Sarah Latham

Respondents: Mr. Scott Tolliss

Issues:

Commercial Appeal – Application to adduce fresh evidence – Ladd v Marshall principles – Whether evidence sought to be adduced could not have been obtained with reasonable diligence for use at first instance – Whether evidence sought to be adduced would have an important influence on the result of the case – Whether evidence sought to be adduced was credible - Sections 159 and 162 (1) (a) of the Insolvency Act 2003 - Application for appointment of joint

liquidators – Whether debt was disputed on genuine and substantial grounds - The Sparkasse test – Defence of common mistake – Whether the effect of the findings of land hoarding and property hoarding by the PRC authorities rendered certain common assumptions false and rendered the subject matter of the SPA and/or the VLA impossible to perform such that these agreements were at law void ab initio - Frustration - Whether the learned judge was correct in holding that the defence of common mistake was not one which was genuinely held and was ‘flimsy’ – Whether the learned judge took into account erroneous matters or factors and failed to address her mind and reasoning to the five elements of the doctrine of common mistake – Cross claim – Whether the judge erred in finding that the Company had failed to make out a genuine and serious cross claim for restitution in an amount which equalled or exceeded the debt – Whether a claim for restitution was possible in the circumstances

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed, and the order of the learned judge made on 31st May 2023 is affirmed.
2. The Company shall pay the respondents’ costs of the appeal, to be paid out of the liquidation of the Company.

Reasons:

1. The criteria for permission to adduce fresh evidence on appeal, including interlocutory appeals, is as formulated by Lord Denning M.R. in *Ladd v Marshall*. It is now well-established that the *Ladd v Marshall* criteria are principles and not rules or special rules to be strictly applied by the court. An appellate court must not only consider whether the application to adduce fresh evidence meets the three *Ladd v Marshall* criteria, but also whether ultimately it is in the interest of justice in the appeal to permit the fresh or new evidence to be adduced. Each application to adduce and to rely on fresh evidence in an appeal will turn on a proper consideration and weighing of all relevant

factors and circumstances. In this case, the Fresh Evidence sought to be admitted consisted of the handwritten notes and recollections by Mr. Ke Yuhong, a former director of the Company who served as such between 27th May 2020 and 13th August 2021. The evidence was said to concern events in the course of negotiations leading up to the acquisition of the PRC Project Company which gave rise to a substantial factual case of bribery. The application to adduce fresh evidence was dismissed by the Court on 14th February 2024 as failing to satisfy the Ladd v Marshall criteria, in particular the first and second criteria.

Rule 1.1 of the Civil Procedure Rules 2000 considered; Ladd v Marshall [1954] 3 All ER 745 applied.

2. As to the first criteria, the Court was not satisfied that this evidence could not have been adduced and relied on by the Company in defence of the JL Application. Likewise, the Court was not satisfied that this evidence could not with reasonable diligence have been obtained by the Company for use in the JL Application proceedings. The Company led no evidence explaining what steps, if any, it took to make reasonable inquiries of past directors or officers of the Company when preparing to mount its defence to the JL Application. As to the second Ladd v Marshall criteria, the allegations of bribery now sought to be made as leading to the SPA and or the VLA being void or voidable under Hong Kong law, was clearly a new 'defence' sought to be advanced for the first time in the appeal, after a trial and final determination of the JL Application in the court below. The Court also was not satisfied to the requisite standard at this stage of the proceedings that the fresh evidence sought to be adduced was credible. Furthermore, no cogent reasons had been advanced by the Company/applicant as to why it would be in the interest of justice to permit such evidence to be admitted and relied upon in this appeal.

3. The test and applicable principles for the appointment of liquidators over a company on the ground of an unpaid debt are well settled. These principles are fundamental to the standing of an applicant, as a creditor, and also to the jurisdiction of the court making the winding up order. Where a debt is disputed on genuine and substantial grounds, the applicant for a winding up order appointing liquidators is not a 'creditor' of the company within the meaning of that term in section 9 of the Act, with the necessary standing to invoke the court's jurisdiction to make an order appointing liquidators. Furthermore, the winding up court is not the forum for determining genuinely disputed debts. Such claims are matters for trial and determination in the civil courts. A debt which is genuinely disputed on substantial grounds does not qualify as a claim admissible in the liquidation of the company. Moreover, an application for the appointment of liquidators by the court on the basis of a debt which is genuinely disputed on substantial grounds by the company, is an abuse of the process of the court and is liable to be struck out or dismissed.

Sections 8, 9 and 162(a) Insolvency Act 2003 Act No. 5 of 2003 of the Laws of the Virgin Islands considered; Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corporation BVI Civil Appeal No. 10 of 2002 (delivered 18th June 2003, unreported) followed.

4. Where a company raises a defence upon which the debt is said to be disputed, it has the burden of putting forward a prima facie case (not proof on a balance of probabilities) that the debt is disputed on substantial grounds, that is, that there is something of substance which ought to be tried, which is or are genuinely or honestly held by the company. It is also well-settled that it is not open to an appellate court to just simply substitute its evaluation of the facts for that of the judge below. The test of what constitutes a 'genuine and substantial dispute' has received much consideration since the exposition of Byron

CJ in Sparkasse. It is accepted that in applying the Sparkasse test, the judge's duty is to carry out a preliminary investigation of the facts to determine whether the dispute has substance and is genuinely held by the company. The company must demonstrate that the dispute is more than 'frivolous' or 'hopeless' or 'thoroughly bad' but need not raise to the level of proof on a balance of probabilities. However, a mere assertion by the company that the debt is disputed on genuine and substantial grounds or that its 'defence' to the debt is substantial and genuinely held or believed by the company, will not suffice to have the application dismissed or a statutory demand set aside. This means that the court must decide if there is a defence or potential defence, whether on the facts or on the law or of mixed fact and law, of substance to the debt as alleged in the winding up application, on a ground or grounds prima facie substantial to warrant further investigation by a court of law or other tribunal having jurisdiction to determine that dispute between these parties.

Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corporation BVI Civil Appeal No. 10 of 2002 (delivered 18th June 2003, unreported) followed; Sian Participation Corp (In Liquidation) v Halimeda International Limited BVIHCMAP2021/0017 (delivered 11th November 2022, unreported) followed; Jinpeng Group Limited v Peak Hotels and Resorts Limited BVIHCMAP 2014/0025 and BVIHCMAP2015/0003 (consolidated) (delivered 8th December 2015, unreported) followed; Goldin Investments Intermediary Limited v China Citic Bank International Limited BVIHCMAP2022/0010 (delivered 5th July 2023, unreported) followed; Re A Company (No 001946 of 1991), ex parte Fin Soft Holding SA [1991] BCLC 737 at 740 applied.

5. In the instant matter, the main 'defence' posited by the Company in answer to the respondents' claim of an undisputed debt entitling them to an order appointing liquidators of the Company, is 'common mistake' at common law. The common law doctrine of common mistake is a common or

mutual mistaken assumption of fact by the contracting parties which renders the service that would be provided or the obligation to be performed under the contract impossible or essentially different from the performance that the parties contemplated under the contract, with the result that the contract is not just liable to be set aside but is void ab initio at common law. The test of common mistake at common law is a narrow one and in order for a contract to be avoided for common mistake the following key elements must be present: i) there is a common assumption as to the existence of a state of affairs; (ii) no warranty by either party that that state of affairs existed; (iii) the non-existence of that state of affairs must not be attributable to the fault of either contracting party; (iv) the non-existence of the state of affairs must render performance of the contract impossible; and (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.

Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd, The Great Peace [2002] EWCA Civ 1407 applied; Bell v Lever Brothers Ltd [1931] All ER Rep 1 applied.

6. There is no material difference between the law of Hong Kong and the law of England and Wales (applicable in BVI) on the law of common mistake. The preponderance of the jurisprudence suggests that the equitable doctrine of common mistake does not exist under the law of Hong Kong, and the prevailing position is as stated in Great Peace. Therefore, in this case, the Company is left with only the common law jurisdiction of common mistake which undoubtedly exists under the laws of Hong Kong, upon which to found its defence to the JL Application in seeking to show that the debt was disputed on genuine and substantial grounds.

Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd, The Great Peace [2002] EWCA

Civ 1407 applied; Bell v Lever Brothers Ltd [1931] All ER Rep 1 applied; Brennan v Bolt Burden (a firm) [2005] QB 303 considered; Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349 considered; Solle v Butcher [1950] 1 KB 671 considered; Magee v Pennine Insurance Co Ltd [1969] 2 QB 507 considered; Associated Japanese Bank (International) Ltd v Credit du Nord SA [1989] 1 WLR 255 considered.

7. The gravamen of the Company's defence of common mistake was whether the effect of the findings of the PRC authorities that the PRC Project Company had been guilty of land and/or property hoarding rendering the common assumptions (assumed for argument purposes by the respondents) false, had rendered the subject matter of the SPA and/or the VLA impossible to perform, or essentially impossible, or fundamentally different, or completely lacking in commercial viability from what was contemplated and provided for in the SPA and/or the VLA, such that these agreements were at law void ab initio. In considering this issue, the learned judge was entitled to consider all relevant circumstances and also to carry out an assessment of the draft pleadings and evidence against the five elements of the 'narrow' test of common mistake. Accordingly, the learned judge was correct and did not take into account irrelevant matters when she considered the 'conduct' of the Company after it had been informed that the PRC authorities had found that the Project had been guilty of land and/or property hoarding, the effect of which, would make the common assumptions false, with the resulting potential effect, of rendering the SPA and/or the VLA void ab initio thereby discharging the Company from any obligations thereunder, and also the 'delay' on the part of the Company in asserting that the common assumptions were false. The learned judge was also entitled to consider the 'impossibility of performance' under the SPA and the VLA rendering them void ab initio; and the Company's responses to the respondents' assertion of Events of Default under the VLA entitling them, as lenders, to accelerate the

payment of the Loan and accrued interest thereunder.

8. On the question of whether the Company has discharged its burden of demonstrating that it had made out a prima facie case of common mistake rendering the debt disputed on genuine and substantial grounds in satisfaction of the Sparkasse test, such that it cannot be the basis of a winding up order appointing JLs, two critical issues arise: (i) the Company's argument that the effect of the common assumptions being false (a matter which, at least for the purpose of argument, is not disputed) was to render the SPA and/or the VLA void ab initio and rescinded by operation of law; and (ii) whether, as a matter of law and fact, a prima facie case can be made out of common mistake at law rendering the SPA and/or VLA void ab initio on the basis of impossibility of performance of the subject matter of the SPA and/or the VLA. Accordingly, the alleged common assumptions must be sufficiently significant or critical to the performance of the obligations under the impugned agreement or agreements so as to render that contract void ab initio.
9. As to the first critical issue, the respondents' concessionary stance for the purposes of argument that the common assumptions are false, makes it at least arguable that the Company has raised, as a matter of fact, the issue of common mistake; the incorrectness or falsity of the representations underpinning the common assumptions; and whether it can as a matter of law make out a prima facie case of common mistake such as to render the debt not indisputable. However, on the second critical issue, the Company's case of common mistake fails. Neither the SPA nor the VLA was concerned directly with the acquisition of the Project or the PRC Project Company. The subject matter of the SPA was the sale and purchase of the shares in Happy Magic and Carton, the two shareholders of the PRC Project Company. The common assumptions being false did not make that transaction and the obligations of the respondents and the Company

under the SPA impossible to perform or make the essence of the contracted obligation impossible. The VLA was essentially a loan agreement by which the respondents agreed to provide the Company with a loan facility to assist it in the payment of the consideration under the SPA for the purchase of the shares. Again, this subject matter and transaction could not on any reasonable view be said to have been rendered impossible to perform. Moreover, the conduct of the Company and its delay in raising its defence of common mistake; its written responses to the respondents' demand for full payment of the Loan and accrued interest (the debt) under the VLA and in doing so, not denying the existence or validity of either the SPA or the VLA or the debt itself but, instead, treating with the SPA and the VLA as valid and binding contracts, belies a lack of honest belief in the proffered common mistake defence. Accordingly, ground 1 of the appeal, that is, that the debt is disputed on genuine and substantial grounds, fails. Ground 2, which is predicated on the SPA and/or the VLA being void ab initio for common mistake also fails. Grounds 3 and 4 also fall away.

10. For completeness, as to the Company's ground 2 of the appeal, that is, that the Company has a genuine cross claim of a value which exceeds or is equal to the debt owed, the applicable principles for disputing a debt on this basis are helpfully restated by this Court in *Sian Participation Corp (In Liquidation) v Halimedia International Limited*. It is not in dispute that the Company's cross claim is: (i) hinged on the SPA and/or the VLA being declared void ab initio; and (ii) is a claim in restitution, more specifically counter-restitution, for a repayment by the respondents of the full consideration paid for the shares under the SPA, and the repayment by the Company of the Loan sum under the VLA. The Court agrees with the learned judge that the case at bar is a case in which restitution is very unlikely to be possible. First, the Company has failed to make out a prima facie case of common mistake such as to show that the debt is disputed on

genuine and substantial grounds. Second, no court doing its best through the avenues of the remedies of rescission and restitution, can sufficiently unwind what has occurred since the acquisition so as to restore the Company and the respondents to the position they were in pre-the SPA and the VLA and to thereby make each of them whole. Accordingly, the Court agrees with the judge's finding that the Company has not made out, to the requisite standard, a genuine cross claim for restitution in an amount which equals or exceeds the debt and, for the reasons already stated, ground 2 fails in any event.

Sian Participation Corp (In Liquidation) v Halimedia International Limited BVIHCMAP 2021/0017 (delivered 11th November 2022, unreported) followed.

Case Name:

**[1] Angela Barkhouse
[2] Toni Shukla
(As Receivers of Shares of Emergent Fidelity Technologies Ltd)**

v

**[1] Samuel Benjamin Bankman-Fried
[2] Emergent Fidelity Technologies Ltd.
(in Provisional Liquidation)
[3] Yonatan Ben Shimon**

**[ANUHCVP2023/0008]
(Antigua and Barbuda)**

Date:

Friday, 26th July 2024

**Coram for
delivery:**

**The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mde. Esco L. Henry, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]**

Appearances:

Appellants:

Mr. Kendrickson Kentish

Respondents: Dr. David Dorsett for the first respondent
Ms. Andrea Smithen-Henry for the third respondent

Issues: Civil appeal – Winding up proceedings – Stay of proceedings – Principles governing the lifting of a stay of proceedings - Whether the learned judge erred in partially lifting the stay of proceedings – Whether the learned judge erred in finding that SBF would suffer prejudice if he was not afforded an opportunity to challenge the receivership order and the freezing orders – Appellate interference – Whether the decision of the learned judge was blatantly wrong warranting appellate interference – Application for permission to adduce fresh evidence – Principles in Ladd v Marshall

Result / Order: IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.
2. The judgment and orders of the learned judge are affirmed.
3. The appellants shall pay the respondents their costs of the appeal, such costs to be assessed if not agreed within 21 days, and to be paid out of the liquidation of Emergent.

Reasons:

1. It is settled law that the power to impose a stay necessarily includes the power to lift it. So that where a stay of proceedings has been ordered, a court does have the power to lift the stay allowing proceedings to continue. Either party may apply to the court to lift the stay under the court's case management powers. When faced with applications to lift or impose a liquidation stay, the court should carry out a balancing exercise of relevant factors, seeking to do what is just and fair in all the circumstances. The proper exercise of the power to lift a stay is informed by the nature of the stay which was granted and the purposes for which it was evidently imposed.

Arkin v Marshall [2020] EWCA Civ 620 applied; King Felix Sunday Bebor Berebon and others v Shell Petroleum Development Company of Nigeria Ltd [2017] EWHC 1579 (TCC) applied.

- 2. This Court is not satisfied that the learned judge's decision to lift the stay in respect of SBF while maintaining the stay in respect of Emergent is incongruous or plainly wrong. The Judge's analysis reveals that she understood that the purpose of a liquidation stay is to facilitate the orderly winding up of Emergent in the interest of its creditors and she recognised that the liquidation of Emergent should proceed unimpeded. However, the learned judge was obliged to take into account the fact that SBF was sued in his personal capacity, and she had to consider the purpose of the stay in relation to the claim against SBF. The Judge clearly considered the appellants' concern that lifting the stay would frustrate the purpose of the stay which was to prohibit SBF from taking steps to regain control of Emergent. However, she was not satisfied that there was enough evidence to show that lifting the stay in respect of SBF could have the dreadful impact which is suggested. The stay was intended to operate solely in respect of the actions or proceedings against Emergent, and not in respect of anyone else. Furthermore, the terms of the 5th December 2022 Order make it clear that to the extent that any suit, action or other proceeding touches or concerns Emergent or its assets, it cannot be maintained without first obtaining the leave of the court. The judgment reveals that the learned judge took this into account and appropriately weighed it in the balance and so ground 1 of the appeal must fail.**
- 3. It is settled law that permission to bring a claim against a company in liquidation should normally be refused if the issues raised by the proposed proceedings could conveniently be decided in the liquidation, because it would ordinarily be quicker and less expensive for that course to be taken. In this appeal, the third respondent has filed a**

proprietary claim against both Emergent and SBF in the court below in which he seeks, inter alia, declaratory relief that they hold funds which he invested with FTX or their traceable proceeds on trust for him and in which he seeks an account and payment of such amount as the court may assess. These claims for relief are advanced on the basis that funds which the third respondent invested with FTX were knowingly received by Emergent and SBF in breach of trust and/or that Emergent and SBF dishonestly assisted breaches of trust. The judge therefore had to consider whether such a claim could be dealt with just as conveniently and/or more cost-effectively in the liquidation. The judge did consider this factor and determined that the claim against SBF was a proprietary tracing claim that could not have been dealt with in the winding up process. Accordingly, there is no basis to interfere with this finding.

National Bank of Anguilla (Private Banking and Trust) Ltd (in administration) and another v National Bank of Anguilla Ltd (in receivership) and another AXAHCVP2016/0008 (delivered 11th July 2018, unreported) followed; Cassegrain v Gerard Cassegrain & Co Pty Ltd (in liquidation) (2012) NSWCA 435 applied; In the matter of Bigdeal Artist Management Pty Ltd (in liquidation) (2015) NSWSC 936 applied.

4. It is clear from the judgment that the learned judge considered both the issue of prejudice and the utility of lifting the stay. The determination of the application to lift the stay requires an exercise of balancing the ingredients enshrined in the overriding objective including the right of every litigant to expeditious justice and the need to minimise litigation delays. There can be no doubt that maintaining the stay would impose a restriction impacting seriously on SBF's right of access to a court, in circumstances where he is a defendant against whom serious allegations involving breach of trust, dishonesty and fraud are alleged. The case law makes it plain that in such circumstances the defendant is entitled to an expeditious hearing. Such actions should come to

trial quickly – if the claimant is entitled to a remedy, it must be swift, practical and effective. The judge was clearly not persuaded that the factors advanced on behalf of the appellants sufficed to displace, limit or delay SBF's right to a speedy disposal of the claims advanced in Claim 456. Specifically, she was not satisfied that there was any cogent evidence that lifting the stay would adversely affect the winding up process and her reasoning cannot be faulted. Accordingly, grounds 2 and 3 also fail.

Klöckner Holdings GmbH v Klöckner Beteiligungs GmbH [2005] EWHC 1453 (Comm) applied; Yiannides v Radley Gowns Ltd (1975) 119 SJ 711 applied.

5. It cannot be appropriate for a court to be asked to maintain a stay of proceedings on the basis that the underlying proceedings are not maintainable or where there is little hope or prospect of the parties securing any effective remedies. Where the subject claim is hopeless or lacks utility, the appropriate course is to discontinue the claim rather than seek to maintain a stay of proceedings to preserve it. Ground 4 accordingly fails.
6. The appellants' application to adduce fresh evidence does not satisfy the *Ladd v Marshall* criteria because it is common ground that the purported fresh evidence contained in the documents exhibited to the *Barkhouse Affidavit*, as well as the factual matters evidenced by and referred to therein, post-date the hearing in the court below. It is apparent that the appellants were seeking to deploy this evidence where this Court had arrived at a determination regarding this appeal and elected to exercise its own discretion in regard to the lifting of the stay. They contend that the matters evidenced by these documents cover ground which is very likely to be raised by the Court of Appeal of its own motion as to what is the present position. However, given the reasoning and the conclusions reached in this appeal, there is no basis upon which this Court would need to exercise its discretion *de novo*. The

appellants have not demonstrated that the learned judge committed an error of principle in arriving at her conclusion, which would warrant this Court exercising its discretion afresh. Accordingly, the application to adduce fresh evidence also fails.

Ladd v Marshall [1954] 1 WLR 1489 applied; Chia Hsing Wang v XY et al BVIHCMAP2022/0055 (delivered 6th June 2023, unreported) followed.

Case Name: **Benedict Alexander**
v
The King
[GDAHCRAP2019/0011]
(Grenada)

Date: **Friday, 26th July 2024**

Coram for delivery: **The Hon. Mde. Vicki Ann Ellis, Justice of Appeal**
The Hon. Mde. Esco L. Henry, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]

Appearances:
Appellant: **Mr. Howard Pinnock**
Respondent: **Mr. Jerry Edwin**

Issues: **Criminal appeal against sentence – Possession and Trafficking of controlled drugs – Right to a fair hearing – Whether the appellant has been afforded a fair hearing within a reasonable time under section 8(1) of the Constitution of Grenada,– Whether the appellant should be sentenced to time served – What adjustments should be made to the sentences, if any and what if any relief should be granted in case an infringement of the fair trial constitutional provision is made out**

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The appellant's appeal against conviction is dismissed.**
- 2. The appellant's appeal against sentence is allowed on the basis that the delay by the state in providing the transcript of proceedings of his trial and conviction infringe his fundamental right to a fair hearing within a reasonable time provided by section 8(1) of the Constitution of Grenada. As a consequence the following redress is granted to him:**
 - a. A declaration that the state of Grenada has breached his fundamental right to a fair hearing within a reasonable time.**
 - b. Consequently the appellant's respective sentences of 7 years and 4 months imprisonment for possession of a controlled drug and of 10 years and 11 months imprisonment for trafficking of a controlled drug are set aside and a sentence of time served is imposed in relation to both convictions.**

Reasons:

On 18th July 2019 the appellant as a pro se litigant filed an appeal against sentence and conviction containing 2 grounds of appeal: (a) the sentence was manifestly excessive and (b) the learned judge erred in law by failing to make the appellant plead to the matter. By notice of abandonment filed on 23rd July 2024, the appellant abandoned his appeal against conviction and gave notice of his intention to proceed with his appeal against sentence. The appellant thereby effectively withdrew the second ground of appeal. Consequently, the appeal against conviction stood dismissed.

In submissions filed amicus on the appellant's behalf learned counsel Mr. Jerry Edwin raised for the first time the issue that the five-year delay in the preparation of transcript of the proceedings has infringed the appellant's constitutional right to a fair hearing within a reasonable time. This ground was not included in the notice of appeal therefore learned counsel orally applied to amend the notice of appeal to insert the additional

ground. The respondent had no objections to the application and so the Court granted the application.

On the respondent's behalf, learned counsel Mr. Pinnock agreed that the 5-year delay in producing the transcript is excessive and amounts to a breach of the constitutional fair trial provision. He submitted that in the circumstances the appropriate remedy would be to make a declaration to such effect and to discount the sentence to time served. As to whether the sentences were excessive, he accepted that the sentence for possession of a controlled drug was excessive but argued that the sentence of 10 years and 11 months for trafficking was not and is within the acceptable range.

Having taken into account all the circumstances of the case in the appeal as well as considering that the appellant has served five years and three days of the sentence, the Court was satisfied that the appropriate redress in the circumstances would be a declaration that the appellant's fundamental right to a fair trial has been breached and that he should be granted a reduction of the sentence to time served as submitted by both counsel.

The issue of whether the sentences were manifestly excessive has been overtaken by the Court's decision on the constitutional point. This is because the Court's determination will effect a reduction in the sentence. It was therefore unnecessary to consider that other ground of appeal. In any event, the absence of the transcript makes it virtually impossible to conduct the requisite evaluation of the case in accordance with the sentencing guidelines so as to properly assess whether the learned judge erred in calculating the sentences or to facilitate a methodical evaluation by this Court.

The appellant's appeal against sentence was consequently allowed and a sentence of time served was imposed in relation to both convictions.

Case Name:

Vanita Henry

v

**[1] The Superintendent of Public Works
[2] The Attorney General of Saint Kitts and
Nevis**

**[GDAHCRAP2019/0011]
(Grenada)**

Date: Friday, 26th July 2024

Coram for delivery: The Hon. Mr. Mario Michel, Chief Justice (Ag.)
The Hon. Mde. Margaret Price Findlay, Justice of Appeal
The Hon. Mr. Trevor M. Ward, Justice of Appeal

Appearances:

Appellant: Ms. Chauntelle Hobson

Respondents: Mr. Christopher Forde

Issues: Civil appeal – Statutory duty on Crown – Duty to maintain roads and highways – Section 7 of the Roads Act - Breach of statutory duty - Section 4(2) of the Crown Proceedings Act - Crown’s liability in tort for breach of statutory duty - 1st respondent’s breach of statutory duty to maintain road and verge in state of good repair – Common law nonfeasance rule - Exemption at common law from liability for failure to maintain or repair roads or highways - Whether common law nonfeasance rule applicable in Saint Christopher and Nevis – Section 2 of the Common Law (Declaration of Application) Act - Whether common law nonfeasance rule repealed by section 4(2) of the Crown Proceedings Act - Private remedy for breach of statutory duty - Damages for personal injury - Whether appellant had a private remedy for damages for personal injury against the respondents owing to breach of statutory duty - Constitutionality of common law nonfeasance rule - Appellate court’s jurisdiction to deal with breaches of the Constitution raised as new points on an appeal

Result / Order: IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed and the decision of the learned trial judge is affirmed.
2. No order as to costs.

Reasons:

1. As a general rule, an appellate Court does not have original jurisdiction to deal with breaches of the Constitution. It has jurisdiction in two situations, viz: on appeal from a final decision of the High Court where such issues were raised for determination, and where such questions arise in extant appellate proceedings. On the facts, whilst the appellant did not argue that the question of constitutional law arises directly for consideration by this Court in these proceedings, the appellant essentially challenged the common law nonfeasance rule on constitutional grounds. This constitutional challenge was raised for the first time on the appeal and did not fall within the situations in which an appellate Court would have jurisdiction to deal with contraventions of the provisions of the Constitution. Consequently, this Court had no jurisdiction to entertain the grounds of appeal based on the alleged constitutional infringements.

Levi Maximea v The Chief of Police et al DOMHCVAP2020/0009 (delivered 7th December 2023, unreported) followed.

2. At common law, the duty to maintain and repair a highway was not based in negligence but in nuisance, and was an absolute duty. Prior to 1959, in the United Kingdom, this common law duty was placed on the inhabitants at large of an area. This duty, however, did not impose on the inhabitants the additional burden of compensating anyone who suffered injury as a result of a failure to maintain or repair the highway. Thus, the inhabitants benefitted from an exemption from liability for nonfeasance. However, by virtue of section 38(1) of the United Kingdom Highways Act 1959 (“the 1959 Act”), this duty on the inhabitants

was abolished. Under the 1959 Act, the duty transferred to the highway authorities and under section 298, the authorities benefitted from the exemption from liability for nonfeasance. By 1961, however, this exemption was repealed so that in the United Kingdom, the nonfeasance rule was effectively abolished. To mitigate this, section 58(1) of the United Kingdom Highways Act 1980 provided a special statutory defence so that a highway authority would not be liable if it proved that it took such care as in all the circumstances was reasonably required.

Goodes v East Sussex County Council [2000] 1 WLR 1356 considered; *Cowley v Newmarket Local Board* [1892] A.C. 345 considered.

3. In Saint Christopher and Nevis, the Common Law (Declaration of Application) Act (“the Common Law Act”) was passed on 5th March 1887 and section 2 provided that the common law of England at that date, as far as it stood unaltered by any written laws of Saint Christopher and Nevis, was in force in the jurisdiction. This meant that the exclusion of liability for nonfeasance in the United Kingdom at common law came into force in Saint Christopher and Nevis at the time the Common Law Act was passed in 1887. Contrasting with the position in the United Kingdom, no law has since been enacted in Saint Christopher and Nevis to abolish the common law nonfeasance rule. The liability of the Crown to actions in tort for breach of a statutory duty under section 4(2) of the Crown Proceedings Act is only engaged where the Crown is bound by a statutory duty which is also binding on persons other than the Crown and its officers. Under section 7 of the Roads Act, the surveyor has the general care and supervision of roads in Saint Christopher and Nevis. Section 4(2) of the Crown Proceedings Act would not be applicable to a breach of section 7 of the Roads Act since that section places the statutory duty on the surveyor and no other person. Consequently, applying the common law nonfeasance rule in Saint Christopher and Nevis means that, the surveyor would not be liable for

damages resulting from a failure to carry out the duty under section 7 to maintain roads of the State in good repair. The learned trial judge therefore did not err in finding that no private remedy in tort was available to the appellant for the breach of the section 7 duty by the Crown and its servants/agents.

Section 2 of the Common Law (Declaration of Application) Act Cap 3.05 of the Revised Laws of Saint Christopher and Nevis, 2002 applied; Section 4(2) of the Crown Proceedings Act Cap 5.06 of the Revised Laws of Saint Christopher and Nevis, 2002 distinguished; Section 7 of the Roads Act Cap 15.05 of the Revised Laws of Saint Christopher and Nevis, 2009 considered.

4. The Supreme Court of Canada in *City of Vancouver v McPhalen* rejected the common law nonfeasance rule as it had developed in England at the time of the decision in 1911. In *McPhalen*, the court held that where a municipal corporation was guilty of negligent default by nonfeasance of the statutory duty imposed upon it to keep its highways in good repair, persons suffering injuries in consequence of such omission may maintain civil actions against the corporation although no such right of action had been expressly provided for by statute. The court found that the common law nonfeasance rule was inapplicable to British Columbia since the rule under which inhabitants of areas through which highways passed were responsible for their repair and maintenance was never introduced into British Columbia and an 1858 proclamation ordained that the civil laws in England, as the same existed at 19th November 1858 and so far as the same were not, from local circumstances, inapplicable to British Columbia would remain in force until such time as they were altered. In Saint Christopher and Nevis, however, it is no answer to state, as the appellant does, that there was never a duty on the inhabitants to repair the roads and since this duty never existed, it could not be transferred to the surveyor. If the appellant's approach was to prevail, it would have the effect

of subjecting all common law rules to a minute examination of their origin to determine whether similar circumstances then existed in Saint Christopher and Nevis before any common law rule was to have any application. This was not the approach adopted by section 2 of the Common Law Act which is different to that adopted in British Columbia by the 1858 proclamation. This Court therefore would not follow the approach taken in Canada.

City of Vancouver v McPhalen (1911) 45 SCR 194 distinguished.

Case Name:

Danny Joseph

v

The King

**[SLUHRAP2023/0003]
(Saint Lucia)**

Date:

Friday, 26th July 2024

**Coram for
delivery:**

**The Hon. Mr. Mario Michel, Chief Justice (Ag.)
The Hon. Mde. Margaret Price Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal**

Appearances:

Appellant:

Mr. Horace Fraser

Respondent:

Mr. Peter Moyston

Issues:

Criminal Appeal – Appeal against conviction – Murder – Intent – Section 56 of the Criminal Code of Saint Lucia – Trial judge’s direction to the jury - Whether a trial judge’s failure to give a direction on intent in accordance with section 56 of the Criminal Code of Saint Lucia is fatal to the conviction – Whether lurking doubt that the conviction is unsafe and unsatisfactory

Result / Order:

IT IS HEREBY ORDERED THAT:

The appeal is dismissed and the conviction is affirmed.

Reasons:

- 1. A trial judge's directions on intent should be kept as simple as possible so as to not confuse the jury. When directing the jury on the mental element in a crime of specific intent, the judge should avoid any elaboration and should leave it to the jury's good sense to decide whether the accused acted with the requisite intent. Thus, a trial judge need not direct a jury on each and all the matters mentioned in a provision contained in statute concerning intent. What is required is that the trial judge should direct the jury on the substance of the requirements in the section. On the facts, the judge's directions made it plain to the jury that the prosecution was required to prove that the appellant killed the deceased with the intention to cause him grievous bodily harm as per section 85(b) of the Criminal Code. Although the judge did not explain to the jury how to determine intent [by using the language of section 56(1)], she directed the jury that they had to be sure, in the events that transpired, that the appellant acted with intent to kill or cause the deceased serious injury and not because he lost self-control. The judge further directed that if they found that the appellant acted with intention to cause grievous bodily harm and did cause the deceased's death, they need not go further. This was not a misdirection. The judge's directions were clear and simple to the jury and were sufficient on the issue of intent without any further need by the trial judge to explore the precise wording of section 56 of the Criminal Code.**

Alphonse (Denis) v R (1996) 52 WIR 179 distinguished; James Miller v The King [2023] UKPC 10 applied; Ezra Phillip v The King SLUHCRA2022/0001 (delivered 5th December 2023, unreported) followed; R v Moloney [1985] AC 905 applied.

2. In reviewing a trial judge's directions to the jury, an appellate court must have regard to the summing up as a whole to determine whether a misdirection caused a miscarriage of justice resulting in an unsafe conviction. The appellate court must therefore look at the thrust of the directions to consider if they have adequately put the several issues before the jury and properly given them an appropriate explanation of their task in relation to those issues which they have to decide. The judge's directions therefore ought to be tailored to suit the issues that actually arise in a case and the judge should explain to the jury how to apply the principles of law to the facts of the case. In reviewing the trial judge's summation as a whole, it is evident that whilst not specifically using the language of section 56 of the Criminal Code, there was nothing in the facts or issues of the case that necessitated any elaboration on the issue of intent. The judge properly directed the jury on the burden on the prosecution and carefully reviewed the evidence from which the jury could infer the intent of the appellant. There was therefore no misdirection by the trial judge.

Jevone Demming v The Queen BVIHCRA2015/0001 (delivered 14th January 2020, unreported) followed; Daniel Dick Trimmingham v The Queen [2009] UKPC 25 applied.

3. As to the defences of provocation and self-defence, the trial judge gave full directions on both. Apart from the bare assertion that the judge's failure to direct on intention in accordance with the terms of section 56 of the Criminal Code deprived the appellant of the opportunity to be acquitted of self-defence, no criticism has been levied at the content of the judge's directions on self-defence. Nor has the argument been developed to demonstrate how a failure to elaborate on the meaning of intention would have cost the appellant an acquittal in the face of very fulsome directions on the issue of self-defence. The same can be said in relation to the issue of provocation since the appellant has not criticised the content of the judge's directions and has failed

to articulate why a failure to define intention meant that he lost the opportunity to be convicted of manslaughter by virtue of provocation. For these reasons, ground 1 of the appellant's appeal failed.

4. Section 35(1) of the Supreme Court Act provides in part that the Court of Appeal may allow an appeal against conviction if it thinks that the verdict of the jury should be set aside on the ground that it is unsafe or unsatisfactory. The test to be applied is whether the appellate court has a subjective, reasonable or lurking doubt that justice may not have been done by the verdict and has been left in doubt as a result of considering all the circumstances, the evidence, the summing up and the general feel of the case. However, it is trite law that the fact-finding function in a criminal trial is entrusted to the jury, and it is only exceptionally that an appellate court should seek to substitute its view of the facts for the jury's. On the facts of this case, both self-defence and provocation were placed squarely before the jury for their consideration, and it was for them to assess the viability of either defence, assessed against the evidence in the case. None of the matters urged upon the Court by counsel for the appellant provides any ground for thinking that the conviction is unsafe. It was open to the jury to accept the prosecution's evidence that the appellant approached the deceased with a knife concealed behind his back intending to inflict at least serious bodily injury and that when he killed the deceased, he was neither acting in lawful self-defence nor was he acting under provocation. The Court therefore was of the view that there was no lurking doubt about the conviction or uneasiness about whether an injustice has been done. For these reasons, ground 2 of the appeal failed.

John (Nathaniel) v R (1994) 47 WIR 122 applied;
Dookran and another v The State [2007] UKPC 15
applied.

APPLICATIONS AND APPEALS

Case Name:

Natasha Beharry

v

Gren-Mac Construction Inc.

**[GDAHCVAP2022/0025]
(Grenada)**

Date:

Monday, 22nd July 2024

Coram:

**The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Trevor M. Ward, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]**

Appearances:

Applicant:

Ms. Marion Suite

Respondent:

Mr. Deloni Edwards

Issues:

Application to deem written submissions properly filed

Type of Order:

Oral Decision

Result / Order

IT IS HEREBY ORDERED THAT:

- 1. The application filed by the respondent on 26th June 2024 for leave to file written submissions and/or for the written submissions to be deemed properly filed is granted.**
- 2. The submissions filed by counsel for the respondent on 18th June 2024 are deemed properly filed.**

3. No order as to costs.

Reason:

Three applications came up for hearing before the Court. The Court firstly dealt with the application to deem written submissions properly filed. Having read the application filed 26th June 2024, the affidavit in support and the submissions; and having heard counsel for the appellant who indicated that the application was not opposed, the application was granted with no order as to costs.

Case Name:

Natasha Beharry

v

Gren-Mac Construction Inc.

**[GDAHCVAP2022/0025]
(Grenada)**

Date:

Monday, 22nd July 2024

Coram:

**The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Trevor M. Ward, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal
[Ag.]**

Appearances:

Applicant: Ms. Marion Suite

Respondent Mr. Deloni Edwards

Issues:

**Application to revoke the order of a single judge -
Application for a stay of proceedings - Whether the
single judge erred in refusing stay application - Whether
the appeal will be stifled or rendered nugatory if a stay
is not granted - Whether the prejudice to the applicant if
a stay is not granted will outweigh any prejudice to the
respondent if a stay is granted - Whether the appeal has
a realistic prospect of success**

Type of Order:

Oral Decision

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The Order of the single judge of the Court of Appeal of 23rd April 2024 is revoked and discharged.**
- 2. The stay of execution of the order of Actie J dated 4th October 2022 is granted pending the hearing and determination of the appeal on the following conditions:**
 - 1. The applicant will pay the sum of EC\$50,000 into the court within 21 days of the date of this order or on or before 15th August 2024.**
 - 2. The applicant is enjoined from selling, leasing, disposing, charging, mortgaging or otherwise encumbering the property described as “all that lot piece or parcel of land together with the building thereon situate at San Souci in the parish of Saint George and State of Grenada containing by admeasurement Nineteen Thousand Six Hundred and Forty-four Square Feet (19,644 Sq. Ft.) English Stature Measure and abutted and bounded as the same is delineated in the plan or diagram annexed [to the indenture made on 18th April 2016]” pending the hearing and determination of the appeal.**
- 3. In the event that the conditions set out at paragraph 2 above are not satisfied, the stay will automatically lapse.**
- 4. Costs of the application shall be costs in the appeal.**

Reasons:

Before the Court was an application filed by the applicant on 6th May 2024 in which they sought a stay of the execution of the order of Actie J made on 4th October 2022 pending the hearing and determination of the appeal and the revocation of the order of the decision of the single judge in the stay of execution pending the appeal before the Full Court. The Court read the notice

of appeal filed by the applicant on 14th November 2022 as well as the evidence filed by the applicant and the respondent in support of and in response to applications. The Court also read the submissions filed in support of and in opposition to the applications and heard the oral submissions made on behalf of the parties.

In arriving at its decision the Court considered the authority of *C-Mobile Services Limited v Huawei Technologies Co. Ltd.* BVIHCMAP2014/0017 (delivered 2nd October 2024, unreported) which prescribes that there is no automatic right to a stay pending appeal as a successful litigant should not normally be denied the fruits of their success pending appeal except in exceptional circumstances. That authority set down the criteria that the court must weigh in arriving at a decision as to whether or not a stay of execution ought to be granted.

Having considered the evidence and the submissions of counsel the Court was satisfied that the applicant demonstrated that they have a realistic prospect of success in their appeal. The Court however was not satisfied that the applicant produced sufficient evidence as to the financial position of the applicant company so as to cause the burden of proof to shift to the company based on the principles set out in *Rodrigues Architects Limited v New Building Society Limited* [2018] CCJ 09 (AJ). The Court was however satisfied that a stay, having considered the other principles in *C-Mobiles Services Ltd*, should be granted in the interest of justice. The Court was of the view that a stay subject to conditions should be granted pending the hearing and determination of the appeal.

Case Name:

Albert Mapp

v

The King

**[GDAHCRAP2022/0011]
(Grenada)**

Date: Monday, 22nd July 2024

Coram: The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Trevor M. Ward, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Jerry Edwin

Respondent: Mr. Howard Pinnock

Issues: Criminal Appeal - Appeal against conviction and sentence - Indecent Assault contrary to section 176(f) of the Criminal Code CAP. 72A of the 2010 Continuous Revised Edition of the Laws of Grenada as repealed by section 18 of the Criminal Code (Amendment) Act, 2012 - Whether the learned trial judge failed to adequately deal with the inconsistency and discrepancies in the evidence of the complainant, adversely affecting the fairness of the trial - Whether the conviction was unsafe and unsatisfactory - Sentence of 7 years imprisonment - Whether the learned judge erred in applying the sentencing guidelines when constructing the sentence - Whether the sentence of 7 years was excessive in the circumstances

Type of Order: Oral Judgment

Result / Order: IT IS HEREBY ORDERED THAT:

1. The appeal against sentence is allowed.
2. The sentence of 7 years imposed by the trial judge is varied and a sentence of 6 years and 6 months substituted in its place.

Reasons: On 4th June 2021 a jury unanimously convicted the appellant of the offence of indecent assault contrary to section 176(f) of the Criminal Code. The prosecution's case was that the virtual complainant resided with her

grandmother. The appellant was known to the family and the virtual complainant referred to him as Uncle Gavon. On the day in question the appellant was asked to assist by taking the virtual complainant to the bus stop to catch the bus to school as her grandmother had to go to work. The appellant initially took the virtual complainant to the bus stop and then took her back to her home. He placed her to lie on her back on her bed, raised her skirt and licked her vagina. He then took her to catch the bus. The appellant did not deny being alone with the virtual complainant that morning. His account was that he had gone to the house to prepare her for school and to put her on the bus. He was listening to a radio programme which was dealing with child abuse and how men touch or interfere with children. After the programme ended the virtual complainant asked him what the man on the radio meant. He told her that people may touch children with their mouths. The virtual complainant asked him how they would be able to do that if one is playing or moving around. The appellant said because they were bigger and could take you to put you to lie down. The appellant said he took her to lay down and said to her that once you see the person come over like this, it means that they are going to touch you. He denied licking her vagina.

This assault was perpetrated on a 5 year old child. She was 10 years old when she testified at the trial. The appellant was sentenced to 7 years imprisonment. He appealed both sentence and conviction. However, on the hearing of the appeal, the appellant conceded the appeal against conviction. In relation to the appeal against sentence the appellant contended that the learned judge had erred in principle in several respects when sentencing the appellant by taking into account matters for which there was no evidential basis. The respondent properly conceded that the learned trial judge did so err.

The appellant however conceded that the learned judge did not err in treating with the disparity in age between the appellant and the virtual complainant as an aggravating factor. The prosecution accepted this. The Court was therefore empowered to vary the sentence in those circumstances. Discounting those matters that were improperly taken into account. The sentencing guidelines for Indecent Assault promulgated by the

Eastern Caribbean Supreme Court stipulates that the starting point is 65% of the maximum sentence. The maximum sentence for this offence is 10 years imprisonment. Accordingly the starting point is 6 years and 6 months. The disparity in age between the appellant and the virtual complainant is an aggravating feature in relation to the offence which requires an upward adjustment of 6 months yielding a sentence of 7 years. There are no aggravating factors in relation to the offender himself but his personal circumstances are mitigated by his previous good character. This should purchase a discount of 6 months reducing the sentence to 6 years and 6 months. There are no other relevant considerations under the guideline. Accordingly the sentence of 7 years imposed by the learned trial judge was varied and a sentence of 6 years and 6 months was substituted in its place.

Case Name:

Unicomer (St. Vincent) Ltd.

v

**[1] Appeal Commissioners
[2] The Comptroller of Inland Revenue**

**[SVGHCVAP2021/0010]
(Saint Vincent and the Grenadines)**

Date:

Tuesday, 23rd July 2024

Coram:

**The Hon. Mde. Margaret Price Findlay, Justice of Appeal
The Hon. Mr. Trevor M. Ward, Justice of Appeal
The Hon. Mr. Eddy D. Ventose, Justice of Appeal**

Appearances:

Applicant:

Mr. Roderick Cordara KC with him Mr. Barrie Attzs

Respondents:

**Mr. Graham Bollers for the first respondent
Mr. Duane Daniel for the second respondent**

Issues:

**Application for leave to appeal to His Majesty in Council
- St. Vincent and the Grenadines Constitution Order -
West Indies Associated States (Appeals to Privy**

Council) Order 1967 - Whether the appeal shall lie for the appellant/applicant to appeal to his Majesty in council against the judgment of the Court of Appeal dated 17th April 2024 as of right pursuant to the provisions of section 99 (1)(a) of the Constitution Order and section 3 of the 1967 Order

Type of Order:

Oral Decision

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The notice of application for conditional leave to appeal to His Majesty in Council against the judgment of the Court of Appeal dated 17th April 2024 is hereby granted on the following conditions:**
 - a. The applicant/intended appellant shall within 90 days of the date hereof enter into good and sufficient security to the satisfaction of the registrar in the sum of \$1500 EC for due prosecution of the appeal. The payment of all costs may become payable by the applicant intended appellant in the event of not obtaining an order granting final leave to appeal, or of the appeal being dismissed for want of prosecution or in the event that the Privy Council orders the applicant intended appellant to pay the cost of the appeal. Such security and payment of all such costs to consist of a deposit in the said amount in the Court office.**
 - b. The applicant/intended appellant shall within 90 days of the date hereof take the necessary steps for the purpose of procuring the record of appeal and settling of such record with the Attorney-at-Law for the respondents and the certification of the record by the Registrar of the Court of Appeal**
 - c. The attorneys at law for the applicant/intended appellant shall take all necessary steps to prepare the record of appeal in**

accordance with the provision of rules 18 to 20 of the Judicial Committee Appellate Rules Order 2009 and practice directions 4.2.1 to 4.3.2 and 5, the same to be transmitted to the Registrar of the Judicial Committee immediately upon the final appeal being granted and shall include a copy of the orders granting conditional and final leave.

d. The applicant/intended appellant shall apply to this Court within 30 days of the receipt of the certificate of the Registrar that the security for costs ordered herein has been given within the time prescribed to the satisfaction of the registrar and that the applicant intended appellant has otherwise complied with the this order for an order for final leave to appeal to His Majesty in Council which application shall be supported by the certificate of the registrar.

2. A stay of execution of the judgment of the Court of Appeal dated 17th April 2024 is granted until the hearing and determination of the appeal to His Majesty in Council.

3. The costs in this application shall be the costs in the notice of motion to His Majesty in Council.

Reasons:

Before the Court was an application for leave to appeal to His Majesty in Council together with an affidavit in support and authorities. The Court was of the view that the appellant/applicant ought to be granted leave to appeal to his majesty in council as of right and accordingly granted the application for conditional leave to appeal with the requisite conditions.

Case Name:

Curtis Cyrus

v

The Commissioner of Police

**[GDAMCRAP2023/0006]
(Grenada)**

Date: Tuesday, 23rd July 2024

Coram: The Hon. Mde. Margaret Price Findlay, Justice of Appeal
The Hon. Mr. Trevor M. Ward, Justice of Appeal
The Hon. Mr. Eddy D. Ventose, Justice of Appeal

Appearances:

Appellant: Ms. Winnifred Duncan Phillip

Respondent: Mr. Howard Pinnock

Issues: Magisterial criminal appeal against sentence - Mischief to property - Intentionally and unlawfully causing damage not exceeding \$1000.00 - Section 94(1) of the Criminal Code Cap 72A of the Revised Laws of Grenada - Whether the magistrate erred in law ordering the appellant compensate the virtual complainant in the sum of \$50.00 within 14 days, failing which, he would be sentenced to 14 days imprisonment - Whether the magistrate erred in law in imposing a fine upon the appellant in the sum of \$250.00 to be paid within 1 month, failing which, he would be sentenced to 21 days imprisonment - Whether the magistrate had jurisdiction to sentence the appellant - Whether the proceedings were tainted with the perception of bias

Type of Order: Oral judgment

Result / Order: IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.

2. The conviction and sentence are affirmed.

Reasons: Having read the written submissions of both parties and having heard from the appellant orally, the Court ordered that the appeal be dismissed and the conviction and sentence of the magistrate be affirmed.

The appellant was charged with the offence under section 94(1) of the Criminal Code; the charge being criminal damage. The subject matter of the charge was a bunch of bananas. The appellant submitted that sections 30 and 31 of the Magistrate's Code prohibited the learned magistrate from having jurisdiction to hear the matter. However, the Court is of the view that having read sections 30 and 31, those sections limit the jurisdiction of the magistrate in civil proceedings brought in the magistrate's court and not criminal proceedings. The magistrate's jurisdiction in the circumstances is set out in sections 27-29 of the Magistrate's Act. The matter before the magistrate being a criminal matter, the learned magistrate had the jurisdiction to hear and determine the matter as she did.

The magistrate did not err or fall into error. As stated previously, the appeal was dismissed and the conviction and sentence affirmed.

Case Name:

Curtis Cyrus

v

The Commissioner of Police

**[GDAMCRAP2023/0011]
(Grenada)**

Date:

Tuesday, 23rd July 2024

Coram:

**The Hon. Mde. Margaret Price Findlay, Justice of Appeal
The Hon. Mr. Trevor M. Ward, Justice of Appeal
The Hon. Mr. Eddy D. Ventose, Justice of Appeal**

Appearances:

Appellant:

Ms. Winnifred Duncan Phillip

Respondent:

Mr. Howard Pinnock

Issues:

Magisterial Criminal Appeal - Appeal against conviction and sentence - Vagrancy and praedial larceny - Hearing of matters in the absence of the appellant - Whether the

learned Magistrate erred in proceeding to hear the matters ex parte

Type of Order: Oral judgment

Result / Order: IT IS HEREBY ORDERED THAT:

- 1. The conviction and sentence in the matter are quashed.**
- 2. The matter is remitted to the Magistrates' Court for retrial before a different magistrate.**

Reasons: Upon reading the submissions of the parties, noting the respondent conceded the appeal filed by the appellant on the 11th July 2024 and noting that the respondent conceded that the learned magistrate erred in proceeding to hear the matter ex parte, the Court was minded to quash the conviction and sentence in the matter and order that the matter be remitted to the Magistrates' Court for retrial before a different magistrate.

Case Name: Curtis Cyrus

v

The Commissioner of Police

**[GDAMCRAP2023/0009]
(Grenada)**

Date: Tuesday, 23rd July 2024

Coram: The Hon. Mde. Margaret Price Findlay, Justice of Appeal
The Hon. Mr. Trevor M. Ward, Justice of Appeal
The Hon. Mr. Eddy D. Ventose, Justice of Appeal

Appearances:
Appellant: Ms. Winnifred Duncan Phillip

Respondent: Mr. Howard Pinnock

Issues: Magisterial criminal appeal - Appeal against conviction and sentence - Driving without licence - Whether the learned magistrate failed to enter the correct plea of the accused - Whether the learned magistrate erred in entering a guilty plea - Whether evidence was led under oath as required by law

Type of Order: Oral Judgment

Result / Order: IT IS HEREBY ORDERED THAT:

1. The conviction and sentence in the matter are quashed.
2. The matter is remitted to the Magistrates' Court for retrial before a different magistrate.

Reasons: Having read the submissions of both parties, the Court observed in the respondent's submissions that they had conceded the appeal. The Court found that the respondent having conceded that the learned magistrate in conduct of the hearing being in breach of sections 79(4) and 79(5) of the Code of Criminal Procedure resulting in a material irregularity, ordered that conviction and sentence be quashed and that the matter be remitted to the Magistrate's Court for retrial before a different magistrate.

Case Name: Vidatel Limited

v

PT Ventures, SGPS, S.A

**[BVIHCMAP2024/0013]
(Territory of the Virgin Islands)**

Date: Wednesday, 24th July 2024

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

Appearances:

Applicant: Mr. Hermann Boeddinghaus KC with him Ms. Colleen Farrington

Respondent: Mr. Christopher Harris KC with him Ms. Georgina Peters and Mr. Stuart Rau

Issues: Application for a stay of execution of appointment order pending appeal – Principles on which a stay of execution is granted - Whether the appeal would be rendered nugatory absent a stay - Whether there is a risk of injustice to the appellant if a stay is not granted

Type of Order: Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The application by notice filed the 10th May 2024 is dismissed.
2. Costs of the application are awarded to the respondent to be assessed by a judge of the Commercial Division of the High Court of the Territory of the Virgin Islands if not agreed by the parties within 21 days of the date of this order.
3. The Court will provide written reasons for its decision.

Reasons: The Court considered the notice of application filed on 10th May 2024 by the applicant Vidatel Limited for a stay of the winding up order made by the learned judge of the Commercial Court on 17th April 2024 pending the hearing and determination of the appeal. The Court also considered the affidavit evidence filed in support of the application and in opposition thereto and the skeleton

arguments filed on behalf of the applicant and the respondent.

The Court further considered the notice of appeal filed on 10th May 2024 and in particular the grounds of appeal, three in number, set out in the said notice of appeal and the judgment of the court below leading to the granting of the winding up order. The Court examined the various authorities which were relied upon by counsel for the applicant and the respondent, in particular the authorities dealing with the principles upon which the Court of Appeal will grant a stay of a judgment of the court below including *C-Mobile Services Ltd v Huawei Technologies Co. Ltd* BVIHCMAP2014/0017 (delivered 2nd October 2014), *Novel Blaze (in liquidation) v Chance Talent Management 2020* EJSC J0709, *Haimen Zhongnan Investment Development (International) Co. Ltd. v Cithara Global Multi-Strategy SPC* BVIHCMAP2023/0012 (delivered 4th August 2023) and others which were relied on by counsel in both their oral and written submissions.

Having given careful consideration to all the aforementioned matters, the Court was not satisfied that the applicant met the threshold, in particular the evidential and legal threshold, for a grant of a stay in relation to the winding up order made by the learned judge below. The Court accordingly dismissed the application.

Case Name:

**[1] SKN Choice Times Limited
[2] Dwight Cozier**

v

Josephine Huggins

**[SKBHCVAP2024/0005]
(Saint Christopher and Nevis)**

Date:

Wednesday, 24th July 2024

Coram:

**The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mde. Esco Henry, Justice of Appeal**

The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]

Appearances:

Applicants: Ms. Angela Cozier

Respondent: Mr. Anthony Gonsalves KC

Issues:

Application for leave to appeal - The interlocutory order upon which the application for leave to appeal is founded has been taken over by the completion of the trial of the substantive matter in the court below - Application for stay of proceedings otiose - Withdrawal of application for leave to appeal - Costs on application for stay of proceedings

Type of Order:

Oral Decision

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. Leave is granted for the application for leave to appeal filed on 9th April 2024 to be withdrawn and dismissed with no order as to costs.**
- 2. The application for a stay also filed on 9th April 2024 is withdrawn and discontinued with costs to the respondent in the sum of \$625.00 such costs to be paid within 14 days of the date of this order or on or before 8th August 2024.**

Reasons:

The Court received correspondence indicating that the trial of the substantive matter in the court below had been completed and judgment had been given on 8th July 2024. It followed that the interlocutory order upon which the notice of application for leave to appeal was founded had been taken over by the disposition of the matter in the court below. Having regard to that indication, counsel for the applicants made an oral application to withdraw the application for leave to appeal. Counsel for the applicants also indicated to the Court that the notice of application for a stay of proceedings filed on 9th April 2024 was of no moment or otiose given that the proceedings had continued with the

result that the matter was disposed of by the said judgment. The parties conceded that the application for a stay would fall away. As to the issue of costs, counsel for the respondent indicated that the respondent would be seeking costs in relation to the application for a stay, counsel having prepared and filed submissions in response to the application. Counsel for the respondent also indicated that counsel for the applicant had failed to indicate in a timely manner, that she was no longer pursuing the application for a stay. Therefore counsel for the respondent was still obliged to appear before the Court on today's date. Upon hearing counsel for the parties, the Court ordered costs in the sum of \$625.00 to be paid within 14 days.

Case Name:

Benedict Alexander

v

The King

**[GDAHCRAP2019/0011]
(Grenada)**

Date:

Wednesday, 24th July 2024

Coram:

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

Appearances:

Appellant: Mr. Jerry Edwin

Respondent: Mr. Howard Pinnock

Issues:

Criminal appeal against sentence - Possession and Trafficking of controlled drugs - Whether the sentence was manifestly excessive in the circumstances - Oral application to amend notice of appeal to include additional ground - Whether the appellant has been afforded a fair hearing within a reasonable time under section 8(1) of the Constitution of Grenada, particularly since the appellant's right to appeal has been

unreasonably delayed stemming from the extensive delay in producing the transcript of proceedings - Whether the appellant should be sentenced to time served

Type of Order:

Oral Decision

Result / Order:

IT IS HEREBY ORDERED THAT:

1. Leave is granted to amend the notice of appeal.
2. Judgment is reserved to 26th July 2024.

Reasons:

Before the Court was a notice of appeal filed by the appellant on 15th July 2019 in which he sought to appeal against his conviction and sentence. The appellant was convicted on 9th April 2019 for the offences of Possession and Trafficking controlled drugs and was sentenced to 7 years and 10 months and 10 years and 11 months imprisonment respectively to run concurrently. The appellant however indicated that he wished to withdraw his appeal against conviction and solely proceed with his appeal against sentence.

Upon reading the written submissions and hearing the oral submissions from both parties the Court noted that the appellant sought to appeal on the ground that his constitutional right to a fair hearing within a reasonable time under section 8(1) of the Constitution of Grenada due to an excessive delay of 5 years in preparation of the transcript of proceedings setting out the statement of facts relied on by the court as well as the court's reasons for sentence. This ground however was not reflected in the appellant's notice of appeal.

The appellant therefore made an oral application for the amendment of his notice of application to include said constitutional ground. The respondent did not oppose the application and the Court granted the application to amend. The Court subsequently reserved its judgment to Friday 26th July 2024.

Case Name: Theresa Agatha Calliste-Belle

v

Miranda Belle

**[GDAHCVAP2023/0032]
(Grenada)**

Date: Thursday, 25th July 2024

Coram: The Hon. Mde. Margaret Price Findlay, Justice of Appeal
The Hon. Mr. Eddy Ventose, Justice of Appeal
The Hon. Mde. Esco Henry, Justice of Appeal

Appearances:

Appellant: Mrs. Crystal Braveboy-Chetram with Mrs. Skeeta Chitan-Sylvester and Mr. Ricardo Sylvester

Respondent Ms. Sheriba Lewis

Issues: Interlocutory appeal – Pre-trial review – Appointment of expert – Application by appellant for appointment of expert witness pursuant to Part 32 of the Civil Procedure Rules 2000 (as amended) and the filing of a witness statement – No application by appellant for extension of time and relief from sanctions to have expert witness appointed – Whether the learned judge erred in refusing to grant application to appoint expert and adduce expert report into evidence due to applicant’s failure to file witness statement within time prescribed and to apply for extension of time to file – Whether the learned judge erred in finding that witness statement ought to be filed for expert to be appointed as expert witness – Whether the learned judge erred in failing to consider Rule 32.7 of the Civil Procedure Rules 2000 (as amended) which requires expert evidence to be given in a written report

Type of Order: Oral Judgment

Result / Order: IT IS HEREBY ORDERED THAT:

1. The appeal is allowed.
2. The order of the judge dated 20th July 2023 is hereby set aside.
3. The application filed by the appellant to appoint an expert witness is remitted to the high court to be determined by a different judge.
4. Costs to the appellant to be paid by the respondent in the sum of EC\$600.00 to be paid within 21 days of today's date.

Reasons:

On 20th July 2023 the learned trial judge gave an order as follows: "Upon the matter coming on for pre-trial review and an application by the claimant for the appointment of an expert and the filing of an expert report and upon the applicant having failed to apply for an extension of time and relief from sanctions the matter is accordingly refused."

The appellant on 2nd February 2024 appealed the order, submitting that the learned trial judge erred in dismissing the application because a witness statement had not been filed for the expert and that an application to extend the time for filing witness statements and relief from sanctions ought to have accompanied the application. CPR 32.6(1) states that a party may not call an expert witness or put in the report of an expert witness without the court's permission. CPR 32.6(2) states that the general rule is that the court's permission is to be granted at a case management conference.

If the learned trial judge was correct in stating that a report of an expert witness must be filed in accordance with the timelines as set out in the case management order, it would mean that the applicant could have only applied to call an expert witness prior to the case management order and no time thereafter. In the instant case the appellant could not have filed the expert report in such a timeline because she had not been granted permission to do so by the court under CPR 32.6(1). Simply put, the timelines for filing witness statements in the case management order in this instance does not apply generally to an expert report unless the order

expressly states that such a report must be so filed after permission has been granted by the court upon application previously made.

The learned trial judge erred in concluding that the appellant having failed to make an application during the period ordered to file witness statements was under the duty to file an application for an extension of time and relief from sanctions in keeping with the requirements of CPR 26.8. There can be no sanction when no permission was granted by the court pursuant to CPR 32.6(1) and no time period by which the expert report was to be filed was included in the case management order. In these circumstances there can be no engagement of the rules relating to relief from sanctions.

The learned trial judge was wrong to equate an expert report as required by Part 32 to a witness statement of a witness who is not appointed pursuant to Part 32 of the Rules. It is correct that CPR 32.6(2) states that the general rule is that a court's permission is to be given at the case management conference, however, this does not mean that the court cannot give its permission at any other time after the case management conference or at a pre-trial review. In any event in the instance case, the case management order of the court expressly allows the parties to file further applications on or before 15th May 2023. The appellant's application to appoint an expert witness was filed on 3rd April 2023, well within the deadline set by the learned trial judge. The application filed by the appellant on 3rd April 2023 was properly made. Based on the foregoing the Court ordered that the appeal against the decision of the trial judge is allowed, the decision of the learned trial judge is set aside, the application is remitted to the high court to be heard by a different judge and costs to be paid to the appellant by the respondent in the sum of EC\$600.00.

Case Name:

Juliette Joy Shears

v

Kenneth Shears

**[GDAHCVAP2024/0005]
(Grenada)**

Date: Thursday, 25th July 2024

Coram: The Hon. Mde. Margaret Price Findlay, Justice of Appeal
The Hon. Mr. Eddy Ventose, Justice of Appeal
The Hon. Mde. Esco Henry, Justice of Appeal

Appearances:

Appellant:	Mr. Ruggles Ferguson KC
Respondent:	Mr. Kristopher-Ross Fields

Issues: Interlocutory appeal - Breach of Natural justice - Section 35(2) of the West Indies Associated States Supreme Court Act (Grenada) - Whether the learned trial judge erred by continuing and concluding proceedings to a decision on the application of the appellant in her absence

Type of Order: Oral Judgment

Result / Order: IT IS HEREBY ORDERED THAT:

1. The decision of the learned trial judge dated 19th June 2023 is set aside and the application for default judgment is remitted to the High Court for rehearing before another trial judge.
2. Costs in the sum of EC\$800.00 to be paid to the appellant within 21 days of the date of this order.

Reasons: Upon the matter coming on for hearing and the Court having heard from both counsel for the appellant and counsel for the respondent, it being a matter of record and not disputed that the order of the learned trial judge dated 19th June 2023 when made that counsel for the appellant and the appellant were let out of the proceedings and were both absent for part of the

proceedings. The court proceeded to hear the matter to conclusion in their absence.

The Court was of the view that the appellant and her counsel, in particular the appellant herself, ought to have been present at the hearing of the application filed on her behalf and the learned trial judge erred by continuing and concluding the proceedings to a decision on her application in her absence. The order having been made was in breach of the principles of natural justice. The Court therefore under the exercise of its powers under the West Indies Associated States Supreme Court (Grenada) Act section 35(2) which reads that “the powers of the Court of Appeal under this section may be exercised notwithstanding that no notice of appeal or respondent’s notice has been given in respect of any particular part of the decision of the High Court by any particular party to the proceedings or that any ground for following the appeal or for affirming or varying the decision of that Court is not specified in such notice; and the Court of Appeal may make any order in such terms as the Court of Appeal thinks just to ensure the termination on the merits of the real question in controversy between the parties.”

The Court exercising its powers under that section therefore found that the decision of the learned trial judge was in error and that decision was set aside. The application was remitted to the high court to be decided by a different trial judge with costs to be paid to the appellant by the respondent within 21 days of the date of this judgment.

Case Name:

Raheeman Frederick

v

[1] Phillip Neptune

[2] Marva Neptune

[3] Zorina Frederick

**(Also in her capacity as personal
representatives in the entire estate of Cecilia
Phyllis Frederick, deceased)**

[GDAHCVAP2022/0023]

(Grenada)

Date: Friday, 26th July 2024

Coram: The Hon. Mr. Mario Michel, Chief Justice (Ag.)
The Hon. Mde. Margaret Price Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal

Appearances:

Appellant: Ms. Karen Samuel holding papers for Mr. Alban John

Respondents: Mr. Ruggles Ferguson KC

Issues: Civil appeal – Consent order – Real property – Trusts and estates – Conveyance of adjoining property to appellant – Subsequent conveyance of entirety of adjoining property to respondent – Appellant holding entirety of property on trust for the beneficiaries of deceased's estate – Whether the learned judge erred in holding that the sole issue for determination was the authority of the Registrar to transfer property to the appellant – Whether the learned judge was wrong in implicitly finding that the purchase price of the property was partly paid for by rental income in the absence of evidence supporting such a finding – Whether the learned judge erred in treating the consent order as an unconditional order to convey the property to the respondent – Whether the learned judge erred in failing to require proof of payment by the fourth respondent of the sum ordered to convey the property – Whether the learned judge erred in ignoring evidence from cross-examination that there were no tenants in the property at the time of its acquisition or purchase by the appellant – Whether the learned judge erred in holding that the entirety of the property conveyed to the appellant was to be held on trust for the respondent and the beneficiaries of the estate of respondent's husband – Whether the subsequent conveyance order to the respondent in paragraph 34(2) of the judgment be set aside as it is wrong in law and prejudicial to the appellant – Whether the learned judge erred in attaching no significance to the appellant being deprived of rent having restored the property

Type of Order:

Oral Judgment

Result / Order:

IT IS HEREBY ORDERED BY CONSENT THAT:

- 1. The Appellant and the Third Named Respondent will jointly instruct an appraiser to value the property, subject-matter of this action, being ALL THAT lot, piece or parcel of land situate at Woodlands in the parish of Saint George in the State of Grenada and containing by admeasurement Two Thousand One Hundred and Eight (2,108) Square Feet English Statute Measure TOGETHER with the building thereon (“the Disputed Property”) AND ALL THAT lot, piece or parcel of land also situate at Woodlands aforesaid and containing by admeasurement One Rood Thirty-nine Poles (1 Rd. 39 Pls.) English Statute Measure evidenced by an Indenture of Conveyance dated the 6th day of November 1969 made between Francis Batson of the One Part and the Testator of the Other Part and recorded in the Deeds and Land Registry of Grenada in Liber V7X at Page 477 (together called “the Woodlands Property”).**
- 2. The Woodlands Property is to be sold on the open market with liberty reserved equally to any of the remaindermen under the will of the Testator to purchase it.**
- 3. Any expenses arising out of the sale and any requisite court proceedings are to be deducted from the proceeds of sale before distribution of the proceeds to the remaindermen.**
- 4. Should the remaindermen fail to agree upon the sums expended by the Appellant to:**
 - (a) Purchase the Disputed Property; and**
 - (b) To develop and maintain the Disputed Property,****Subject to the next succeeding paragraph, the proceeds of sale of the Woodlands Property are to**

be paid into Court and application made to the Court to determine the just expenses.

- 5. The Third Named, Respondent in her capacity as legal personal representative of the Estate of the Testator, shall be at liberty to distribute to the remaindermen such portion of the proceeds as are uncontested, the distribution to be in equal shares in accordance with the Testator's will dated 30th April 1980.**
- 6. The Appellant and the Third Named Respondent agree to discuss with the other remaindermen the sale of the other property inherited under the will of the Testator situate at Tempe and to proceed with the sale of same, once agreement has been arrived at by all of the remaindermen.**
- 7. If the remaindermen under the will of the Testator are unable to arrive at agreement on the sale of the Woodlands Property and the said Tempe property, the parties are to apply for the Registrar to conduct the sale of both properties.**
- 8. In order to give effect to the terms of this Order, the Registrar of the Supreme Court is to execute any conveyance in place of any of the remaindermen who is unwilling to sign same.**
- 9. The Appellant will furnish to the personal representative of the Estate of the Testator an updated account, with supporting documentation, of all expenditure and income in relation to the Woodlands Property.**
- 10. With respect to the First and Second Named Respondents, the appeal is withdrawn and accordingly stands dismissed.**
- 11. Costs in favour of the Third Named Respondent to be paid by the Appellant in the sum of \$2,000.00.**

Reasons:

The Court was in agreeance with the consent order dated 26th July 2024 subject to some minor changes. The parties took no issue with the changes to the consent order dated 26th July 2024. The Court therefore entered the order upon the signing by the parties.