

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

Montserrat
Monday, 15th April 2024 – Wednesday, 17th April 2024

JUDGMENTS

Case Name:

Wycliffe Baird

V

[1] David Goldgar

[2] Paul B. Coburn

[3] Caribe (Realities) Canada Limited

[4] Immeubles Caribe Canada Ltee

[5] Betts Realty Limited

[SKBHCVAP2019/0038]

(Saint Kitts and Nevis)

Date:

Monday, 15th April 2024

Coram for
delivery:

The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Eddy Ventose, Justice of Appeal

Appearances:

Appellant:

Ms. Talibah Byron and Mr. Terence Byron led by Mr.
Christopher Hamel-Smith, SC

Respondents:

Ms. Midge Atria Morton and Ms. Maurisha Robinson

Issues:

Leave to appeal to His Majesty in Council – Section 99(1)(a) of the St. Christopher and Nevis Constitution Order 1983 (“Constitution”) – Appeals as of right - Whether the appeal arises from a final decision of the Court – Applicable test in determining whether an order is interlocutory or final – Special leave to appeal - Section 99(2)(a) of the Constitution - Whether question involved in intended appeal is one of great general or public importance or otherwise

Type of order:

Judgment

IT IS HEREBY ORDERED THAT:

- 1. The notice of motion to appeal to His Majesty in Council against the judgment of the Court of Appeal dated 22nd December 2023 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 £500.00 sterling for the due prosecution of the appeal, the payment of all costs as 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 costs of appeal. Such security and the payment of all such costs to consist of a deposit of the said amount at 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 preparation of 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 provisions of rules 18 to 20 of the Judicial Committee (Appellate Jurisdiction) 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 final leave to 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 receipt of the certificate of the Registrar that the security for costs ordered herein had been given within the time prescribed to the satisfaction of the Registrar and that the applicant/intended appellant has otherwise complied with 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 22nd December 2023 until the hearing and determination of the appeal to His Majesty in Council.**
- 3. The costs in this application shall be costs in the notice of motion to His Majesty in Council.**

Reason:

- 1. The application test has been the yardstick by which the courts of the Eastern Caribbean determine whether a decision or order is final or interlocutory. The decision in Othniel Sylvester v Satrohan Singh did not settle the question of whether the application test or the order test must be used in determining whether an order is final or interlocutory, however it revealed the preference for the application test over the order test. This position has been subsequently approved by this Court on numerous occasions and consistently applied in several decisions of this Court. The practice of using the application test to determine whether a decision or order is interlocutory or final was undoubtedly settled by 2003 in *Pentium (BVI) Limited et al v The Bank of Bermuda*.**

Inderjit Kaur Chhina v Muhammad Nazir Muhammad Ismail et al BVIHCMAP2020/0024 (delivered 23rd March 2023, unreported) followed; Othniel Sylvester v Satrohan Singh Saint Vincent and the Grenadines, Civil Appeal No. 10 of 1992 (delivered 18th September 1995, unreported) considered; Nam Tai Electronics, Inc v David Hague and Another Territory of the Virgin Islands Civil Appeal No 12 of 2003 (delivered 21st September 2004, unreported) followed; Pirate Cove Resorts Limited et al v Euphemia Stephens et al St. Vincent & The Grenadines Civil Appeal No. 11 of 2002 (delivered 5th March 2003, unreported) considered; Nigel Hamilton-Smith et al v Alexander M. Fundora ANUHC VAP2010/0031 (delivered 31st August 2010, unreported) followed; Cukurova Holding A.S v Sonera Holding B.V BVIHC VAP2012/0029 (delivered 5th December 2012, unreported) considered; TSJ Engineering Consulting Ltd. v Al-Rushaid Petroleum Investment Company et al Territory of the Virgin Islands High Court Civil Appeal No. 13 of 2010 (delivered 27th July 2010,

unreported) followed; *Oliver McDonna v Benjamin Wilson Richardson Anguilla High Court Civil Appeal No. 3 of 2005* (delivered 29th June 2007, unreported) followed; *Pentium (BVI) Limited et al v The Bank of Bermuda Territory of the Virgin Islands Civil Appeal No. 3 of 2003* (delivered 12th January 2003, unreported) followed.

2. The use of the application test in determining whether an order is final or interlocutory for the purposes of applications for leave to appeal to His Majesty in Council is not grounded in the Civil Procedure Rules 2000. The inclusion of the application test in the Civil Procedure Rules 2000 was done to codify the settled practice of this Court in relation to appeals to the Court of Appeal, not appeals to His Majesty in Council which is governed exclusively by section 99 of the Constitution. There is no question that in making the determination, even under the Constitution, decisions of this Court are the body of substantial case law that must be applied. These decisions make it clear that it is the application test that governs that determination, even under similar constitutional provisions relating to appeals to His Majesty in Council.

Part 62.1(3) of the Civil Procedure Rules 2000 considered; *Jacpot Ltd v Gambling Regulatory Authority (Mauritius)* [2018] UKPC 16, [2018] LLR 754 applied.

3. The accepted definition of the application test is that an order is final if it would have determined the matter in litigation for whichever side the decision was given. Applying this test, the order of the Court striking out the appeal for abuse of process and or want of prosecution is not a final order. Had the Court not dismissed and or struck out the appeal, the legal dispute between the parties would have not been determined. The appeal would have remained extant, and proceedings continued to enable a final determination of the legal dispute between the parties. Consequently, the applicant cannot ground his appeal to His Majesty in Council in section 99(1)(a) of the Constitution because the order of the Court of Appeal is not a 'final decision' which is a necessary condition for the grant of leave under that section.

4. The questions of: (1) whether it is correct to apply the same test to determine if to strike out an appeal for abuse of process as for determining whether to strike out an appeal for want of prosecution; (2) whether it is incorrect to apply the same test, and, if so, what is the correct test to apply to determine if to strike out an appeal for: (a) abuse process or (b) want of prosecution, and (3) whether the Court of Appeal was correct in calculating the period of delay from a period prior to any date or time specified in the Civil Procedure Rules for that step to be taken and prior to the date the court ordered the party to take that step, are questions of great general or public importance that should be settled by the Judicial Committee of the Privy Council. The applicant therefore satisfies the criteria under section 99(2)(a) of the Constitution for leave to appeal to His Majesty in Council.

Multibank FX International Corporation v Von Der Heydt Invest SA BVIHCMAP2022/0008 (delivered 7th July 2023, unreported) followed.

Case Name:

**[1] Magistrate Bertlyn Reynolds
[2] Financial Intelligence Authority**

v

**[1] Peter Hippolyte
[2] Michael Augustin
[3] Martinus Alexander**

**[SLUHCVAP2022/0019]
(Saint Lucia)**

Date:

Tuesday, 16th April 2024

**Coram for
delivery:**

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Margaret Price Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal**

Appearances:

Appellants:

Mr. George K. Charlemagne

Respondents:

Mr. Horace Fraser

Issues: Civil appeal – Judicial review – Section 29A of the Proceeds of Crime Act of Saint Lucia – Seizure – Detention order – Authority to seize and detain cash under the Proceeds of Crime Act of Saint Lucia - Whether the learned magistrate acted ultra vires in granting a continued detention order – Retention of seized property following discontinuance of criminal proceedings - Whether police were in lawful possession of seized cash following discontinuance of criminal proceedings and whether this was a relevant consideration of the learned magistrate

Type of order: Judgment

Result/Order IT IS HEREBY ORDERED THAT:

1. The appeal is allowed and the judgment of the learned judge is set aside in its entirety.
2. The appellants shall have their costs in this Court and in the court below, such costs to be assessed by a Judge or Master of the High Court unless agreed within 21 days.

Reason: 1. In conducting a judicial review of the decision of a statutory or public body, a judge's jurisdiction is very narrow and is limited to evaluating the decision solely within the framework of administrative law principles. This entails considering the grounds of illegality, irrationality or Wednesbury unreasonableness, and procedural impropriety. In this case, the learned judge treated judicial review as an original hearing of the matter and went about his own fact-finding mission while impugning the facts accepted by the learned magistrate. It was simply not open to him to arrive at his own set of facts or to act as an appellate body. In so doing he fell into error.

Hugh Wildman v The Judicial and Legal Services Commission Grenada Civil Appeal No. 9 of 2006 (delivered 1st March 2007, unreported) applied; Attorney General v Kenny D Anthony SLUHCVAP2009/031 (delivered 14th June 2010, unreported) applied; Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 applied.

2. Seizure in the traditional sense refers to the act of physically taking possession of property and removing it from the owner's control and that property is usually held by the authorities pending legal proceedings. However, authorities may also effect seizure by asserting control over property without physically removing it from the owner's possession. The affidavit evidence of WPC Jules was that she made a formal seizure of the cash. The learned magistrate was clearly satisfied upon hearing WPC Jules and reading her affidavit, that she had satisfied the necessary conditions of seizure to warrant the grant of a continued detention order. The cash was in the possession of the Royal Saint Lucia Police Force and they were well aware of the seizure. The respondents were also made aware of the seizure in due course. It was therefore open to the learned magistrate to find that WPC Jules did in fact seize the cash on 24th April 2019.

Cory & Sons v Burr [1881-85] All ER Rep 414 considered; United States v Jacobsen 466 U.S. 109 (1984) considered; Levar Devere Browne v Chief of Police SKBMCRAP2021/0003 (delivered 5th July 2023, unreported) applied.

3. Section 29A of the POCA permits financial investigators of the FIA to seize and detain cash. The powers which WPC Jules sought to exercise fell entirely within the scope of the POCA. It was not open to the learned judge to ignore the explicit power given to the financial investigators of the FIA by section 29A in the absence of any challenge to the validity or legality of the section. The learned judge accordingly committed an error of law by disregarding the explicit provisions of the POCA and relying on the provisions of the MLPA to ascertain the extent of the powers of the FIA. Additionally, section 29A gives authority to seize and detain cash to both police officers of the rank of corporal or above, or a financial investigator of the FIA thus bestowing the power on two distinct categories of persons. Although WPC Jules is a police officer, at the time of the seizure she was serving in her capacity as an investigator of the FIA and acting on behalf of its Director as evidenced in her affidavit.

Section 29A of the Proceeds of Crime Act Cap. 3.04 of the Revised Laws of Saint Lucia applied.

4. Section 29A of the POCA requires that the investigating officer or police officer seizing cash have a reasonable ground for suspecting that it directly or indirectly represents any person's proceeds of criminal conduct or is intended by any person for use in criminal conduct. The POCA does not include any requirement that the reasonable grounds or reasonable suspicions be that of the seizing officer only. Based on the circumstances in which the cash was found, and the additional evidence of the original officers, there was enough evidence for WPC Jules to form her own reasonable suspicion that the cash formed the proceeds of criminal conduct and the learned judge erred in substituting his assessment for that of the magistrate and in finding otherwise. Having concluded that WPC Jules did in fact seize the cash on 24th April 2019 and that she had the authority to so seize, the learned magistrate, in granting the continued detention order on 26th April 2023, being the first occasion of seizure under the POCA, was not acting *ultra vires* the POCA in that she granted the detention order within 72 hours of the seizure of the cash, as is required by section 29A. She made no error of law and her decision was not so unreasonable or irrational that it ought to have been quashed on a judicial review.

Section 29A of the Proceeds of Crime Act Cap. 3.04 of the Revised Laws of Saint Lucia applied; Labour Tribunal et al v St. Lucia Electricity Services Limited SLUHCVP2019/0002 (delivered 8th April 2020, unreported) applied.

5. Although the Police and Criminal Evidence Act 1984 ("PACE") is no longer applicable in the state of Saint Lucia, the provisions of PACE are, in large part, codifications of the common law of England which has and continues to form part of the laws of Saint Lucia. The learned magistrate's reliance on cases applying PACE does not imply a direct application of PACE to the present case but instead indicates a consideration of principles such as 'necessity' and 'reasonableness' which are grounded in common law as well as in good police practices which balance the rights of the

individual against the welfare of the public. In all the circumstances, it was open to the learned magistrate to arrive at a finding that the police were in lawful possession of the cash during the period 1st January 2019 to 23rd April 2019. The learned magistrate relied on relevant and appropriate cases and her conclusion was justified in light of those authorities and the investigations of the police which she accepted to have been necessary and proportionate. Once the learned magistrate determined that a seizure under section 29A of the POCA did in fact take place on 24th April 2019, it was open to her to consider whether the period of retention prior to the seizure tainted that seizure with unlawfulness. If she found (which she did not) the seizure to be unlawful, this would have influenced the considerations to which she would have had regard in determining whether to grant the continued detention order. This was a reasonable consideration in all the circumstances and did not constitute an excess of jurisdiction such that the learned judge should have interfered.

Ghani v Jones [1970] 1 QB 693 considered; R (on the application of Iqbal) v South Bedfordshire Magistrates Court [2011] EWHC 705 (Admin) considered; Earl Hunte v The Queen SLUHCRA2006/012 (delivered 19th January 2011, unreported) applied.

Case Name:

Lester Jonas

v

Jumby Bay Island Company

**[ANUHLTAP2019/0002]
(Antigua and Barbuda)**

Date:

Wednesday, 17th April 2024

**Coram for
delivery:**

**The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal**

Appearances:

Appellant:

Mr. Kendrickson Kentish

Respondent: Ms. Nelleen Murdoch

Issues: Civil Appeal – Appeal against decision of Antigua and Barbuda Industrial Court – Employment Law – Dismissal by reason of redundancy – Challenge to compensatory award – Whether the Industrial Court erred in declining to award compensation for manner of dismissal, future loss of earnings, overtime/premium pay and public holiday pay – C6, C7, C14, C15, C26, C27 of the Antigua and Barbuda Labour Code Cap. 27 – Whether the Industrial Court erred in failing to award the appellant compensation for unpaid allowances on account of the restructuring of his salary

Type of order: Judgment

Result/Order IT IS HEREBY ORDERED THAT:

1. The appeal is allowed in relation to the claims for overtime/premium and holiday pay and would award the appellant the sum of \$5,000.00 in relation to each head. I would dismiss the claims for loss by reason of manner of dismissal, loss of future earnings and unpaid allowances.
2. There will be no order as to costs.

Reason:

1. The appellant, being an employee within the meaning of the Antigua and Barbuda Labour Code, was entitled to premium pay at the prescribed statutory rate for hours worked in excess of the 40-hour work week. There was no evidence before the Industrial Court that the appellant was remunerated at a higher salary level to compensate for him having to work overtime and on holidays. In addition, the Industrial Court's conclusion that 'if payment for overtime and off days was intended for the employees and other managers this benefit would have been negotiated and included in the contract or memorandum of agreement' fails completely to address the provisions of the Labour Code prescribing mandatory minimum standards in relation to premium pay for employees. The effect of these provisions is that where the contract of employment expressly derogates from these minimum standards or is silent in relation to premium pay, those terms are null and void to that extent and the

provisions of the Labour Code apply. However, in the absence of some evidential basis that provides at least some rough estimate of the number of overtime hours worked by the appellant, only a nominal sum should be awarded under this head, set at \$5000.00.

Sections C6, C7, C26 and C27 of the Antigua and Barbuda Labour Code Cap. 27 of the Laws of Antigua and Barbuda applied.

2. The Industrial Court was wrong not to have considered the provisions of Division C of the Labour Code in relation to holiday pay as (1) the statement in the respondent's policy document contradicts the respondent's contention that the respondent had a policy of not paying holiday pay to managers and (2) there is no evidence of any negotiated alternative means of compensation for the appellant in relation to holiday pay, which does not run afoul of the minimum statutory standards. Division C15 of the Labour Code therefore applied, and the appellant is entitled to compensation for holiday pay. The appellant having not furnished any evidence to establish the number of holidays on which he worked, an award under this head can only be for a nominal sum, set at \$5000.00.

Sections C6, C7, C26 and C27 of the Antigua and Barbuda Labour Code Cap. 27 of the Laws of Antigua and Barbuda applied.

3. To succeed on a claim for loss by reason of manner of dismissal there is an evidential burden on the employee to adduce evidence of the likelihood or risk of financial loss to the employee as a result of the manner or circumstances of their dismissal, or that the manner or circumstances of the dismissal made the employee less acceptable to potential employers or exceptionally liable to selection for dismissal. The evidence before the Industrial Court falls well short of establishing a causal link between the manner or circumstances of the appellant's dismissal and his failure to secure employment. There was no evidence before the Industrial Court that any of the employers

to whom he reached out were even made aware of the circumstances of his dismissal, which would provide some basis for drawing an inference that that was the reason for them not engaging him. Resultantly, the appellant has failed to discharge this evidential burden and the Industrial Court did not err in refusing to make an award under this head.

Antigua Village Condo Corporation v Jennifer Watt Civil Appeal No. 6 of 1992 (delivered 7th February 1994, unreported) followed; **Antigua and Barbuda Transport Board v Anderson Carty** ANUHLTAP2020/0005 (delivered 27th July 2023, unreported) followed; **Norton Tool Co. v Tewson** [1973] 1 All ER 183 applied; **Lewis v Courts (Antigua and Barbuda) Ltd.** Reference No. 13 of 1997 applied.

4. An appellate court should accord weight to the findings of facts made by the Industrial Court mindful of the advantage they enjoyed over the appellate court, having seen and heard the witnesses. The Industrial Court having accepted (1) the evidence of the respondent's witnesses relating to the circumstance surrounding the re-structuring of the appellant's salary, (2) that the appellant did not sign the formal contract containing these terms under duress and (3) that the restructuring did not operate to the appellant's disadvantage as his net take-home pay was higher since his statutory deductions were only applied to his base pay, there is no basis for disturbing any of the findings of fact made by the Court. The decision of the Industrial Court not to make an award for unpaid allowances is therefore upheld.

APPLICATIONS AND APPEALS

Case Name:

Brian Bailey

v

The Chief Immigration Officer

**[MNIMCRAP2022/0001]
(Montserrat)**

Date: Monday, 15th April 2024

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Eddy Ventose, Justice of Appeal

Appearances:

Appellant: Dr. David Dorsett

Respondent: Mr. Oris Sullivan, Director of Public Prosecutions

Issues: Magisterial Appeal - Prohibited Immigrant - Enumeration of prohibited immigrants - Section 9(d) of the Immigration Act - Whether the Chief Magistrate erred in affirming the decision of the Chief Immigration Officer deeming the appellant a prohibited immigrant within the meaning of section 9(d) of the Act - Fundamental rights and freedoms of the individual - Constitutional right to protection of family life - Section 2(c) of the Constitution - Whether the Chief Magistrate erred in deciding that the issue that the appellant sought to raise on appeal that there was a breach of his constitutional right to protection of family life, was one that was premature, frivolous and vexatious, and there was therefore no merit in referring the issue to the High Court for determination

Type of Order: Oral Judgment

Result/Order: IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.
2. The appellant is a prohibited immigrant and accordingly the Court issues a warrant for the removal of the said prohibited immigrant from the Territory of Montserrat.
3. The execution of the said warrant shall be stayed until Wednesday 17th April 2024, at 4 pm.
4. There is no order as to costs.

Reason: This is an appeal brought by the appellant pursuant to section 41(3) of the Immigration Act of Montserrat ("the Act"). The short facts are as follows. The appellant, who is not a national of Montserrat, was convicted of various

criminal offences in 2020, and sentenced to a term of imprisonment of 4 years and 6 months.

On 18th October 2021, the Chief Immigration Officer of Montserrat issued a letter in which he stated that the appellant was a prohibited immigrant pursuant to section 9(d) of the Act. Section 9(d) of the Act starts out under the rubric, “Enumeration of prohibited immigrants”. It further states that:

“the following persons not belonging to Montserrat are prohibited immigrants...

..

d) any person who not having received a free pardon has been in any country convicted of an offence for which a sentence of imprisonment has been passed and who for this reason appears to be an undesirable immigrant...”

The said letter also advised the appellant of his right to appeal that decision to the magistrate in accordance with the provisions of the Act. The appellant exercised his right of appeal and duly appealed pursuant to the Act, the determination that he was a prohibited immigrant. The appellant on the hearing of his appeal before the Chief Magistrate sought and did raise the issue as to whether his right to family life was threatened or being breached, and he requested that the question be referred to the High Court for determination under section 20(3) of the Constitution of Montserrat.

The said section 20 of the Constitution, so far as relevant, reads as follows:

“20. (1) if any person alleges that any of the foregoing provisions of this Part has been, is being, or is likely to be contravened in relation to him or her, then, without prejudice to any other action with respect to the same matter which is lawfully available to him or her, that person may apply to the High Court for redress.”

Subsection 3, says as far as relevant that:

“if, in any proceedings in any court established in Montserrat other than the High Court or the Court of Appeal, any question arises as to the contravention of any of the foregoing provisions of this Part, the court in which the question has arisen shall refer the question to the High Court unless, in

its opinion, the raising of the question is merely frivolous or vexatious.”

The learned Chief Magistrate, having heard the appeal, reasoned that the matter before her was an appeal on the question of whether the appellant was a prohibited immigrant, and in so doing, she took into account those matters as set out under section 9 of the Act. She then held that the constitutional issue raised by the appellant was premature and accordingly, per section 20(3) of the Constitution, was frivolous and vexatious, and there was no need to refer the question, at that stage, to the High Court.

In the Court’s view, the Chief Magistrate was correct to treat with the matter in the way that she did. Counsel for the appellant accepted that the letter from the Chief Immigration Officer, stating that the appellant was a prohibited immigrant, did not in and of itself, raise any question of breach or threatened breach of the appellant’s rights under the Constitution. Accordingly, it was difficult for the Court to see how the appellant, on exercising his right of appeal against the Chief Immigration’s Officer’s determination under the Act, could automatically raise the issue of a breach or threatened breach on an appeal so founded.

Counsel for the appellant further accepted that the other issue he sought to raise, as to the criteria for the exercise of the Chief Immigration Officer’s discretion, as set out in paragraph 56(a) of the appellant’s written submissions, did not form a ground of appeal, and in the Court’s view, rightly did not press that issue further.

Accordingly, in the Court’s view, the appeal was misconceived and wholly without merit.

In relation to section 41(5) of the Act which requires that the Court, upon holding that the appellant is a prohibited immigrant, issue a warrant for his removal, counsel for the appellant made an oral application for a stay of execution of the warrant. In all the circumstances, the Court exercised its discretion to grant a stay of the execution of the warrant until 17th April 2024 at 4 pm.

On the issue of costs, the Court having heard the oral submissions of the parties on the issue, found that in all the circumstances, there should be no order as to costs.

Case Name:

**[1] Bertrand Burke
[2] Jennifer Burke trading as Jenny Tours**

v

Office of the Premier

**[MNIHCVAP2022/0001]
(Montserrat)**

Date:

Monday, 15th April 2024

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Margaret Price Findlay, Justice of Appeal
The Hon. Mr. Eddy Ventose, Justice of Appeal**

Appearances:

Appellants:

Dr. David Dorsett

Respondent:

Ms. Renee Morgan

Issues:

Civil Appeal – Costs – Appeal against costs order - Whether the learned judge erred in refusing to award costs of the proceedings on a discontinuance in the absence of unusual circumstances and on the footing that furthering the overriding objective was a ‘cogent’ reason for departure from the presumption of awarding costs of the proceedings upon a discontinuance - Whether the learned judge erred in awarding costs upon the discontinuance in the sum of \$1,250.00 on the basis that said amount is normally ordered on a strike out application - Whether the learned judge erred in failing to quantify costs on the discontinuance in accordance with CPR 37.7(1).

Type of Order:

Oral Judgment

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal is dismissed.**
- 2. The order of the trial judge dated 29th November 2021 ordering costs to the appellant in the sum of XCD\$1250.00 on the discontinuance is hereby affirmed.**
- 3. Costs in the appeal is awarded to the respondent in two-thirds of the amount ordered in the court below.**

Reason:

The learned trial judge in his costs ruling dated 29th November 2021 awarded costs on the discontinuance to the appellant in the sum of EC\$1250.00 treating it as analogous to the costs to the application to strike out.

The rules make it clear that costs lie within the discretion of the court under both CPR 37.1B and 64.6. There is no question that the award of costs under the CPR regime is an exercise of discretion by a judicial officer. This much was noted by the learned trial judge when he stated that in reviewing how to approach the exercise of the Court's discretion in awarding costs under CPR 64.6(5), the court must have regard to all the circumstances.

In this case, the trial judge considered the following: (a) whether it had been reasonable to pursue the claim which given the internal audit report, it is, the manner in which the claim had been pursued where discontinuance points to a mere mistake in nomenclature, and whether the mistake was reasonable; (b) the claim had not been de facto discontinued but had been instead re-issued, cured of a defect in language; and (c) in all the circumstances, the costs requested by the appellant was out of all proportion to the expenses incurred, by rewarding taking technical points likely to lead to an inordinate delay in the proceedings below.

The learned trial judge noted that having reviewed the principles, costs on discontinuance remained within his discretion and that in the unusual circumstances of this case, that he would not order the sum based on a mechanistic calculation based on the prescribed costs regime.

As with the exercise of any judicial discretion, this Court would be slow to interfere with the exercise with the learned trial judge's discretion on costs, unless it is satisfied that he erred in principle in the ways described in the leading case of *Dufour et al v Helenair Corporation Ltd. et al* (1996) 52 WIR 188, where Chief Justice Sir Vincent Floissac gave the following guidance:

“We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too

little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”

The appellant was not able to show the way in which the trial judge erred in the exercise of his discretion to award costs in the manner in which he did. The appellant submits that the learned trial judge should have considered the factors in CPR 65.2. However, these factors mirror in essence those considered by the trial judge in 64.6.

At various points in his judgment, the learned trial judge lamented the lack of assistance from counsel for the appellant in arriving on the amount of costs to be awarded. Counsel for the appellant conceded in the hearing before this Court that more could have been done to assist the learned trial judge. Having not assisted the learned trial judge and not being able to identify any error of principle made by the learned trial judge, the appellant cannot now complain about the decision on the costs award that the learned trial judge made.

In *Scherer and another v Counting Instruments Ltd* [1986] 2 All ER 529, the English Court of Appeal stated that:

“If there is any relevant ground available to the judge and he exercises, or appears to have exercised, his discretion judicially on it, this court cannot review that exercise of his discretion or interfere with his order because this court disagrees with the weight he appears to have attributed to any particular ground or because this court would have exercised the discretion in some other way but if, notwithstanding the availability of that ground, the judge has not, in the judgment of this court, exercised his discretion judicially, that is, if his decision is clearly wrong because the available ground could not in principle support the particular order he has made, it is in our judgment open to this court to correct it.”

The amount awarded by the learned trial judge was within the discretion open to him to award costs on the discontinuance and it cannot be said that his decision is

clearly or blatantly wrong. There is no basis on which this Court can therefore interfere.

Case Name:

Victorija Fetaimia

v

**[1] Albert Court (Westminster) Management
Company Limited**

[2] Dondore Incorporated (In Liquidation)

**[BVIHCMAP2020/0018]
(Territory of the Virgin Islands)**

Date:

Tuesday, 16th April 2024

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal**

Appearances:

Appellant//Respondent:

No appearance

Respondent/Applicant:

Mr. Stephen Moverley Smith, KC with him Mr. Jonathan Addo

Issues:

Application for a stay of execution - Application for security for costs, an unless order and costs of the application - Application for an extension of time to file written submissions - Adjournment

Type of Order:

Adjournment

Result/Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

- 1. The hearing of the applications is adjourned.**
- 2. The appeal and applications are fixed for hearing at the Court of Appeal sitting in the Territory of the Virgin Islands on Wednesday, 22nd May 2024 commencing at 9 am. The court will proceed to hear the matter whether or not the respondent/ appellant is acting in person or represented by counsel.**

3. There shall be no further adjournments of the hearing of the matter unless the Court finds that there are exceptional circumstances.

Reason:

The Court noted that there was no counsel on the record for the appellant, however the appellant's husband ("Mr Fetaimia") was present. Mr. Fetaimia informed the Court that the appellant was ill, and in any event, she was unavailable before 18th April 2024. In the circumstances, the Court was minded to grant one final adjournment and fix a date for the hearing of the applications and the substantive appeal.

Case Name:

David McKeand

v

**[1] H.E. The Governor of Montserrat
[2] The Attorney General of Montserrat
[3] The Chair, Planning and Development
Authority**

**[MNIHCVAP2022/0005]
(Montserrat)**

Date:

Tuesday, 16th April 2024

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Margaret Price Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal**

Appearances:

Applicant:

In person

Respondents:

Ms. Renee Morgan

Issues:

Application for conditional leave to appeal to His Majesty in Council - Section 3(2)(a) of The Montserrat (Appeals To Privy Council) Order 1967 - Whether the proposed appeal involves a question, that by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council - Whether leave to appeal to His Majesty in Council can be granted from the refusal of the Court of Appeal to grant leave to appeal

Type of Order: Oral Decision

Result/Order: IT IS HEREBY ORDERED THAT:

1. The application for conditional leave to appeal to His Majesty in Council is refused.
2. No order as to costs.

Reason: The Court noted that the order from which the applicant sought leave to appeal to His Majesty in Council was an order of the Court refusing leave to appeal. The Court found that section 3(2)(a) of The Montserrat (Appeals to Privy Council) Order 1967 applied in relation to applications for leave to appeal against decisions of the Court of Appeal where the Court had heard and determined the matter; it did not apply in circumstances where the Court had refused leave to appeal. Consequently, the Court was constrained to refuse the applicant's application for conditional leave to appeal to His Majesty in Council.

Case Name: Cameron Yearwood

v

Commissioner of Police
[MNIMCRAP2019/0002]
(Montserrat)

Date: Tuesday, 16th April 2024

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Margaret Price Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal

Appearances:

Appellant: In person

Respondent: Mr. Oris Sullivan, Director of Public Prosecutions

Issues: Magisterial Criminal Appeal - Driving without due care and attention - Section 54 of Road Traffic Act Cap 7:06 - Application to withdraw appeal

Type of Order: N/A

Result/Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:

1. With the leave of the Court, the appeal MNIMCRAP2019/0002 is hereby withdrawn at the request of the appellant.
2. Time is given to the appellant to pay the fine imposed by the learned magistrate until Tuesday 30th April 2024, in default 7 days imprisonment.

Reason: The appellant made an application to withdraw his appeal to which the Court had no objection. The Court also noted that the appellant had not paid the fine imposed by the learned magistrate. Accordingly, the Court decided to give the appellant until Tuesday 30th April 2024, to make the necessary payment.

Case Name: Sylvester Solomon

v

Julian Romeo

[MNIMCVAP2020/0013]
(Montserrat)

Date: Tuesday, 16th April 2024

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal

Appearances:

Appellant: No appearance

Respondent: In person

Issues: Magisterial Civil Appeal - Failure to prosecute appeal - Application to strike out appeal

Type of Order: Oral Decision

Result/Order: IT IS HEREBY ORDERED THAT:

The appeal is struck out, the appellant showing no interest in prosecuting the appeal.

Reason: The Court noted that an affidavit of non-service was filed on 15th April 2024 indicating that attempts to serve the appellant were unsuccessful and that other attempts to locate him were equally unsuccessful. The Court further noted that the matter had been on the Court's list for quite some time, and on each occasion when it would come up for hearing, the appellant would not appear to prosecute his appeal. The respondent consequently made an application to strike out the appeal. Taking into account that all efforts had been made to locate the appellant and that he had consistently failed to demonstrate any interest in prosecuting the appeal, the Court granted the respondent's application thereby striking out the appeal.

Case Name: Sylvester Solomon

v

Julian Romeo

[MNIMCVAP2020/0014]
(Montserrat)

Date: Tuesday, 16th April 2024

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal

Appearances:
Appellant: No appearance

Respondent: In person

Issues: Magisterial Civil Appeal - Failure to prosecute appeal - Application to strike out appeal

Type of Order: Oral Decision

Result/Order: IT IS HEREBY ORDERED THAT:

The appeal is struck out, the appellant showing no interest in prosecuting the appeal.

Reason: The Court noted that an affidavit of non-service was filed on 15th April 2024 indicating that attempts to serve the appellant were unsuccessful and that other attempts to locate him were equally unsuccessful. The Court further noted that the matter had been on the Court's list for quite some time, and on each occasion when it would come up for hearing, the appellant would not appear to prosecute his appeal. The respondent consequently made an application to strike out the appeal. Taking into account that all efforts had been made to locate the appellant and that he had consistently failed to demonstrate any interest in prosecuting the appeal, the Court granted the respondent's application thereby striking out the appeal.

Case Name: David Brandt

v

Owen Rooney

[MNIHCVAP2023/0008]
(Montserrat)

Date: Wednesday, 17th April 2024

Coram: The Hon. Mde. Margaret Price Findlay, Justice of Appeal
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal

Appearances:

Appellant: Dr. David Dorsett

Respondent: Ms. Nadia Chiesa

Issues: Civil appeal - Costs - Whether it was proper that there be a commingling of the decisions to grant permission to discontinue and order that there be no order as to costs upon the discontinuance - CPR 37.6 - Whether the learned judge exercised his discretion in accordance with

established legal principles and precedent when he ordered that there be no order as to costs

Type of Order: N/A

Result/Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name: **Dion Weekes**
v
[1] Providence Estate Limited
[2] Owen Rooney
[MNIHCVAP2023/0007]
(Montserrat)

Date: Wednesday, 17th April 2024

Coram: The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal

Appearances:

Appellant:	Mr. Sylvester Carrott and Dr. David Dorsett
Respondents:	Ms. Nadia Chiesa

Issues: Civil Appeal - Locus standi - Whether the judge erred by holding that Mr. Rooney had locus to sue by way of derivative actions - Abuse of process - Whether the application for determination of the preliminary issue amounted to an abuse of process - Stamp Duty - Whether the learned judge erred in law in admitting the documents relied upon by Mr Rooney as grounding his entitlement to PEL and giving leave to stamp those documents late when no stamp duty had been paid - Whether the failure of Mr Rooney and Mr Wood to pay stamp duty on the transfer of the initial shareholding in 1989 (which was now time barred) and subsequently from Mr Wood to Mr Rooney in 2017 precluded Mr Rooney from evidencing the documents adduced by him in support of his entitlement to PEL - Whether the learned Judge erred in law in holding that the actions of Mr. Rooney in issuing the various claims were ratified by PEL - Whether the judge erred by

**giving Mr Rooney leave to discontinue his own claims
with no order for costs**

Type of Order:

N/A

Result/Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved.