

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

TERRITORY OF THE VIRGIN ISLANDS
21ST – 24TH MAY 2024

JUDGMENTS

Case Name:

Augustin Pascall
v
Public Service Commission

[GDAHCVAP2021/0024]
(Grenada)

Date:

Wednesday, 22nd May 2024

Coram:

The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal
The Hon. Mde. Esco Henry, Justice of Appeal
The Hon. Mr. Robert Levy, Justice of Appeal [Ag.]

Appearances:

Appellant:	Dr. Francis Alexis KC, with him Ms Olabisi Clouden
Respondent:	Mr. Kevon Charles holding for Ms. Karen Samuel

Issues:

Civil appeal – Ethics and advocacy – Legal practitioners – Application to restrain an attorney from acting for a client – Court’s supervisory role – Power of the court to restrain a legal practitioner from acting for a party to litigation – The court’s inherent jurisdiction to supervise its officers and to protect the administration of justice – Exceptional jurisdiction – Test – Perception of the fair-minded and reasonably informed member of the public – Perception of a real risk that the administration of justice would be adversely affected – Whether the judge erred in the exercise of her discretion by restraining counsel from acting for the appellant in the lower court proceedings – Whether a conflict of interest arises outside of the legal practitioner-client relationship – Confidentiality – Whether the duty of confidentiality extended beyond the legal practitioner-client relationship – Whether there was a real risk of misuse of the confidential information obtained by a legal practitioner who

served as chairman of the PSC – Whether the judge failed to determine whether any other lawyer in the firm could have represented Mr. Pascall

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.
2. The judgment of the judge in the court below is affirmed.
3. The stay of execution granted on 6th April 2022 and continued on 20th February 2023 by this Court is discharged.
4. The respondent will have its costs of this appeal to be assessed, if not agreed by the parties within 21 days of this judgment.

Reason:

1. The court has an inherent jurisdiction to restrain an attorney from representing a litigant in order to protect the integrity of its processes and the administration of justice. In the exercise of this jurisdiction, it is the duty of the court to ensure that justice is not only done but that it is seen to be done. The power to exercise this inherent jurisdiction enables the court to preserve public confidence in the judicial system and derives from the court's supervisory jurisdiction over its officers. The power is an exceptional one and consequently, judicial restraint is imperative as litigants should not be deprived of their choice of representation without good cause.

Honourable Guy Joseph v The Constituency Boundaries Commission et al SLUHCVP2015/0013 (delivered 6th April 2016, unreported) followed; Holborow and Others v MacDonald Rudder [2002] WASC 265 applied; Kallinicos and Another v Hunt and Others [2005] NSWSC 1181 applied; Premier Capital (China) Ltd v Sandhurst Trustees Ltd [2012] VSC 611 applied.

2. Where it is necessary for a court to intervene to restrain an attorney, the power of the court will be exercised where a fair-minded and reasonably informed member of the public would conclude that the proper administration of justice requires that the attorney be prevented from acting for a client. The test is an

objective one based on what the general public could expect of the administration of justice. As the determination of whether or not an attorney should be restrained involves an exercise of judicial discretion, an appellate court would not intervene unless the trial judge's decision exceeded the general ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. On the facts, the learned judge correctly identified the test and there was no error on her part in this regard.

Honourable Guy Joseph v The Constituency Boundaries Commission et al SLUHCVP2015/0013 (delivered 6th April 2016, unreported) followed; Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 followed.

3. In the appeal, the appellant contended that the judge failed to give sufficient consideration to the fact that the PSC was obliged to voluntarily disclose the information requested by the appellant owing to the duty of candour falling on public authorities in judicial review proceedings. However, contrary to the appellant's assertions, the judge's reasons demonstrate an acceptance that the PSC had a duty of candour in the proceedings. The judge nevertheless had to consider whether the PSC's duty negated the attorney's obligations such that a court should not restrain the attorney from acting. Ultimately, the judge concluded that it did not, and the Court found that she did not err in this regard. The fact that the PSC has a duty of candour would not mean that the information gleaned by Mr. Sylvester in his role as chairman was not confidential. It was therefore no answer to a restraint application to suggest that the applicant was required to disclose information to the court in any event. The judge therefore did not err in her reasoning and grounds 1 and 2 of the appeal were dismissed.

Spector v Ageda [1973] Ch 30 considered; R v Lancashire County Council ex p Huddleston [1986] 2 All E.R. 941 considered.

4. It is well-established that an attorney owes a duty of confidentiality to his clients and ought to avoid situations which conflict with this duty. The principle of avoiding this conflict of duty is broader than the attorney-client relationship and protects quasi-clients or indeed any person who gave information to an attorney which was capable of being used to the giver's detriment. Once a relationship of trust and confidence is established an attorney can be restrained so as to protect confidential information given in trust. A court will only restrain an attorney if a reasonable observer, informed of the facts might reasonably anticipate a danger of misuse of confidential information and there is a real and sensible possibility that the interest of the lawyer in advancing the case might conflict with that lawyer's duty to keep that information confidential. This risk must be a real one and not merely fanciful. On the facts, it was evident that the judge was fully seised of these basic principles, and it was entirely appropriate for her to apply these principles to the factual context which obtained in the appeal.

Mytton's Ltd v Phillips Fox (a firm) (delivered 23rd September 1997, unreported, Supreme Court of Victoria) applied; Macquarie Bank Ltd v Myer and others; Toycorp Ltd (Receivers and Managers Appointed) v Myer and others [1994] VR 350 applied; Prince Jefri Bolkiah v KPMG (a firm) [1999] 2 AC 222 applied.

5. It is a necessary precursor to invoking the Bolkiah jurisdiction to establish that an attorney had been in possession of information confidential to the applicant and that the applicant had not consented to its disclosure. The burden is on the applicant to identify the confidential information and to prove, on a balance of probabilities, that the attorney was in possession of same and was intending to represent a client with an adverse interest in a matter to which the information might be relevant. Once established, the burden then shifts to the attorney to prove the existence of effective measures to ensure there was no risk of disclosure or misuse of the confidential information. On the facts, it was not disputed that Mr. Sylvester would have presided over

meetings in which matters concerning the substantive post and the post-holder Mr. Robertson, would have been discussed. The judge was satisfied that although the public decisions of the PSC were not confidential, the internal deliberations were. She was further satisfied that the internal and undisclosed deliberations of the PSC relative to the post of Technical Officer would have constituted the confidential information at risk of being misused. This confidential information would have been relevant to matters in dispute in the proceedings and would have been communicated to Mr. Sylvester during his tenure as chairman. The judge was correct to find that the appellant failed to show that there was no real risk of misuse of the confidential information. The Court therefore found that there was no error on the judge's part in her reasoning and there was no basis upon which the Court could interfere.

Prince Jefri Bolkiah v KPMG (a firm) [1999] 2 AC 222 applied; Re A Firm of Solicitors [1997] Ch 1 applied.

6. Where an application seeking to restrain an attorney concerns a former client or otherwise, it is clear that there must be a connection between the two underlying matters. They must be the same or closely related. Moreover, the parties' interests must be adverse to each other before a court can exercise its jurisdiction to restrain an attorney. On the facts, in the proceedings below, Mr. Sylvester now acted for Mr. Pascall, a client with interests adverse to the PSC, a commission in which he served as chairman. Whilst there was no evidence that Mr. Sylvester had any direct dealings with decisions affecting Mr. Pascall, there is evidence which reflected his dealing with matters concerning the substantive post holder. The judge therefore was correct to isolate the critical issue arising from the parties' opposing pleadings (that is, the availability of the post) and the judge was also correct to hold that PSC's deliberations during the material period relative to the substantive post, would be materially connected to an important issue in the proceedings. The judge

therefore did not err and grounds 7 – 8 of the appeal were dismissed.

Re A Firm of Solicitors [1997] Ch 1 applied; Marks & Spencer plc v Freshfields Bruckhaus Deringer [2004] 3 All E.R. 773 applied; Boyce t/as Hunt And Hunt Lawyers v Goodyear Australia Ltd. [1996] NSWCA 63 applied.

7. As to the appellant's argument under ground 9 that the judge erred in applying the principles regarding the rule against bias to Mr. Sylvester, there was never any suggestion either by the PSC or the judge that Mr. Sylvester was the decision maker in the claim. The question of bias therefore had no relevance in deciding whether or not an attorney should be restrained from acting for a client. At its highest, the judge's comments at paragraph 40 of her judgment were no more than a cautionary commentary about the potential degree of reputational harm to the PSC, if its former chairman was perceived as being capable of using knowledge gained in his capacity as chairman to later advance his client's case. In this light, the judge's observation did not carry the import ascribed by the appellant and ground 9 of the appeal was dismissed.
8. Unless satisfied on the basis of cogent evidence that reasonable measures have been taken to ensure that no disclosure of a client's confidential information will occur, a court will restrain a lawyer from so acting. On the facts, there was no cogent evidence put before the judge below by the appellant that any other attorney could have had carriage of the matter and that sufficient measures were in place to ensure no disclosure of the client's confidential information. It was for the appellant to put this evidence before the judge and this was not done. Having not advanced any evidence or submissions on the issue in the court below, the Court was of the view that ground 10 of the appeal should also fail.

Davies v Clough (1837) 8 Sim 262 considered; Supasave Retail Ltd v Coward Chance (a firm); David Lee & Co (Lincoln) Ltd v Coward Chance (a firm) [1991] Ch 259 considered; Prince Jefri

Bolkiah v KPMG (a firm) [1999] 2 AC 222 considered; Re A Firm of Solicitors [1992] QB 959 considered; MacDonald Estate v Martin [1990] 3 SCR 1235 considered.

Case Name:

**Columbus Communications (St. Lucia)
Limited dba Flow
v
Mark Maragh
[SLUHCVAP2023/0005]**

Heard together with:

**Richard Frederick
v
Mark D. Maragh
[SLUHCVAP2023/0006]**

Heard together with:

**Mark D. Maragh
v
[1] McDowall Broadcasting Corporation (MBC)
Limited
[2] Columbus Communications (St. Lucia)
LTD trading as FLOW
[SLUHCVAP2023/0007]
(Saint Lucia)**

Date:

Wednesday, 22nd May 2024

**Coram for
Delivery:**

**The Hon. Mde. Margaret Price Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Gerard Farara, Justice of Appeal [Ag.]**

Appearances:

Appellants:

**Mr. Deale Lee for Columbus Communications (St. Lucia)
Ms. Vanessa Pinnock for Mr. Mark Maragh
Mr. Horace Fraser for Mr. Richard Frederick**

Respondent:

Issues: Costs - Entitlement to Costs – Successful party generally entitled to costs – Rule 64.6(1) of the Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023 - The discretion of the Court to award costs – Costs in instances of mixed success

Result/Order: IT IS HEREBY ORDERED THAT:

Each party to bear their own costs on the appeals.

Reasons:

1. The general rule is that where the court, including the Court of Appeal, decides to make an order about costs, it must order the unsuccessful party to pay the costs of the successful party. Notwithstanding, the power of the court to award costs is a discretionary one. The rule does not say that the court must award costs nor does it otherwise use language to indicate that awarding costs to a successful party is mandatory. Where the Court decides to depart from the general rule, the Court must state the reasons for its decision, as is set out in CPR 64.6(2). Any departure from the general rule must be exercised on a principled and judicial basis. In cases where the Court finds that both or all parties have enjoyed some success on appeal, the Court may order that each party bear their own costs. This has been shown to be a reason for the Court to decide that the parties bear their own costs on the appeal.
2. In the present case, the relevant consideration is that all parties challenged the unless order and have been successful on the appeal, even though Columbus and Mr. Frederick experienced mixed success. Having regard to the totality of the circumstances, the Court finds that this is a case where the justice of the matter requires that each party ought to bear their own costs.

Case Name: Bank of Nova Scotia
v

Comptroller of Inland Revenue

**[SLUHCVAP2022/0007]
(Saint Lucia)**

Date: Friday, 24th May 2024

Coram for Delivery: The Hon. Mde. Margaret Price Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Gerard Farara, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Barrie Attzs and Mr. Thomas Theobalds

Respondent: Ms. Tia Austin

Issues: Civil appeal – Tax law – Income Tax Act Cap 15.02 – Statutory interpretation – Meaning of ‘income’ in relation to income tax – Whether the appellant was liable to pay withholding tax in respect of the Payments – Whether the Commissioners were correct in determining that ‘cost of sales’ in section 39 of the ITA included interest payments

Result/Order: IT IS HEREBY ORDERED THAT

1. The appellant’s appeal is dismissed, and the order made by the learned trial judge in subparagraph 2 of paragraph 91 of the learned trial judge’s judgment is affirmed.
2. The respondent’s appeal is allowed in part, and the orders made by the learned trial judge in subparagraphs 1, 3 and 4 of paragraph 91 of the learned trial judge’s judgment are set aside.
3. The respondent shall have: (1) 100 per cent its costs in respect of the appeal; and (2) 50 per cent of its costs in respect of the counternotice, to be paid by the appellant which costs are to be assessed if not agreed within 21 days of today’s date.

Reasons:

- 1. In determining whether the Payments are subject to any withholding tax, it is necessary to ascertain whether they fell within any of the categories mentioned in paragraph 1(1) of Schedule 3 of the ITA. Section 2 states that ‘management charges’ means charges made for the provision of (a) management services; (b) personal services; (c) technical services. It cannot be disputed that some of the services provided by the BNS head office and the BNS Caribbean subsidiaries fall within the categories of management services and technical services. It is important to make the distinction between head offices expenses and ‘management charges’ – for the provision of management and technical services. It is no answer that the services provided are labelled ‘reimbursements’ because that is exactly what ‘management charges’ are. They are reimbursements for the management and technical services provided by the BNS head office and the BNS Caribbean subsidiaries to BNS Saint Lucia. BNS has not provided any evidence to contradict the self-evident nature of those services as technical or management services. Consequently, the Payments made in respect of those services were properly subject to withholding tax under paragraph 1(1)(b) of Schedule 3 of the ITA.**

Section 2 of the Income Tax Act Cap 15.02 of the Revised Laws of Saint Lucia applied; Paragraph 1(1) of Schedule 3 of the Income Tax Act Cap 15.02 of the Revised Laws of Saint Lucia applied; The Appeal Commissioners v The Bank of Nova Scotia [2013] UKPC 19 considered; Bank of Nova Scotia v The Appeal Commissioners GDAHCVAP2011/012 (delivered 19th September 2011, unreported) considered.

- 2. Prior to 2006, withholding tax was payable only by ‘[e]very person who makes payments to a non-resident’ but this was expanded in 2006 to include a branch of a non-resident company which makes payments to its head office or to some other branch or associate outside Saint Lucia. There cannot be any clearer intention of Parliament in making the 2006 amendment to the ITA now reflected in section 76(1). Also, section 39(1)(b) expressly contemplates the**

application of paragraph 1(1)(a) and 1(1)(b) of Schedule 3 relating to expenditures made by a branch of a non-resident company to its head office or to some other branch outside Saint Lucia of such a company. If Schedule 3 did not apply in such circumstances, section 39(1)(b) would be completely unnecessary.

Section 76(1) of the Income Tax Act Cap 15.02 of the Revised Laws of Saint Lucia applied.

3. The Court has the power to correct obvious drafting errors and in appropriate cases, in discharging its interpretative function, can add words, or omit words or substitute words in a statute. In this case, there is a plain drafting mistake in not adding the words 'or branch' after the word 'person' as it appears in paragraph 1(1) of Schedule 3. The Court is satisfied that: (1) the intended purpose is to ensure that Schedule 3 applies in the circumstances outlined in section 76(1)(b); (2) by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question by not including the words 'or branch' after the word 'person' in paragraph 1(1) of Schedule 3; and (3) the Parliament would have made that change in paragraph 1(1) of Schedule 3 had the error been noticed before the 2006 amendment was made to the ITA. To give effect to the intention of Parliament in extending the application of Schedule 3 to payments made under section 76(1)(b), it is necessary to add the words 'or branch' after the word 'person' where it appears in paragraph 1(1) of Schedule 3.

Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586 applied; Attorney General's Reference (Saint Lucia) SLUHCVP2012/0018 (delivered 24th May 2013, unreported) followed.

4. Section 7(5) of the ITA states that where income ascertained in accordance with Part 5, accrues directly or indirectly to a non-resident person, from any source, other than from the exercise of employment or the carrying on of business through a permanent establishment, such income shall not form part of the assessable income of such person and the gross amount of such income is liable to withholding tax in

accordance with sections 76 and 80. The important point here is that section 7(5) relates to income from any source that accrues directly or indirectly to a non-resident person which, subject to two exceptions, is in effect subject to withholding tax. Section 8(1) relating to the scope to tax is made expressly subject to section 7(5). It is section 7(5) that makes clear that such income is liable to withholding tax in accordance with section 76. Since there is no territorial limitation on the word 'source' in section 7(5) the learned trial judge was correct to find that to attract withholding tax the services need not have been performed in Saint Lucia.

Section 7(5) of the Income Tax Act Cap 15.02 of the Revised Laws of Saint Lucia applied.

5. The effect of section 39(1)(b)(ii) is to remove the 'cost of sales' from the amount by which the taxpayer can reduce its assessable income for the purposes of determining the withholding tax that is payable on management charges. In the modern day of commerce with complex financial and banking products, there is no good reason in principle to limit the word 'sale' only to goods. It cannot seriously be doubted that services are traded on the marketplace and have been for decades. Cost of sales in the banking sector reflect the cost related to the services that are provided by banks. Once it is accepted that costs of sales are applicable to the banking and financial sector, it follows that interest expense is a cost of BNS in providing the banking services. The Commissioners were therefore correct in their assessment and the learned trial judge erred in rejecting their conclusion and in adopting a different approach.

Section 39(1)(b)(ii) of the Income Tax Act Cap 15.02 of the Revised Laws of Saint Lucia applied; *Bank of New South Wales v The Commonwealth* (1948) CLR 1 distinguished.

APPLICATIONS & APPEALS

Case Name:

**Elmo Conner
v
Anyelina Mejia Villa**

**[BVIHCVAP2022/0014]
(Territory of the Virgin Islands)**

Date:

Tuesday, 21st May 2024

Coram:

**The Hon. Mr. Mario Michel, Chief Justice [Ag.]
The Hon. Mr. Robert Levy, Justice of Appeal [Ag.]
The Hon. Mr. Dexter Theodore, Justice of Appeal [Ag.]**

Appearances:

Respondent/Appellant: Mr. Daniel Fligelstone Davies

Applicant/Respondent: Ms. Ruthilia Maximea

Issues:

Application to strike out notice of appeal- Oral application for adjournment

Type of Order:

Adjournment

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

- 1. The hearing of the application to strike out the notice of appeal is adjourned to the next sitting of the Court of Appeal for the Territory of the Virgin Islands scheduled for the week commencing 28th October 2024.**
- 2. The appellant shall pay to the respondent forthwith costs in the amount of USD\$1200.00 by 12 noon on Friday, 24th May 2024 failing which the appeal shall stand dismissed.**

3. If the appellant shall have paid the costs as directed, the appellant shall file an affidavit in response and written submissions in response to the respondent's application on or before 4th June 2024 failing which the appeal shall stand dismissed.

Reason:

The Court noted that counsel for the respondent/appellant, was not fully retained as counsel for the appellant/respondent. Counsel indicated that he was not in a position to proceed with the hearing of the application to strike out the appeal as he was not seized with all of the documents that had been filed, did not have access to the [E-litigation] Portal and thus requested more time in order to be fully retained and to prepare himself to respond to the application.

The Court noted that submissions were filed on behalf of the respondent/applicant on the 6th May 2024, unbeknownst to counsel for the respondent/appellant.

The Court also noted that the appellant/respondent was in possession of the documents that were relevant to the application to strike out the notice of appeal but had not made an application, filed an affidavit nor submitted a letter explaining why he had not responded or bothered to deal with the application. Instead, he sought to instruct counsel at the very latest opportunity to ask for an adjournment of the hearing. The Court noted that the appellant would be prepared to pay costs in the sum of USD\$1200.00 as a result and that the said costs should be paid forthwith.

The Court was therefore of the view that in granting the request for an adjournment of the hearing of the application, a condition should be imposed that the appeal would be struck out if costs were not paid in accordance with the order of the court. The Court also gave directions for the filing of submissions and affidavit in response once the order for costs was complied with.

Case Name:

[1.] Julian Svirsky
[2.] Denis Donin

v
Arman Oyekenov

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

Date: Tuesday, 21st May 2024

Coram: The Hon. Mr. Mario Michel, Chief Justice [Ag.]
The Hon. Mr. Robert Levy, Justice of Appeal [Ag.]
The Hon. Mr. Dexter Theodore, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Robert Nader with Mr. Ben Giblin

Respondent: Ms. Lisa Walmisley with Ms. Sara Malik and Tim Wright

Issues: Application for extension of time to file written submissions - Interlocutory appeal - Disclosure obligation - Exercise of judicial discretion to grant unless order - Appeal against unless order granting the respondent judgment on his claim on a failure of the appellants to comply with a disclosure obligation - Whether the learned judge's exercise of his discretion to make the order fell outside the bounds of the generous ambit to be afforded to him and was clearly wrong - Whether the order granted by the learned judge and its effects contravene the overriding object of the Civil Procedure Rules- Whether there existed sufficient evidence of any breach made out on the evidence - Whether the order was appropriate given the procedural history and pending appeals - Whether the sanction provided was wholly excessive in light of more appropriate relief being available

Type of Order: N/A

Result / Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:

1. The application by the respondent for an extension of time to file submissions by 13th November 2023 is granted.
2. Judgment is reserved.

Reason:	N/A
Case Name:	Victorija Fetaimia v [1] Albert Court (Westminster) Management Company Limited [2] Dondore Incorporation (In liquidation) [BVIHCMAP2020/0018] (Territory of the Virgin Islands)
Date:	Wednesday, 22 nd May 2024
Coram:	The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal The Hon. Mde. Esco Henry, Justice of Appeal The Hon. Mr. Robert Levy, Justice of Appeal [Ag.]
Appearances:	
Appellant:	In person
Respondents:	Mr. Alexander Cook KC and Mr. Mark Wells for the first respondent Mr. David Harby for the second respondent
Issues:	Preliminary issue - Locus standi of appellant - Correspondence received from the trustee in bankruptcy of the bankruptcy estate of the appellant - Bankruptcy order made against the appellant in London Court on 15 th August 2023 - Whether following the bankruptcy order, as a matter of English law, the beneficial interest in the shares in the 2nd respondent formerly held by the appellant vested in the trustee in bankruptcy automatically - Whether the appellant has standing to pursue the claims after 15 th August 2023 - Bankruptcy order neither registered nor recognised in the Territory of the Virgin Islands - Court taking judicial notice of the Bankruptcy order
Type of Order:	Directions
Result / Order:	[Oral Delivery]

IT IS HEREBY ORDERED THAT:

- 1. The appellant shall file and serve written submissions on the preliminary issue on or before 10th June 2024.**
- 2. The 1st respondent shall file and serve written submissions in response on the preliminary issue on or before 24th June 2024.**
- 3. The appellant shall file and serve written submissions in reply, on the preliminary issue, if necessary, on or before 4th July 2024.**
- 4. The pending applications, including the application to debar the appellant are adjourned before the Full Court at the next sitting of the Court for the Territory of the Virgin Islands or a date to be fixed by the Chief Registrar, such date to follow the determination of the preliminary issue as to the appellant's locus standi to prosecute her appeal in view of the appointment of the trustee in bankruptcy of her estate by the UK High Court.**
- 5. The preliminary issue is to be determined on paper by the Full Court.**
- 6. In the event that the appellant obtains a stay of the trustee in bankruptcy order, the pending applications and the substantive appeal are to be relisted only on final determination of those proceedings.**
- 7. Costs of today's proceedings are reserved.**

Reason:

It was brought to the Court's attention that a Bankruptcy order was made against the appellant in London on 15th August 2023. This was brought to the attention of the Court by counsel for the trustee in bankruptcy who wrote to the Court by correspondence dated 21st May 2024. The Court took judicial notice of the bankruptcy order which to date, had neither been registered or recognised in the Territory of the Virgin Islands. The preliminary issue which arose on account of the existence of the bankruptcy order was whether following the bankruptcy order, as a matter of English law, the beneficial interest in the shares in the 2nd respondent formerly held by the appellant vested in

the trustee in bankruptcy automatically. The natural consequence of this was the issue of whether the appellant had standing to pursue the claims after 15th August 2023. The Court was of the view that written submissions were necessary in order to determine the effect of the bankruptcy order on further proceedings before the Court and made directions for the parties to file same. As the issue of the appellant's locus standi was in question, the Court determined that as it relates to the various applications before the Court and the substantive appeal, these would be adjourned pending the determination of this preliminary issue.

Counsel for the first respondent urged the Court to determine the standing application to debar the appellant. The Court however considered the overriding objective of the Civil Procedure Rules (Revised Edition) 2023 to deal with cases justly and was of the view that the interest of justice would be best served by saving time, costs and other resources of the court and the parties and ultimately awaiting the determination of the preliminary issue by the Court.

Case Name:

Greater Sail Limited

v

[1.] Nam Tai Property Inc.

[2.] Nam Tai Group Limited

**[3.] Nam Tai Investment
(Shenzen) Co Ltd**

[BVIHCMAP2022/0022]

(Territory of the Virgin Islands)

Date:

Thursday, 23rd May 2024

Coram:

The Hon. Mde. Esco Henry, Justice of Appeal

The Hon. Mr. Robert Levy, Justice of Appeal [Ag.]

The Hon. Mr. Dexter Theodore, Justice of Appeal [Ag.]

Appearances:

Applicant:

Mr. John Carrington KC, Ms. Reisa Singh and Mr. Andrew Emery

Respondent:

Mr. Ben Griffiths, Mr. Nicholas Burkill and Mr. Rondelle Keller

Issues: Application to amend notice of appeal - Parts 62.4(7) and (8) of the Civil Procedure Rules 2000 - Whether the proposed amendment relates to a matter that arose after the original notice of appeal was filed - Whether the application was made promptly - Whether the applicant has a real prospect of success on the proposed amendment, which arises from the finding that there was a real possibility of apparent bias from of the learned judge - Whether the applicant would suffer prejudice if the amendment is refused - Whether the respondent would have insufficient opportunity to respond to the amendment before the hearing of the appeal and therefore would suffer prejudice if the amendment is granted - Whether the overall administration of justice would be affected by the amendment

Type of Order: Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The notice of application dated 18th December 2023 to amend the notice of appeal is dismissed.
2. The applicant shall pay the respondent's costs of the application to be assessed within 21 days of this order if not agreed.

Reason: Before the Court was an application by Nam Tai Property Inc. ("the applicant") to amend its notice of appeal filed on 22nd June 2022. The appeal relates to the order of Jack J on 14th March 2022, leave to appeal having been granted by the Court on 31st May 2022. The hearing to which the order was related was the applicant's challenge to the jurisdiction of the courts in the British Virgin Islands to hear the claims being brought against it.

The notice of appeal in its unamended form alleged that the learned judge was blatantly wrong in that he erred in principle and in the exercise of his discretion by reason of considering irrelevant matters and failed to consider relevant ones. It also alleged that he misapplied the relevant legal principles. The new ground of appeal that the applicant sought to add alleged that "the decision of the learned judge cannot stand in light of the finding by the Court of Appeal in

BVIHCMAP2022/0022 that there is a real possibility of apparent bias of the learned judge in the proceedings below”. King’s Counsel for the applicant relied heavily on the Court of Appeal’s judgment in February 2022 by which it found apparent bias on the part of Jack J. That did not, to the mind of the Court, have the effect that everything that Jack J said or did in every application in this case could be undone on the basis of the applicant simply relying on that finding of the Court of Appeal. Nor was that the applicant’s intention in that recusal appeal because nowhere did that submission appear and at no stage do they seek to roll other extant appeals on other non-bias grounds into the recusal appeal.

In considering whether to grant permission to amend, King’s Counsel for the applicant reminded the Court of the decision in *Marinor Enterprises Limited et al v First Caribbean International Bank (Barbados) Ltd.* DOMHCVAP2013/0003 and reminded the Court that it is exercising a discretion that must be done in accordance with the overriding objective with the emphasis of dealing with cases justly. Counsel for the applicant stated that the Court must consider all parties and strike a fair balance.

Whilst the factors to be considered cannot be exhaustively listed, they are likely to include the history as regards the amendment, an explanation as to why the application is being made at this point in time, prejudice and whether the text of the amendment is satisfactory in terms of clarity and particularity.

Counsel for the respondent suggested that because the proposed ground is a new point that had not been raised ab initio the situation is akin to one where an extension of time is sought. Accordingly, he submitted by reference to *Rose v Rose* SLUHCVP 2003/0019, that the factors to be taken into account are the length of the delay, reasons for the delay, chances of the appeal succeeding and prejudice. Counsel for the applicant’s submissions also referred to *Rose v Rose*. There is clear overlap between the two sets of considerations and the Court considered both sets.

Starting with the history as regards amendment as urged by counsel for the applicant and the length of and reasons for the delay as urged by counsel for the respondent, the Court was of the very firm view that the delay was extraordinarily long and nowhere near

properly explained. The notice of application to amend was some 14 months after the Court of Appeal's recusal judgment. Even before the day of the forum hearing the applicant had formed the view that the judge was apparently biased yet despite that, it did not argue at the hearing itself that the judge should recuse himself from hearing the forum challenge. What is more, the applicant pursued its recusal challenge in the context of the contempt application that followed soon after the forum hearing. That recusal application failed in the first instance and was ultimately taken to the Court of Appeal. There was no reason that the Court could conceive of that the applicant should not have included the proposed ground of appeal in its original grounds of appeal in the forum challenge. After all, it had formed the view of the judge's apparent bias. That being the case it was incumbent upon the applicant to have raised the point by way of appeal and not wait to see whether its bias appeal in relation to a different application would succeed. Had the applicant done that then all points would have been resolved by this Court's judgment in the recusal appeal. Instead, the Court was now invited to have successive appeals. The short point was that the delay was toward the far end of the scale.

As for explanation of the delay, there was no proper or adequate explanation for it. The Court referred to paragraph 48 and following of this Court's judgment from February of 2024.

As to the next issue urged upon the Court by the application namely "an explanation for why the application is being made at this point in time", the Court did not believe that this added much to the time and explanation points already addressed. However, nothing was said properly to explain it. The Court noted the argument between counsel at the hearing as to who was responsible for the delay of the application coming on but the more fundamental issue was why the proposed amendment should not have been raised in the original notice of appeal or very soon thereafter.

Before turning to the next issue of prejudice, the Court briefly addressed the issue of whether the text of the amendment was satisfactory in terms of clarity and particularity. As previously mentioned, it reads "the decision of the learned judge cannot stand in light of the finding by the Court of Appeal in BVIHCMAP2022/0022 that there is a real possibility of

apparent bias of the learned judge in the proceedings below”. The Court did not find this to be an entirely clear or properly particularised ground. It begs numerous questions such as ‘what about the order cannot stand in light of the apparent bias as opposed to the other existing grounds of appeal and what was it that in the bias that affected the considerations in that application’.

It was suggested by counsel for the applicant that during the course of that hearing the judge made observations that the Court of Appeal found to be evidence of bias but the Court did not see them as exhibiting bias in allowing the issues to be determined in the forum challenge.

Turning to the issue of prejudice, the Court did not accept that just because prejudice caused could be compensated for in costs, it is not a ground for refusing permission. First, prejudice is but one consideration. Secondly, there is suggestion from as long ago as 2004 in England and Wales that the view that prejudice could be compensated in costs is outdated. In *Savings & Investment Bank Ltd. v Fincken* [2004] 1 WLR 667. Rix LJ held “the older view that amendments should be allowed as of right if they could be compensated in costs without injustice had made way for a view which paid greater regard to all the circumstances which are now summed up in the overriding objective.”

That case was referred to in counsel for the respondent’s submissions and counsel for the applicant did not say it was inapplicable. That is a decision of the English Court of Appeal and is strongly persuasive.

As to the chances of the appeal succeeding, the Court did not feel that the proposed new ground has strong or even reasonable prospects of success. First, if the applicant believed that it did, then it would surely have included the bias point in its notice of appeal as originally drafted. But second, there was nothing before the Court that suggested that the forum challenge was a strong one. Forum challenges are meant to take hours not days and appeals should be rare. It seemed to the Court that it is not enough to say that the forum decision will be reversed because the judge was biased. That is a non sequitor. The forum

order would only be reversed if the BVI was not the appropriate forum.

The Court then turned to deal with the judgment of this Court in February of this year. In that case, the Court suggested, in the context of an extension of time application, that in an exceptional case in which public confidence in the administration of justice is engaged the court has jurisdiction to extend time where absent the issue of bias, the court would otherwise not do so. The Court did not consider the present application to be such a case. The Court did accept that the officious bystander of the Virgin Islands scrutinising Jack J's conduct would consider that the administration of justice was dented or endangered where the issue of bias was not mentioned at all at the forum hearing or in the notice of appeal following it. That is to be contrasted with the truly exceptional case in relation to contempt because the recusal application was firmly raised in relation to contempt.

Finally, the Court noted that the overriding objective requires a 'cards on the table' approach and demands that all parties make their points in good time. To grant permission offends those principles. In those circumstances the Court refused the application to amend and ordered that the applicant pay the respondent's costs within 21 days to be assessed if not agreed.

Case Name:

Greater Sail Limited

v

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

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

Date:

Thursday, 23rd May 2024

Coram:

**The Hon. Mde. Esco Henry, Justice of Appeal
The Hon. Mr. Robert Levy, Justice of Appeal [Ag.]
The Hon. Mr. Dexter Theodore, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. John Carrington KC with Ms Reisa Singh and Mr. Andrew Emery

Respondent: Mr. Ben Griffiths with Mr. Nicholas Burkill and Mr. Rondelle Keller

Issues: Application for adjournment - Application for discharge of stay in light of adjournment

Type of Order: Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The appellant's oral application for an adjournment of the appeal is granted.
2. In relation to the respondent's application for costs thrown away on the adjournment, the respondent shall within 10 days of today's date i.e. on or before 3rd June 2024 file and serve its application for such costs pursuant to CPR 71.1(3) accompanied by an itemized bill, written submissions and list of authorities.
3. The respondent shall within 10 days of service of the said application and supporting documentation file and serve its written submissions and list of authorities in response.
4. With respect to the underlying reason for the adjournment, instructing solicitor Mr. Andrew Emery is directed to file and serve within 10 days of today's date i.e. on or before 3rd June 2024 an affidavit outlining the reasons for his or associated servants', agents' or legal practitioners' failure to communicate to lead counsel for the appellant Mr. Carrington KC and/or the appellant the fact of the service of the notice of hearing in respect of BVIHCMAP2023/0027 notifying the appellant of the fixture of the hearing for the sitting of the Court of Appeal in the Territory of the Virgin Islands commencing on the 20th of May 2024 and he shall at the same time file and serve written submissions or other representations as to why the Court should not impose wasted cost sanctions against him for the impugned conduct

to the extent that it amounts to improper, unreasonable or negligent act or omission within the meaning of CPR 64.8.

5. The parties shall within 10 days of today's date file and serve supplemental written submissions and list of authorities in respect of the appeal adjourned today.
6. The Court shall consider the appeal on papers and notify the parties when the decision is ready for delivery and reserves the right to convene the hearing in open court for oral submissions from the respective parties.
7. The Chief Registrar shall notify the interested parties including Mr. Andrew Emery of the date for the hearing of that matter.
8. The respondents' oral application for discharge of the stay of execution in relation to the costs orders made by Mangatal J which are the subject of the appeal BVIHCMAP2023/0027 is refused with liberty to the respondent to apply to the Court.

Reason:

The Court considered several submissions on the applicant's oral application to adjourn the hearing of the appeal as well as the respondent's oral application for the discharge of the stay in relation to costs. The Court also considered the conduct of legal practitioners or agents thereof and adjourned the application. The Court ordered, inter alia, that the hearing of the appeal be adjourned and that the appeal would be heard on papers. The Court further ordered that the application to discharge the stay would be refused with liberty to the respondent to apply to the Court for such discharge.

Case Name:

The Commissioner of Police

v

Marley Sebastien

[BVIMCRAP2022/0005]

(Territory of the Virgin Islands)

Date: Friday, 24th May 2024

Coram: The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal
The Hon. Mde. Esco Henry, Justice of Appeal
The Hon. Mr. Dexter Theodore, Justice of Appeal [Ag.]

Appearances:

Applicant/Respondent:	Mr. Valston Graham
Respondent/Appellant:	Mr. Sandip Patel KC with him, Ms. Kellee-Gai Smith

Issues: Application for an extension of time to file submissions

Type of Order: Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The application for an extension of time to comply with the order of the Court dated the 5th of February 2024 to file submissions in response by the 18th of March 2024 until the 3rd of May 2024 is granted.
2. The submissions filed on the 3rd of May 2024 are deemed to be properly filed.
3. There is no order as to costs.

Reason: The Court reviewed the application for an extension of time to file submissions in response and noted that the application was unopposed. The Court further noted that counsel for the respondent had no observations with regard to the terms of the draft order filed by the applicant. The application was subsequently granted.

Case Name: Brian Penn
v
The Commissioner of Police
[BVIMCRAP2018/0003]

(Territory of the Virgin Islands)

Date: Friday, 24th May 2024

Coram: The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal
The Hon. Mde. Esco Henry, Justice of Appeal
The Hon. Mr. Dexter Theodore, Justice of Appeal [Ag.]

Appearances:

Appellant:	Mr. Israel Bruce
Respondent:	Ms. Tiffany R. Scatliffe

Issues: Magisterial criminal appeal - Appeal against sentence and conviction - Appellant convicted of failure to make contributions contrary to regulation 10(1) of the Social Security (Contributions) Regulations - Appellant convicted of evasion of liability by deception contrary to section 218 (1)(b) of the Criminal Code - Fine imposed by the learned magistrate - Whether the sentence imposed was harsh and excessive in the circumstances - No case submission - Whether the learned magistrate erred by failing to uphold the appellant's no case submission at the close of the case for the Crown - Whether the magistrate erred by failing to find that there was no evidence that the appellant evaded liability by dishonestly deceiving the Social Security Board - Whether the mens rea element of the charge under section 218(1)(b) of the Criminal Code was made out by the Crown before the learned magistrate - Whether the appellant's failure to make good payment was in reality a violation of section 35 of the Social Security Act and not a violation of regulation 10(1) of the Social Security (Contributions) Regulations - Whether magistrate failed to give due weight to the evidence that the appellant had entered into agreements with the Social Security Board to make the outstanding payments

Type of Order: Directions

Result / Order: [Oral delivery]

IT IS HEREBY ORDERED THAT:

1. The parties are to file and serve written submissions on or before 7th June 2024 addressing the very narrow points raised during

oral submissions at the hearing of the appeal by Ms. Scatliffe including (i) the magistrate's failure to uphold the no case submission relative to the charge of failure to make payment; (ii) the narrow issue that the charge would have been defective because it would have been levied under a section which does not ascribe a penalty; and (iii) the authority of R v Dover Magistrates' Court, ex parte Webb [1999] All ER (D) 796.

2. Judgment is reserved.

Reason:

During the oral hearing of the appeal, certain issues arose which the Court determined that it would be best to have the parties address them in written submissions on these matters. The Court therefore gave directions for the filing and exchange of further written submissions, addressing the issues raised and reserved judgment in the matter.

Case Name:

**Antonio Stoutt
v
The Commissioner of Police
[BVIMCRAP2015/0006]
(Territory of the Virgin Islands)**

Date:

Friday, 24th May 2024

Coram:

**The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal
The Hon. Mde. Esco Henry, Justice of Appeal
The Hon. Mr. Dexter Theodore, Justice of Appeal [Ag.]**

Appearances:

**Appellant: Mr. Stephen Daniels
Respondent: Ms. Tiffany R. Scatliffe**

Issues:

Magisterial Criminal Appeal - Appeal against decision of the Senior Magistrate - Appellant convicted of Carrying of Firearm without a licence, contrary to section 11 (2) (a) of the Firearms Act, Chapter 126 of the Laws of the Virgin Islands - Appellant convicted of Unlawful Possession of Explosives, contrary to section 6 and section 26 of the Explosives Ordinance

Chapter 124 - Whether the decision of the learned Senior Magistrate was unreasonable and cannot be supported having regard to the evidence - Whether the decision of the learned Senior Magistrate was erroneous in point of law, to wit (a) the learned Senior Magistrate erred in law by applying the Common Law inference test for the joint possession of the unlicensed firearm and (b) the learned Senior Magistrate failed to properly direct herself on the law of the deeming provision as contained in section 12 of the Firearms Act Chapter 126

Type of Order: N/A

Result / Order: [Oral delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name: **The Commissioner of Police
v
Marley Sebastien
[BVIMCRAP2022/0005]
(Territory of the Virgin Islands)**

Date: Friday, 24th May 2024

Coram: The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal
The Hon. Mde. Esco Henry, Justice of Appeal
The Hon. Mr. Dexter Theodore, Justice of Appeal [Ag.]

Appearances:
Appellant: Mr. Sandip Patel KC with Ms. Kellee-Gai Smith

Respondent: Mr. Valston Graham

Issues: Magisterial appeal - Committal hearings - Want of prosecution - Jurisdiction of the magistrate to dismiss proceedings - Appeal against the decision of the learned magistrate to dismiss the charges against the respondent on complaints 0055A of 2022 and 0055B of 2022 for the charges of perjury and attempting to pervert the course of justice - Whether the learned magistrate had the jurisdiction to dismiss the

proceedings for want of prosecution - Whether the learned magistrate failed to take into account and properly weigh the fact that there was evidence in light of the fact that the prosecution was ready to proceed without the transcript

Type of Order:

Oral judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal is allowed.**
- 2. The decision of the learned magistrate to dismiss complaints 55A and 55B for want of prosecution is set aside.**
- 3. Committal proceedings are remitted to be completed before a different magistrate.**

Reason:

Before the Court was an appeal against the decision of the learned magistrate in which she dismissed the following 2 complaints against the respondent for want of prosecution:

- 1. Perverting the course of justice, contrary to section 93 of the Criminal Code 1997(Act 1 of 1997) of the Laws of the Virgin Islands; and**
- 2. Perjury, contrary to section 95 (1) of the Criminal Code.**

In dismissing the complaints the learned magistrate would have brought an end to proceedings which would have required her to conduct a preliminary inquiry in order to determine if there was sufficient evidence to commit the respondent to trial in the High Court.

During the course of the hearing of this appeal, the prosecution adjusted their submissions in support of the appeal contending that the learned magistrate erred in arriving at a decision on the following bases:

- 1. That the learned magistrate had no jurisdiction to dismiss the committal proceedings for want of prosecution.**
- 2. Even assuming that she did have the jurisdiction to so dismiss the complaints the learned magistrate failed to take into account and properly weigh:**

- a. the fact that there was evidence submitted by the prosecution in support of the paper committal; and
- b. the express indication from counsel for the prosecution that they were prepared to proceed with the committal proceedings on the basis of that evidence.

Counsel for the appellant submitted that it was clearly open to the learned magistrate to so proceed, a fact that was acknowledged by her in the transcript of proceedings. Counsel further submitted that even assuming that the learned magistrate had the jurisdiction to dismiss the complaints for want of prosecution she further erred in that she arrived at this determination without first affording the parties, most especially the prosecution an opportunity to make representations. This latter point was quite laudably conceded by counsel for the respondent.

After having considered the record of appeal and the submissions advanced by both sides both orally and in writing - and in light of the admirable concession by counsel for the respondent the Court determined that the appeal should be allowed. In arriving at this decision the Court applied the appropriate appellate restraint prescribed in numerous cases decided by this Court.

The Court determined that the decision of the learned magistrate was unreasonable and in all the circumstances should be set aside. Whether or not it could be said that there was a lack of diligence on the part of the prosecution in securing and submitting the transcript of proceedings into evidence. It was clearly open to the learned magistrate to determine the proceedings on the basis of the evidence before her and in circumstances where the prosecution had clearly expressed its willingness to do so. Moreover the failure of the learned magistrate to entertain submissions from the parties, most especially the prosecution which stood to be most adversely affected by her decision, warranted the interference of this Court.

Case Name:

Rayley Company Limited

v

**Kathryn Ma Wai Fong
[BVIHCMAP2022/0014]**

**[1]Wong Kie Yik
[2]Wong Kie Chie**

v

**Kathryn Ma Wai Fong
[BVIHCMAP2022/0015]**

**[1]Incredible Powers Limited
[2]Esben Finance Limited**

v

Kathryn Ma Wai Fong

**[BVIHCMAP2022/0016]
(Territory of the Virgin Islands)**

Date: Tuesday, 21st May 2024 - Friday, 24th May 2024

Coram: The Hon. Mde. Margaret Price Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Gerard Farara, Justice of Appeal [Ag.]

Appearances:

Appellants: Mr. Andrew Westwood KC with him Ms. Laure-Astrid Wigglesworth for Rayley Company Limited
Mr. David Alexander KC with him Ms. Aisling Dwyer and Mr. Scott Tollis for Wong Kie Yik and Wong Kie Chie
Mr. Stephen Atherton KC with him Mr. Oliver Clifton and Ms. Colleen Farrington for Incredible Powers Limited and Esben Finance Limited

Respondent: Mr. Orlando Fraser KC and Mr. Herman Boeddinghaus KC with them Ms. Eleanor Holland and Ms. Joni Khoo

Issues: Commercial appeal - Whether the learned trial judge failed to have proper regard to the submissions of the appellant - Whether the learned judge failed to discharge his judicial duties by adopting the submissions of the respondent - Apparent Bias - Natural justice - Whether the orders subject to appeal should be set aside on the grounds that there has been a breach of the duty to act fairly and/or a breach of the

requirements of fairness and/or procedural unfairness and/or a breach of natural justice - De facto directorship - Test for determining de facto directors - Whether the learned judge erred in concluding that Wong Kie Yik (“WKY”) and Wong Kie Chie (“WKC”) were de facto directors of Rayley Company Limited - Sections 120 and 121 of the BVI Business Companies Act (“BCA”) - Whether the learned judge erred in concluding that WKY and WKC were in breach of their alleged fiduciary duties under sections 120 and 121 of the BCA - Whether the learned judge erred in concluding that there was no intercompany debt between Rayley Company Limited and Esben Finance Limited as at the date the Credit Balance Sums were transferred - Breach of trust - Derivative claim - Whether the learned judge failed to satisfy himself that the derivative claim was being pursued for the bona fide benefit of Rayley Company Limited – Unjust enrichment - Whether the learned judge erred in concluding that Incredible Power and Esben Finance Limited were unjustly enriched at the expense of Rayley Company Limited - Indemnity for costs in a derivative claim – Section 184D of the BCA – Common law jurisdiction to order an indemnity in a derivative claim - Whether the learned judge failed to have regard to Liberian law on the issue of indemnity - Whether the learned judge failed to sufficiently limit the indemnity - Whether the learned judge ought to have disallowed costs of the substantive claim from the indemnity

Type of Order:

N/A

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved.