

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

TERRITORY OF THE VIRGIN ISLANDS
12th FEBRUARY – 16TH FEBRUARY 2024

JUDGMENTS

Case Name:

[1] Greater Sail Limited
[2] Li Jianping
[3] Mai Fan

V

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

[BVIHCMAP2022/0070]
[BVIHCMAP2022/0071]
[BVIHCMAP2022/0072]

(Territory of the Virgin Islands)

Date:

Monday, 12th February 2024

Coram for
delivery:

The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal

Appearances:

Appellants/Applicants: Mr. John Carrington, KC

Respondent: Mr. Rondelle Keller

Issues:

Application for extension of time for leave to appeal –
Court's general discretion to extend time to comply
with Civil Procedure Rules 2000 – Leave to appeal
applications of trial judge – Finding by the Court of

Appeal of apparent bias on the part of the learned judge in lower court proceedings – Whether decisions of the learned judge should be allowed to stand in light of findings of apparent bias – Whether notwithstanding the delay in seeking leave to appeal the findings of apparent bias warrant leave being granted

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. The Contempt Extension Application is granted, and that the Notice of Appeal should be issued within seven days of the handing down of this judgment.**
- 2. The SJ Leave and Injunction Extension Applications are dismissed.**
- 3. The parties are invited to exchange and file short written submissions within two weeks of the handing down of this judgment, with each party to have permission to exchange and file responsive submissions one week thereafter.**

Reasons:

Held: making the orders at paragraphs 69 and 70 of this judgment, that;

- 1. The Court has a general power to extend or shorten the time for compliance with any rule, practice direction, order or direction, even if any application for an extension is made after the time for compliance has passed. The grant of an extension of time is a discretionary power. The Court will consider in the exercise of its discretion: (1) the length of the delay, (2) the reasons for the delay, (3) the chances of the appeal succeeding if the extension is granted and (4) the degree of prejudice to the respondent if the application is granted. These considerations, however, are not cumulative and the applicant does not have to establish each of these four elements.**

Rule 26(1)(k) of the Civil Procedure Rules (Revised Edition) 2023 applied; John Cecil Rose v Anne Marie Uralis Rose SLUHCVP 2003/0019

(delivered 22nd September 2003, unreported) followed; Joseph Hyacinth v Allan Joseph GDAHCVAP2015/0025 (delivered 20th June 2016, unreported) followed.

2. In the Contempt Extension Application, the delay is around six months, in the SJ Leave Application it is around five months and in the Injunction Application it is about two months. The delays vary from inordinate (in the Contempt Extension and SJ Leave Applications) to serious, in the Injunction Application. The appellants do not offer any explanation for the delays or any reason why the appeals could not have been filed in the time afforded by the rules other than describing the delays as 'not unduly significant'. As for the chances of success of the proposed appeals, the common ground running through the applications is that the decisions cannot stand because there was a real possibility that the learned judge may have predetermined the underlying applications. It is noted however, that at no point during the applications did the appellants raise the issue of actual or apparent bias when they had every opportunity to do so. Failure to make any application arising out of the then recusal appeals lends itself to the determination that this proposed ground has no reasonable chance of success (the sole ground in the Injunction Application).
3. In relation to the SJ Leave Application, an extension of time, and leave to appeal should also be refused. The delay is substantial and unexplained. As to the proposed grounds of appeal (including the previously dismissed catch-all ground concerning recusal), the grounds fail as the judge correctly exercised his discretion to grant relief despite the appellants' assertions. Further, overturning an injunction is not something that can simply be compensable for in costs and neither is the reversal of an order granting summary judgment on an issue in proceedings.

4. A distinction should be drawn however with reference to the Contempt Extension Application and the other applications. That is because the finding of bias occurred in and about the committal application whereas the applicants barely mentioned it at all in the other applications and made no steps in those applications arising from the allegation of bias. Justice does not demand that those applications be re-opened and poured over on appeal in circumstances where the merits of any proposed appeal are such that the inevitable conclusion on appeal would be the same as the conclusion below. Justice however may demand that an extension of time be granted when public confidence in the administration of justice is engaged where an allegation of apparent bias has been made out. Even where the appeal lacks merit, the delay is not properly explained and the applicant has taken no steps to assist itself, the Court can still grant an extension, not because the applicant deserves it, but rather because the proper administration of justice demands that an appellate court exercises proper scrutiny over proceedings below and can demonstrate, with a view to preserving confidence in the administration of justice, that the Court's processes and procedures are fair and just.

Case Name:

[1] Julian Svirsky

[2] Denis Donin

v

Arman Oyekenov

Respondent

Tensigma Limited

First Defendant

Digital Asset Exchange Limited

Fourth Defendant

[BVIHCMAP2022/0064]

(Territory of the Virgin Islands)

Date: Monday, 12th February 2024

Coram: The Hon. Mr. Eddy Ventose, Justice of Appeal
The Hon. Mr. Gerard St. C Farara, Justice of Appeal [Ag.]
The Hon. Mde. Georgis Taylor-Alexander, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Christopher Bromilow holding papers for Mr. Nader

Respondent: Mr. Scott Tolliss holding papers for Mr. Tim Wright
Mr. Andre McKenzie holding a watching brief for Tensigma Limited.

Issues: Civil appeal – Civil Procedure Rules 2000 – Failure to provide sufficient notice under rule 11.11 of the Civil Procedure Rules 2000 – What effect, if any, did the lack of 7 days’ notice have on the October Hearing and consequently the Receivership Order – Procedural irregularity – Whether the procedural irregularity would result in an unfair trial or lead to an injustice – Unless order – Whether the unless order complied with the requirements of rule 26.4 of the Civil Procedure Rules 2000 – Failure to require the party in default to remedy the default by a specified date

Result/Order: IT IS HEREBY ORDERED THAT:

1. The appellants’ appeal against the Receivership Order and the Unless the Order is allowed.
2. The Receivership Order and the Unless Order are set aside.
3. The Receivership Application is remitted to be heard before a different judge of the Commercial Court.
4. The respondent pays all costs of the appellants on appeal and in the court below to be assessed by a judge of the Commercial Court if not agreed within 21 days.

Reasons:

- 1. A litigant who challenges a case management decision or order must reach a very high threshold in order to justify an appellate court's interference with such a decision or order. The test for interfering with a judge's case management decision or order is not whether the Court of Appeal would have exercised its discretion differently or made a different order or come to a different decision. The Court must be satisfied that the decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.**

Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 followed; Multibank FX International Corporation v Von Der Heydt Invest SA BVIHCMAP2022/0061 (delivered 5th July 2023, unreported) followed.

- 2. CPR 11.11 provides that a notice of an application must be served as soon as practicable after the day on which it is issued and at least 7 days before the court is to deal with the application. The rationale for 7 days' notice in the context of applications generally is: (1) to allow the respondent to the application adequate time in which to consider the applicant's case on both factual and legal issues; and (2) to enable the respondent to be properly prepared to be able to: (i) address all relevant issues of fact and of law; (ii) adduce all relevant evidence; and (iii) make full submissions on all legal and factual issues. In this case, it has been accepted that the appellants received less than 7 days' notice of the October Hearing as required by CPR 11.11 and as a result, it was a procedural irregularity. As such, the Court must determine whether the procedural irregularity would result in an unfair trial or lead to an injustice and that fairness involved fairness to both parties.**

Rule 11.11 of the Civil Procedure Rules 2000 applied; CEF Holdings Ltd v Munday [2012] EWHC 1524 (QB); [2012] FSR 35 applied.

- 3. It is clear that the breach of the requirement to give 7 days' notice of the October Hearing meant that the appellants were not able to prepare properly or at all for the legal and factual issues arising from the Receivership Application. At the October Hearing, the appellants were not able to adduce all relevant evidence in opposition to the Receivership Application and to make any submissions on any legal and factual issues. The counsel who appeared for the appellants at the October Hearing was not prepared to respond to the Receivership Application and made it clear to the learned judge that they did not wish to represent the appellants on a pro bono basis. Further, the learned judge did not allow the appellants to make submissions to the court, stating that since the appellants had counsel representing them at the October Hearing, the court would only hear from the legal practitioner, not the parties themselves. In considering the fairness to the respondent, the learned judge had options available to him rather than proceeding with the Receivership Application without hearing evidence and submissions from the appellants. It was also open to the learned judge to treat the October Hearing as an ex parte hearing with a return date at which the appellants would be entitled to be heard. The evidence in support of the Receivership Application did not require the learned judge to proceed as he did. Considering all these circumstances, the decision by the learned judge to proceed with the hearing of the Receivership Application on two (2) days' notice resulted in serious injustice and unfairness to the appellants. Consequently, the appellants' appeal on this ground succeeds.**

St Clair v King and another [2018] EWHC 682 considered; Labrousche v Frey (Practice Note)

[2012] EWCA Civ 881; [2012] 1 WLR 3160 considered; Dunbar Assets plc v Dorcas Holdings Ltd and others [2013] EWCA Civ 864 applied; Bilta (UK) Ltd (In Liquidation) v Tradition Financial Services Ltd [2021] EWCA Civ 221 applied.

- 4. Where a party has failed to comply with any court order which does not contain a sanction for non-compliance any other party may apply to the court for an “unless order” in accordance with CPR 26.4. The application may be made without notice but must be supported by evidence on affidavit which: (a) contains a certificate that the other party is in default; (b) identifies the rule or order which has not been complied with; and (c) states the nature of the breach. The court office must immediately refer any such application to a judge, master, or registrar. If an appointment is fixed to consider the application, the court must give 7 days’ notice of the date, time, and place of the appointment to all parties. An unless order, if granted by the court, must identify the breach and require the party in default to remedy the default by a specified date. Where the defaulting party fails to comply with the terms of any “unless order” made by the court that party’s statement of case shall be struck out.**

Rules 26.4 (2), (4) and (5) of the Civil Procedure Rules 2000 applied.

- 5. In this case, while the respondent’s Receivership Application did contain a certificate that the appellants were in default, and the learned judge identified the breach by the appellants in paragraph 21 of the Freezing Order, the appellants received less than 7 days’ notice of the October Hearing as required by CPR 26.4 and the Unless Order failed to comply with the requirement that the party in default to remedy the default by a specified date. When read, the Unless Order seemingly requires the appellants to perform an act that was impossible because the time specified in**

paragraph 21 of the Freezing Order had already lapsed. Even if one could read into paragraph 16 of the Receivership Order a requirement to comply with the 48-hour period as stated in paragraph 21 of the Freezing Order from receiving notice of the Receivership Order, this would not cure the failure to adhere to the requirement in CPR 26.4(5) for the “unless order” to require the party in default to remedy the default by a specified date. The reference in paragraph 16 of the Receivership Order to paragraph 21 of the Freezing Order would also not satisfy the requirement that any such specified date should be reasonably ascertainable if contained in any other document or order. The appellants therefore succeed on this ground of appeal.

Rules 26.4 (2), (4) and (5) of the Civil Procedure Rules 2000 applied; Khan and another v Burke [2023] EWHC 534 (Ch) at [20] applied.

6. In relation to the appellants’ concerns about the judge’s encouragement of arguments by the respondent’s counsel, the dismissal of information emailed to his clerk on the day of the October Hearing, that the October Hearing ought to have been ex parte, and statements surrounding the alleged worthless undertaking and fortification, the Court found these grounds lacked merit, as the appellants failed to demonstrate errors in the judge’s discretion.

Case Name:

[1] Lau Man Sang, James
[2] Lung Hung Cheuk
[3] Cheung Wing Sum, Albert
[4] Ngai Hin Kwan, Albert
[5] Yeung Yiu Chong
[6] Zhang Guo Wei

Defendants/Appellants

v

- [1] King Bun Limited**
- [2] Kency Ltd**
- [3] Kar Kwong Development Limited**
(trading as Kai Kwong Trading Company)
- [4] Khi Capital Limited**
- [5] Kentrue Company Limited**
- [6] Hui Pak Kong (Suing in the name and**
on behalf of themselves and all other
shareholders in Vanway International
Group Limited, except the First and
Second Defendants)

Claimants/Respondents

- [1] Chau Cheuk Wah, Angus**
- [2] Vanway International Group Limited**

Defendants/Respondents

[BVIHCMAP2022/0006]

Heard together with:

- [1] Lau Man Sang, James**
- [2] Lung Hung Cheuk**
- [3] Cheung Wing Sum, Albert**
- [4] Ngai Hin Kwan, Albert**
- [5] Yeung Yiu Chong**
- [6] Zhang Guo Wei**

Appellants

v

- [1] King Bun Limited**
- [2] Kency Ltd**

**[3] Kar Kwong Development Limited
(Trading as Kai Kwong Trading
Company)**

[4] Khi Capital Limited

[5] Kentrue Company Limited

[6] Hui Pak Kong

**(suing in the name and on behalf of
themselves and all other shareholders in
Vanway International Group Limited,
except the first and second defendants)**

[7] Chau Cheuk Wah, Angus

[8] Vanway International Group Limited

Respondents

[BVIHCMAP2022/0028]

(Territory of the Virgin Islands)

Date:	Thursday 15th February 2024
Coram for delivery:	The Hon. Mde. Vicki Ann Ellis, Justice of Appeal The Hon. Mr. Trevor Ward, Justice of Appeal The Hon. Mr. Gerard St. C Farara, Justice of Appeal [Ag.]
Appearances:	
Appellants:	Ms. Mottley Driver
Respondents:	Mr. Andre Sheckleford for the 1st - 6th respondents
Issues:	Interlocutory appeal – Appellate interference with trial judge’s case management orders - Appeal against case management orders made by judge after split trial - Prevention against double-recovery - Election of remedies – Inconsistent and alternative remedies – Whether the trial judge erred by failing to mandate that the respondents elect between an account of profits and damages/compensation - Time of election - Whether the trial judge erred in the exercise of his discretion by making the Consequential Order –

Disclosure - Whether the disclosure ordered by the trial judge in the Directions Order exceeded the information that the respondents were entitled to at that stage

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. The Consequential and Directions Appeals are dismissed.**
- 2. The appellants shall pay the respondents' costs on the appeal and in the court below, to be assessed by a judge of the Commercial Court, if not agreed, within 21 days of the date of this judgment.**

Reason:

- 1. In an appeal against a trial judge's case management decision, an appellate court would only interfere with the judge's exercise of his discretion if it can be shown that he exceeded the generous ambit within which reasonable disagreement was possible. An appellate court is therefore not at liberty to substitute its own exercise of discretion for the discretion already exercised by the judge merely because they would have exercised the original discretion in a different way.**

A.E.I. Rediffusion Music Ltd. v Phonographic Performance Ltd. [1999] 1 WLR 1507 applied; Roache v News Group Newspapers Ltd [1998] EMLR 161 applied; Charles Osenton and Company v Johnson [1942] AC 130 applied; Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 All ER 343 applied.

- 2. The doctrine of election of remedies compels a claimant to choose his/her remedy between two or more inconsistent remedies when two legal theories with contradictory remedies arise out of the same facts. The doctrine prevents double-recovery for a loss from a single wrong. For the doctrine to apply there must at least be two remedies; they must, in law, be inconsistent; and they must arise from a single wrong. The**

doctrine would not apply if the remedies are concurrent, cumulative and consistent.

Clough v London and North Western Rail Co. [1861-73] All ER Rep 646 applied.

3. Built into the doctrine of election, however, is an element of flexibility. It is not rigid and unbending. Like all procedural principles, they are not fixed and unyielding rules. They are a means to an end, not the end in themselves. They are no more than practical applications of a general and overriding principle governing the conduct of legal proceedings, namely that proceedings should be conducted in a manner which strikes a fair and reasonable balance between the interests of the parties and the wider public interest in the conduct of court proceedings.

Personal Representatives of Tang Man Sit v Capacious Investments Ltd. [1996] A.C. 514 applied.

4. As to the timing of election, this must occur at the time when the judgment is entered. Where however, litigation is bifurcated and liability is determined as a separate question, election may be deferred until quantum is determined. A critical factor in determining the appropriate time at which election should be made is fairness. However, considerations of fairness operate in favour of both parties to the litigation. Accordingly, in the absence of conduct which prejudices the defendant, a claimant should not be called upon to elect until the evidence has established the facts upon which the election can fairly be made. Thus, where a claimant must elect between inconsistent and alternative remedies, he ought not to be mandated to elect unless and until he is able to make an informed choice.

Minnesota Mining and Manufacturing Co v C Jeffries Pty Ltd [1993] FSR 189 applied; Island Records Ltd v Tring International plc [1995] 3 All ER 444 applied; Immer (No. 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW) (1993) 182 CLR 26 applied; Peyman v Lanjani [1985] Ch 457 considered.

5. Although Personal Representatives of Tang Man Sit v Capacious Investments Ltd. (and the several cases that follow its reasoning), has been generally referred to as holding that an account of profits and damages/compensation are inconsistent and alternative remedies, this incompatibility has largely been assumed. Ultimately, each case ought to be considered on its own facts. In some circumstances, the question of whether there has been a double-recovery is a pure question of fact, whereas at other times, it is a question of law.

Peter Birks Inconsistency between Compensation and Restitution (1996) 112 LQR 375 considered; Stephen Watterson Alternative and Cumulative Remedies: What is the Difference? (2003) 11 RLR 7 considered; Graham Virgo QC The Principles of the Law of Restitution 3rd Edition, 2016 considered; Ramzan v Brookwide Ltd [2011] EWCA Civ 1033 applied.

6. On the facts, the judge was not prepared to draw any definitive conclusions as to whether the proposed remedies were concurrent, cumulative and consistent, or inconsistent and alternative. This was due to the fact that at the date of the Consequential Order, he was unclear as to the extent to which the remedies pleaded by the respondents were inconsistent or cumulative. His cautious approach, which was reflected at paragraph 6 of the Consequential Order by which the appellants were protected from any attempt by the respondents to benefit from inconsistent remedies, was appropriate in the circumstances as the parties should have

the opportunity to address the judge on the relevant facts and the law and authorities regarding election. The judge therefore did not err and it was appropriate that he did not pre-judge these matters before hearing from the parties. Furthermore, the appellants have not demonstrated that they have suffered any actual prejudice as a result of the judge's Order. Taken as a whole, the judge was clearly aware of the relevant legal authorities and principles in making the Consequential Order and litigation was not at the point where the evidence had established the facts upon which an election could have fairly been made. The Court therefore found that there was no basis upon which to disturb the judge's findings or the terms of the Consequential Order.

Personal Representatives of Tang Man Sit v Capacious Investments Ltd. [1996] A.C. 514 applied.

7. The scope of discovery in relation to an act of election is different from the pre-trial discovery process. In an election, the discovery is more limited as it is merely to assist a claimant in making a choice between remedies. A defendant therefore ought to disclose such documents and information a court considers fair in the circumstances of the particular case, to enable the claimant to make an informed election. This disclosure is not intended to be an onerous and totally accurate exercise since there shouldn't be any undue delay in the process of making an election. Delay may, in fact, prejudice a defendant. The extent of disclosure to be ordered therefore will depend on the facts of each case. A court may thus take into account what information has already been disclosed, whether any information is publicly available or otherwise readily accessible to the claimant, and what information is required for the claimant to identify the most valuable remedy.

Personal Representatives of Tang Man Sit v Capacious Investments Ltd. [1996] A.C. 514 applied; Main-Line Corporate Holdings Ltd v United Overseas Bank Ltd and Another [2008] SGHC 55 considered; Island Records Ltd v Tring International plc [1995] 3 All ER 444 considered; Comic Enterprises Ltd v Twentieth Century Fox Film Corporation (No 3) [2014] IP & T 1008 applied.

- 8. On the facts, the judge's finding that the respondents should make an informed decision before election is one that is consistent with established legal principles and procedure. The learned judge did not err when he invited the parties to assist in defining the scope of the disclosure since the determination of relevant remedies would often turn upon facts within the peculiar knowledge of the parties themselves. The lack of practical assistance rendered by the appellants in defining the scope of the disclosure would have placed the judge in a difficult position but he would have been obliged to apply the relevant case law and legal principles to define the scope of disclosure.**
- 9. There was no error on the judge's part in ordering disclosure of documents relevant to the true and fair value of the Target Group. There was no suggestion that this would be a particularly arduous exercise since, as the learned judge found, a business which has kept well-maintained records and has complied with accounting procedures should have no difficulty in producing the evidence. Furthermore, the judge's wording of the Directions Order was clear and unambiguous. The Court found that there was no error in the judge's approach, and he therefore did not err in making the Directions Order.**

Case Name:

**Joseph Senhouse
v
The State
[DOMHCRAP2015/0009]
(Territory of the Virgin Islands)**

Date:

Friday 16th February 2024

**Coram for
delivery:**

**The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Eddy Ventose, Justice of Appeal
The Hon. Mde. V. Georgis Taylor-Alexander, Justice
of Appeal [Ag.]**

Appearances:

Appellant: Mrs. Dawn Yearwood-Stewart

Respondent: Ms. Marie Louise Pierre-Louis

Issues:

Criminal appeal – Appeal against conviction and sentence – Role of trial judge in summing up – Section 30 of the Sexual Offences Act of Dominica – Cross-examination of virtual complainant on previous sexual history – Unsworn statement – Whether trial judge is permitted to interrupt the appellant’s unsworn statement from the dock – Evidential value of unsworn statement - Whether interruptions by trial judge of defence counsel had effect of preventing counsel from fully and forcefully addressing the jury and/or prejudicing the jury’s mind against appellant – Whether learned judge erred in allowing the minor virtual complainant to testify on oath – Section 38 (1) of the Eastern Caribbean Supreme Court (Dominica) Act – Whether the proviso ought to be applied – Whether case is fit for retrial

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal is allowed.**
- 2. The convictions are quashed and the sentences set aside.**
- 3. The appellant is to be discharged.**

Reasons:

1. A trial judge must refrain from presenting an unbalanced summation to the jury and must not embellish a case for either the prosecution or the defence. In determining whether this was done, the court is enjoined to consider the trial judge's summation as a whole. In this case, the trial judge explicitly told the jury that they ought not to give much consideration to the delay in the investigative process, when this was indeed part of the appellant's case. This statement by the trial judge was improper and amounted to an irregularity, on the basis of which ground 1 of the appeal is allowed. This finding however is not sufficient on its own for a finding that the appellant's trial was unfair.

R v Gunning (1994) 98 Cr App Rep 303 applied; Abraham Nelson v R [1997] CRIM L.R. 234 CA applied; Mears (Byfield) v R (1993) 42 WIR 284 applied; Sheldon Bain v The Queen GDAHCRAP2016/0007 (delivered 1st November 2019, re-issued 8th November 2019, unreported) applied.

2. Pursuant to section 30 of the Sexual Offences Act, a trial judge may, upon an application made by or on behalf of the accused in the absence of the jury, allow cross examination of a complainant on previous sexual history if such evidence is necessary for the fair trial of the accused. A primary consideration by the court when determining such applications is the nature and relevance of the questions which are proposed to be put to the virtual complainant. The questions which were proposed to be put in this case did not go towards the credibility of the virtual complainant but were more relevant to the guilt or innocence of the appellant. The application was made in relation to the fact that the medical examination form which was referred to by WPC Bellot in giving her evidence was in respect of another individual who was prosecuted and convicted for sexual offences against the virtual complainant. There was a significant overlap between the dates of the offences for which the appellant was charged

and those for which the other man was convicted. This conviction was relevant to the defence of the appellant, which was a complete denial of any sexual contact with the virtual complainant and a claim that the accusations against him were fabricated. Ground 2 of the appeal is therefore allowed.

Section 30 of the Sexual Offences Act Act No. 1 of 1998 of the Laws of the Commonwealth of Dominica applied; R v Viola [1982] 3 ALL ER 73 applied; Director of Public Prosecutions v GK [2007] 2 IR 92 applied.

3. The right of an accused to give an unsworn statement from the dock is circumscribed by the relevancy of the statement's content. In order to ensure that an accused does not give a purely irrelevant unsworn statement, the trial judge has the authority to limit the scope of the unsworn statement from the dock which may in some cases only be achievable by interrupting the accused. In this case, the appellant was prevented from completing his unsworn statement, the content of which was relevant to his defence; and even what the trial judge allowed him to say was discredited by the judge in his summation to the jury. The trial judge ought to have allowed the appellant to make his unsworn statement and left entirely to the jury the question as to what weight is to be given to it and his failure to do so effectively prevented the appellant's defence, advanced in his unsworn statement, from being adequately put to the jury. In the circumstances, grounds 3 and 8 of the appeal are allowed.

R v Dunn and O'Sullivan (1924) 17 Cr App R 12 applied; DPP v Walker [1974] 1 WLR 1090 applied; Denison (Alvin) v R [2014] JMCA Crim 7 applied.

4. The essential question to be asked when considering judicial interventions in a criminal trial is whether the nature and extent of the interventions have resulted in the defendant's

trial becoming unfair. The question whether the interventions have denied the accused a fair trial depends on a qualitative evaluation of the effect the interruptions had on the fairness of the trial process. In this case, there is nothing which shows the learned judge's interruptions of counsel in her address to the jury prevented her from advancing the appellant's defence. Further, the judge's interruptions do not warrant a finding of bias so as to have caused the appellant's trial to be unfair. Ground 4 of the appeal is accordingly dismissed.

Richardson Fontaine v The State DOMHCRAP2015/0007 (delivered 13th May 2020, unreported) applied; Allie Mohammed v The State [1999] 2 AC. 111 applied.

5. A minor in respect of whom an offence is alleged to have been committed or any other minor of tender years who is called as a witness at a trial may give evidence on oath if, in the opinion of the court, he or she understands the nature of an oath. A belief in God and an understanding of the significance of the divine sanction provides a reasonable basis for concluding that the child understands the nature of an oath. In this case, the virtual complainant was able to distinguish between the truth and a lie and that there would be divine punishment if she told a lie. She was able to say that she was in court to tell the truth and that the truth means telling the court exactly what happened in the matter. The virtual complainant therefore understood the solemnity of the occasion and the duty to tell the truth. Ground 5 of the appeal is therefore dismissed.

Section 2 of the Children and Young Person's Act Act No. 12 of 1990 of the Laws of the Commonwealth of Dominica considered; Section 32 of the Sexual Offences Act Act No. 1 of 1998 of the Laws of the Commonwealth of Dominica applied; Fazal Mohammed v The State [1990] 2 AC 320 considered; Abraham Nelson v R [1997] CRIM L.R. 234 CA applied.

6. While a medical report is not required in law for the prosecution of a sexual offence, in this case there was no medical examination form tendered into evidence at the trial of the appellant, yet one of the witnesses gave evidence in relation to a medical form and a medical examination, neither of which though was in relation to the charges against the appellant, and the trial judge failed to address this in his summation to the jury. This cumulatively would have caused the trial of the appellant to be unfair. Ground 9 of the appeal is accordingly allowed.
7. The Court may, notwithstanding that it is of the opinion that the point raised in the appeal may be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred. The test is whether the appellate court is satisfied that any jury acting properly must inevitably have convicted the defendant if the flaws in the proceedings had not occurred. In this case, much of the grounds of appeal which have been allowed concerned the appellant's defence and its ventilation at trial. Based on the overall conduct of the trial by the learned judge, it cannot safely be said that there was no miscarriage of justice. Therefore, the proviso ought not be applied and the appellant's appeal should be allowed and his conviction and sentence quashed.

Section 38 (1) of the Eastern Caribbean Supreme Court (Dominica) Act, Cap 4:02 of the Laws of the Commonwealth of Dominica applied; *Giselle Stafford v The State* [1999] 1 WLR 2026 applied; *Mathis Alson Woodman v The State* DOMHCRA2016/0016 (delivered 4th July 2022, unreported) applied.

8. The test for determining whether the Court should order a retrial is whether it is in the interest of justice that such an order be made. In this case, justice will probably not be served to

either the appellant or the virtual complainant if they and their families have to relive the sordid events which occurred between January and August 2013. Among other considerations, a new trial would also mean that the virtual complainant would have to undergo a third trial of this nature in her young life. Furthermore, witnesses may be unavailable or unwilling to testify to matters which occurred as many as 11 years prior, while others may simply not recall relevant details. A new trial resulting in a verdict being given over 8 years later than would have been the case if the trial judge had not fallen into error also swings the pendulum away from the grant of a retrial. There is an 11-year gap between the commission of the offences and the date by which a new trial may be held. The appellant has also already spent over 8 years in prison between the date of conviction in 2015 and the date of this judgment. In all the circumstances, a new trial will not be ordered.

Reid v The Queen [1979] 2 All ER 904 applied.

APPLICATIONS AND APPEALS

Case Name:

[1] Lam Wo Ping
[2] Lam Kin Chung
v
[1] Chen Jian Yun
[2] Zhong Da Mining Holding Limited

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

Date:

Monday, 12th February 2024

Coram:

**The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal**

Appearances:

Appellants/Applicants: Mr. Alex Taylor, KC with him Mr. Simon Hall

Respondents: Mr. Terence Mowschenson KC

Issues: Application to adduce further evidence - Principles in Ladd v Marshall [1954] 3 All E.R. 745 - Whether the PRC Documents could have been obtained with reasonable diligence for use at the trial - Whether the PRC Documents is credible - Whether the admission of the PRC Documents would have had an important influence on the outcome of the appeal

Type of Order: Oral decision with written reasons to follow

Result / Order: IT IS HEREBY ORDERED THAT:

1. The application to adduce further evidence is denied.
2. Written reasons to be provided in the written judgment of the substantive appeal.

Case Name:

[1] Lam Wo Ping
[2] Lam Kin Chung
v
[1] Chen Jian Yun
[2] Zhong Da Mining Holding Limited

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

Date: Monday, 12th February 2024

Coram: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal

Appearances:

Appellants: Mr. Alex Taylor KC, with him Mr. Simon Hall

Respondents: Mr. Terence Mowschenson KC

Issues: Interlocutory appeal - Service of claim form out of the jurisdiction - Rule 7.3 of the Civil Procedure Rules 2000 ("CPR") - Whether the judge erred in finding that there was no good arguable case that the claim fell within the provisions of CPR 7.3(2)(a)(i) - Whether the judge erred in finding that there was no good arguable case that the claim fell within the provisions of CPR 7.3(7)(a) or (b) - Forum conveniens - Whether the judge erred in finding that the BVI was not the more appropriate forum for trial of the dispute - Application to strike out claim form - Whether the judge erred by striking out the claim against the respondent and the company

Type of Order: N/A

Result / Order: [Oral delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name: Sergey Taruta
v
JSC VTB Bank

[BVIHCMAP2021/0029]
[BVIHCMAP2021/0043]
(Territory of the Virgin Islands)

Date: Monday, 12th February 2024

Coram: The Hon. Mr. Eddy Ventose, Justice of Appeal
The Hon. Mr. Gerard St. C Farara, Justice of Appeal
[Ag.]

The Hon. Mde. Georgis Taylor-Alexander, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Adrian Francis with Mr. Scott Tolliss

Respondent: No appearance

Issues:

Commercial appeal - Appeal against Order recognising Russian judgment Civil Case No. 2-1929/2014 dated 28th February 2014 in the Territory of the Virgin Islands - Breach of natural justice in foreign proceedings - Whether a finding of breach of natural justice in foreign proceedings renders the foreign judgment unenforceable in the Territory of the Virgin Islands - Whether the learned judge erred in finding that the appeal process in the Russian proceedings remedied the breach of natural justice

Type of Order

N/A

Result / Order:

**IT IS HEREBY ORDERED THAT:
Judgment is reserved.**

Case Name:

**Darwin Blyden
v
[1] Benedicta Samuels
[2] Estelle Wheatley
[BVIHCVAP2023/0005]
(Territory of the Virgin Islands)**

Date:

Tuesday 13th February 2024

Coram:

**The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mde. V. Georgis Taylor-Alexander, Justice of Appeal [Ag.]**

The Hon. Mde. Cadie St. Rose-Albertini, Justice of Appeal [Ag.]

Appearances:

Applicant: Mr. Sydney Bennett KC instructed by Ricardo Madden

Issues:

Application to vary order of single judge - Whether the learned judge erred in determining that the application for leave to appeal was out of time - .Formalities for an application for leave to appeal to the court under Rule 62(2) and (3) of the CPR.

Type of Order

Oral Decision

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The Order of Ward JA made on 31st October 2023 refusing leave to appeal the Order of Master Cybelle Cenac-Dantes made on the 21st July 2023 is hereby revoked.
2. The Application for Leave to Appeal filed on 15th September 2023 erroneously failed to set out the date of the decision of the Master from which leave to appeal was sought.
3. Leave is granted for the Application for Leave to Appeal dated the 15th of September 2023 to be amended to reflect the decision of the Master dated 8th September 2023 from which leave to appeal is sought, and to reflect the rule of the Civil Procedure Rules under which such application is made.
4. The Amended Notice of Application is to be filed within seven days of today's date, the 13th February 2024, failing which the application for leave is dismissed.

Reason:

The single judge erred in determining that the application for leave was out of time. The application for leave erroneously failed to set out the date of the

decision of the Master from which leave was sought and the rule of the CPR under which the application was brought. Accordingly the Court revoked the learned judge's order and granted leave to amend the notice of application and gave directions that the amended notice of application be filed or is otherwise dismissed .

Case Name:

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

[2] Dondore Incorporated (In Liquidation)

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

Date:

Tuesday 13th February 2024

Coram:

**The Hon. Mde. Margaret Price-Findlay, Justice of
Appeal
The Hon. Mde. V. Georgis Taylor-Alexander, Justice
of Appeal [Ag.]
The Hon. Mde. Cadie St. Rose-Albertini, Justice of
Appeal [Ag.]**

Appearances:

Appellant/Respondent	No appearance
First Respondent/Applicant	Jonathan Addo, Harney, Westwood & Riegels for the First Respondent
Second Respondent	Caroline Oliver, Edmond Fung, Bedell Cristin BVI Partnership for the Second Respondent

Issues:

Application for a stay, compliance with outstanding costs orders and security for costs - Appellant/respondent produced to the court only medical certificate of her illness - Application adjourned upon reviewing the medical certificate

Type of Order

Adjournment

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

- 1. The application is adjourned to a date to be fixed by the Chief Registrar at the earliest possible convenience.**
- 2. The appellant/respondent is to retain counsel within two weeks of today's date (13th February 2024), so that she would be in a position to deal with the application on the date set for the hearing.**
- 3. If the appellant/respondent is unable to attend the hearing for reason of illness, she must file and serve any medical report/s with the Court, at least 5 days before the hearing so that counsel for the first respondent/applicant would have that information prior to the hearing of the application.**
- 4. There is no order as to costs in the circumstances.**

Reason:

The Court noted that the appellant/respondent submitted two medical reports via email; one dated 5th February 2024 and the other dated 12th February 2024, indicating that she is unwell and due to her condition, unable to appear for the hearing of the application.

In the circumstances, the Court was of the view that the matter ought to be adjourned so as to allow the appellant/ respondent to retain counsel and to allow the application to proceed on the next hearing .

Case Name:

Kelon Browne

V
Kay Barry
[BVIMCVAP2022/0001]
(Territory of the Virgin Islands)

Date: Tuesday 13th February 2024

Coram: The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mde. V. Georgis Taylor-Alexander, Justice of Appeal [Ag.]
The Hon. Mde. Cadie St. Rose-Albertini, Justice of Appeal [Ag.]

Appearances:

Appellant: Ms. Marie Lou-Creque

Respondent: In person

Issues: Civil Appeal - Child Maintenance - Failure to fulfill obligations in Child Maintenance application - Appeal against order for the payment of maintenance of a child - Whether the learned magistrate was erroneous in law by failing to take evidence of the respondent to justify the payment of maintenance - Whether the learned magistrate erred in failing to adequately consider the requirements under section 7(3)(b) of the Child Maintenance and Access Act 2017 - Whether the learned magistrate failed to make adequate enquiries for the basis of the application - Whether the learned magistrate erred in failing to note that the appellant's means had significantly and adversely been altered - Whether the decision of the learned magistrate is unreasonable in that she made no enquiries of the respondent's income or expenses - Whether the decision of the learned magistrate is unreasonable in that she made her determination without sworn examination of the respondent

Type of Order Oral Judgment

Result / Order: IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed and the decision of the learned magistrate that the appellant pay the sum of \$350.00 per month for the maintenance of the child and half medical, educational and daycare expenses is affirmed.
2. Costs to the respondent in the sum of \$1500.00 to be paid within 21 days of the date of this order, i.e. 13th February 2024.

Reason:

The Court read the notice of appeal filed on 7th July 2022 along with the amended notice of appeal filed on 8th June 2023, the affidavit of the respondent in response along with exhibits attached both filed on 23rd January 2024. The Court listened to the submissions of the appellant and the respondent and considered the Child Maintenance and Access Act 2017 section 9(1) (a) to (k) which states the factors the learned magistrate ought to have considered in arriving at her decision.

The Court was of the view that the learned magistrate properly considered the circumstances which she ought to have considered when arriving at a decision. The Court noted that the learned magistrate examined the appellant as to his means, that the appellant was cross-examined by the respondent as to his means and that the appellant also provided a report with an affidavit as to his means. The Court also noted that the learned magistrate, while not taking evidence under oath or affirmation from the respondent, had sufficient information from the respondent as to the monthly expenses of the child.

The learned magistrate, having considered the factors set out in section 9 of the Child Maintenance and Access act, the decision of the learned magistrate was an exercise of her discretion having heard all of the evidence and considering the documentation before her.

The Court, being aware of the principles surrounding the Court of Appeal's ability to overturn the exercise of the discretion of a lower court.i.e that the learned magistrate erred in principle either by failing to take into account or giving too little weight to relevant

factors or be influenced by irrelevant factors and considerations and that as a result of the error, the judge's decision exceeded the generous ambit within which reasonable disagreement is possible.

The Court found that the learned magistrate did not err in the exercise of her discretion in making the award which she did. The Court therefore dismissed the appeal, affirming the order of the learned magistrate and awarded costs to be paid to the respondent.

Case Name:

Chu Kong

v

[1] Ocean Sino Limited (In Liquidation)

[2] David Yen

[3] Chan Pui Size (Nichole)

[4] Roy Bailey

[5] John Greenwood

[6] Lau Wing Yan

[BVIHCMAP2021/0048]

(Territory of the Virgin Islands)

Date:

Wednesday, 14th February 2024

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Eddy Ventose, Justice of Appeal
The Hon. Mde. Cadie St. Rose-Albertini, Justice of Appeal [Ag.]**

Appearances:

Applicant:

Mr. John Carrington KC with him Ms. Reisa Singh

Respondents:

Mr. Stephen Moverly Smith KC with him Ms. Marcia McFarlane for the fourth and fifth respondents

Mr. Phillip Jones KC with him Ms. Rosalind Nicholson and Mr. Renell Benjamin for the 6th respondent

Issues:

Application for extension of time to file Motion for conditional leave to appeal to His Majesty in Council - The Virgin Islands (Appeals to Privy Council) Order 1967 (“the 1967 Order”) - Whether the Court of Appeal has the inherent jurisdiction to extend the time prescribed by Article 4 of the 1967 Order to apply for conditional leave to appeal to His Majesty in Council - Whether a genuine error by the applicant in calculation of time is an exceptional circumstance warranting the exercise of the Court’s inherent jurisdiction to extend time under Article 4 of the 1967 Order

Type of Order:

Oral Decision

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The application for an extension of time is dismissed.**
- 2. The applicant’s Conditional Leave Application, having been filed out of the time period set out in Article 4 of the 1967 Order, must also be dismissed.**
- 3. The applicant shall bear the costs of the respondents, such costs to be assessed if not agreed within 21 days of the date of this order.**

Reason:

The applicant applied on 7th February 2024 for an extension of time under Article 4 of The Virgin Islands (Appeals to Privy Council) Order 1967 (“the 1967 Order”) for the applicant to file his Notice of Motion of leave to appeal to His Majesty in Council (“the Conditional Leave Application”) from 24th July 2023 to 25th July 2023. The applicant also sought an order that the filing of the Conditional Leave Application on 25th July 2023 be deemed to be properly done.

Article 4 of the 1967 Order provides that:

“Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days of the date of the decision to be appealed from, and the applicant shall give all other parties concerned notice of his intended application.”

The judgment of this Court, for which the applicant seeks conditional leave, was given on 3rd July 2023, which meant that the Conditional Leave Application had to be filed no later than 24th July 2023. The Conditional Leave Application was filed on 25th July 2023. That the Conditional Leave Application was filed out of time is not disputed and underpins the applicant’s application filed on 2nd February 2024 for an extension of time to file the Conditional Leave Application. The applicant averred that he mistakenly calculated this time limit as meaning 21 clear days based on the genuine understanding that the applicant had 21 clear days to do so and that the applicant’s failure to comply with the time limit was not intentional but arose due to a mistake as to the law.

This may be so, but the Court found that none of these arguments avail the applicant. Article 4 of the 1967 Order is clear and means what it says. The judgment of this Court was delivered on 3rd July 2023. This means that the Conditional Leave Application should have been filed on or before 24th July 2023, that is, within 21 days of 3rd July 2023. The Conditional Leave Application was filed on 25th July 2023, one day later.

The applicant accepted this but prayed in aid the decision of the Caribbean Court of Justice in *Tasker v The United States of America* [2023] CCJ 14 (AJ) BB. The comments made by the CCJ to the effect that the court possesses an exceptional jurisdiction to extend the statutory time limits in those circumstances where strict compliance would operate to deprive a litigant of his right to a fair trial or limit his right to access the appeal process, are not applicable here. The exceptional circumstances to which the CCJ referred includes national disaster, serious illness, or inadequate notice of the decision to be appealed. Similar circumstances do not obtain here. In any event, the decision in *Tasker* can be distinguished on the

basis that it concerned the liberty of the subject, namely, his committal by a Magistrate to surrender to authorities of the United States of America to face charges of money laundering and conspiracy to launder money.

The issue here is markedly different. It concerns a Conditional Leave Application to appeal to the His Majesty in Council from a decision of this Court dated 3rd July 2023 whereby it dismissed an appeal from a decision of the High Court dated 24th November 2021 to remove the liquidators under section 187 of the Insolvency Act 2003. The decision in Tasker was an appeal from a committal decision of a Magistrate concerning extradition proceedings to the Court of Appeal of Barbados. The circumstances in this case are not analogous to the circumstances recognised by the CCJ in Tasker to invoke the exceptional jurisdiction of the Court which was invoked, not by the Court of Appeal of Barbados, but by the final court of Barbados, the Caribbean Court of Justice.

This Court has considered the issue of whether an application can be made to extend the time period found in Article 4 of the 1967 Order in which a conditional leave application may be filed in its decision in *Fairfield Sentry Limited (in liquidation) v Alfredo Migani et al* HCVAP 2011/041-052 (delivered 4th October 2012, unreported). In that decision, the applicant filed its conditional leave application 36 days outside the 21 days period permitted by Article 4 of the 1967 Order. The applicant in *Fairfield Sentry Limited*, like the applicant in the instant case, argues that this Court may extend the 21-day period given in Article 4 of the 1967 Order and in essence cure its delay, by invoking the Court's inherent jurisdiction. This Court made it plain that it remains the case that the inherent jurisdiction of the Court cannot be prayed in aid of flouting a clear provision, in this case, the time period set out in Article 4 of the 1967 Order.

The Court in *Fairfield Sentry Limited* stated as follows:

“[11]... We adopt this approach. Article 4 is clear. It lays down a time line of 21 days for the making of an application and gives no power to this Court to extend that time, and we do not consider that it would be

correct to invoke the inherent jurisdiction of this Court so as to arrogate to itself a power to extend the time as limited in Article 4, where neither in Article 4 nor in any other provision contained in the 1967 Order is such a power (save where specifically permitted) given, and thereby engage a procedure to arrive at a different outcome to that contemplated by Article 4. This power appears to be reserved to the JCPC under the 2009 Rules. This Court has no power to extend the time under Article 4 of the 1967 Order.”

The Court in *Fairfield Sentry Limited* stated that Article 4 of the 1967 Order is clear. The issue is one of interpretation of Article 4 of the 1967 Order. Where a provision is clear, there is no need to resort to the inherent jurisdiction to extend the time limits set out in that provision. The Court found that the applicant has not shown that the decision of this Court is demonstrably wrong to fall within the exceptions recognised in *Young v Bristol Aeroplane Company Limited* [1944] KB 718 to justify why this Court should depart from its previous decision in *Fairfield Sentry Limited*. We are not only bound by our decision in *Fairfield Sentry Limited*, but we repeat here that this Court has no power to extend the time limits under Article 4 of the 1967 Order.

Case Name:

[1] Lisa Smith, Lenice Smith and Rochelle Smith as Representatives of Michael Smith (Deceased)

[2] Bryon Smith

[3] Edric Brathwaite

v

[1] Duff's Valley Corporation Ltd

[2] Ishmael Brathwaite

[BVIHCVAP2023/0004]

(Territory of the Virgin Islands)

Date: Wednesday, 14th February 2024

Coram: The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Eddy Ventose, Justice of Appeal
The Hon. Mde. Cadie St. Rose-Albertini, Justice of Appeal [Ag.]

Appearances:

Applicants: Mr. Jamal Smith

Respondents: Mr. Daniel Davies

Issues: Application for leave to appeal - Application for a stay of proceedings or alternatively an application for extension of time and relief from sanctions to comply with the order of the master directing the applicants to pay costs to the respondents failing which the applicants' defence and counterclaim would be struck out

Type of Order: Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The applicants are granted leave to appeal the order of Master Cybelle Cenac-Dantes dated 2nd May 2023.
2. The applicants shall file and serve the Notice of Appeal setting out the grounds of their appeal within 14 days of the date of this order.
3. The proceedings in the court below are stayed pending the outcome of the appeal.
4. The appeal shall proceed in accordance with the Civil Procedure Rules (Revised Edition) 2023.
5. Costs will be costs in the appeal.

Reason: The Court was satisfied that the applicants had met the threshold for leave to be granted. The Court accordingly granted leave to appeal and stayed the proceedings in the court below until the appeal is determined.

Case Name: RZ3262019 Limited
v
Happy Lion Ventures Ltd et al
[BVIHCMAP2023/0011]
(Territory of the Virgin Islands)

Date: Wednesday 14th and Thursday 15th February 2024

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

Appearances:

Applicant:	Mr. Edward Davies KC with him Ms. Anna Scharnetzky, Mr. Nicholas Brookes, Ms. Sara Latham
Respondent:	Mr. Adrian Francis and Mr. Scott Tolliss

Issues: Application to adduce fresh evidence - Principles in Ladd v Marshall [1954] 3 All E.R. 745 - Whether the evidence (being the facts which transpired from two meetings on 28 May 2020 and 25 September 2020 respectively) to be adduced could have been obtained with reasonable diligence for use at the trial - Whether the evidence is credible - Whether the admission of the evidence would have had an important influence on the outcome of the appeal - Application to amend notice of appeal - Whether the notice of appeal should be amended in light of the new evidence to be adduced

Type of Order: Oral Decision with written reasons to follow

Result / Order: IT IS HEREBY ORDERED THAT:

The applications to adduce further evidence and to amend the notice of appeal are dismissed.

Reason: The Court read the written submissions of both parties and heard the oral submissions of counsels for both parties. Having had regard to the same, the Court was of the view that the applications ought to be dismissed with written reasons to follow in the written judgment of the substantive appeal. As to the issue of costs, the Court noted that this would be encapsulated in the written judgment of the substantive appeal.

Case Name: RZ3262019 Limited
v
Happy Lion Ventures Ltd et al
[BVIHCMAP2023/0011]
(Territory of the Virgin Islands)

Date: Wednesday 14th and Thursday 15th February 2024

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

Appearances:

Appellant: Mr. Edward Davies KC with him Ms. Anna Scharnetzky,
Mr. Nicholas Brookes and Ms. Sara Latham

Respondent: Mr. Adrian Francis and Mr. Scott Tolliss

Issues: Commercial appeal - Mistaken common assumption - Whether the Judge erred in finding that the Company had failed to raise a genuine and substantial dispute as to the debt upon which the liquidation application was founded - Whether matters relied upon by the Judge were insufficient to warrant a finding that the

Company was not acting in good faith in disputing the alleged debt - Cross-claim - Whether the learned judge erred in finding that the Company had failed to make out a genuine and serious cross claim that exceeded the alleged debt upon which the liquidation application was based - Whether the learned judge erred in law in holding that the Company was estopped from seeking to dispute the alleged debt and/or advance its cross claim and in holding that the relevant agreements had been affirmed, so as to afford a defence to the Company's cross claim seeking restitution

Type of Order:

N/A

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name:

**1. Sancus Financial Holdings Limited
2. Carson Wen
3. Julia Yuet Shan Fung
V
Chad Christopher Holm
[BVIHCMAP2023/0024]
(Territory of the Virgin Islands)**

Date:

Thursday 15th February 2024

Coram:

**The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mde. Cadie St. Rose-Albertini, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. Alex Hall Taylor KC

Respondent:

Mr. Michael Faye KC with Ms. Colleen Farrington

Issues:

Commercial appeal - Interlocutory Appeal - Risk of dissipation - Whether the Judge erred in law and fact in finding there was a real risk of dissipation - Whether the judge took account of irrelevant matters, and failed to apply the correct test or to require, solid evidence of a real and imminent risk of dissipation, there being no evidence before him of a present, imminent or real risk - Whether the Judge erred in failing to take account of the fact that the alleged evidence of dissipation relied upon by the respondent was historic, largely consisting of dealing in (rather than dissipation of) assets when the appellants were not subject to any judgment or restraint, and preceding the application for an injunction by a number of years - Delay- Whether the Judge erred in failing to take account of the delay by the respondent in bringing the application for an injunction once he became aware of the matters on which he relied to demonstrate risk of dissipation, and failed to consider that delay as demonstrating that there was in fact no such risk nor any perception of such risk by the Claimant - Worldwide Freezing Injunction - Whether the Judge erred in law and fact in determining that justice and convenience favoured the granting of the Freezing Order - Whether the Judge wrongly failed to take account of the fact that the respondent has no assets, and had put forward no evidence to demonstrate that his cross undertaking in damages has any value or that he has any means of satisfying it - Ordinary course carve out - Whether the judge erred in wrongly refusing to provide a general ordinary course exception to the Second and Third Appellants - Exercise of discretion - Whether the Judge misread and misunderstood the evidence before him, and overlooked or failed to take into account relevant evidence - Whether the Judge wrongly took into account irrelevant matters and failed to take into account relevant matters and came to a decision which was plainly wrong

Type of Order

N/A

Result / Order:

[Oral Delivery]

**IT IS HEREBY ORDERED THAT:
Judgment is reserved.**

Case Name: **Nam Tai Property Inc.
(a company incorporated in the British Virgin Islands)
v
Westridge Investment Limited
(a company incorporated in Hong Kong)
[BVIHCMAP2022/0046]
(Territory of the Virgin Islands)**

Date: **Friday 16th February 2024**

Coram: **The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Eddy Ventose, Justice of Appeal
The Hon. Mde. V. Georgis Taylor-Alexander, Justice of Appeal [Ag.]**

Appearances:

Appellant:	Mr. Jack Rivett with Ms. Arabella di Iorio and Ms. Misha Walters
Respondent:	Mr. John Machell, KC with Ms. Kimberly Crabbe-Adams and Ms. Jhneil Stewart

Issues: **Motion for conditional leave to His Majesty in Council - Section 3(2)(a) of the Virgin Islands (Appeal to Privy Council) Order 1967 - Whether leave ought to be granted to the applicant to appeal to His Majesty in Council by virtue of the appeal involving a question of great general or public importance or otherwise - Unlawful Means Conspiracy- Whether the Court erred in law or fact in holding that Nam Tai’s pleaded case of unlawful means conspiracy had no realistic prospect of success - Dishonest Assistance - Whether the Court erred in law or fact in holding that Nam Tai’s pleaded case of dishonest assistance had no realistic prospect of success - Setting Aside the purported indemnity - Whether the Court erred in law and in fact in holding**

that Nam Tai had no realistic prospect of demonstrating that the purported indemnity was ineffective and/or void and/or not binding on Nam Tai - Change of position - Whether the Court misapplied the law and principles of change of position

Type of Order

N/A

Result / Order:

[Oral Delivery]
IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name:

Malini Bhisundial
V
[1] Mohamed Yonnas
[2] Safeeia Yonnas

[BVIHCVAP2023/0003]
(Territory of the Virgin Islands)

Date:

Friday 16th February 2024

Coram:

The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Gerard St. C Farara, Justice of Appeal [Ag.]
The Hon. Mde. Cadie St. Rose-Albertini, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. John Carrington KC with him Ms. Reisa Singh

Respondents: Ms. Lorraine La Rose

Issues:

Interlocutory appeal - Dismissal of request for entry of default judgment - Rule 12.10(4) of the Civil Procedure Rules - Whether the appellant's filing of a request for default judgment after the time for filing a defence had expired and no defence had been filed nor extension

of time had been filed, triggered the appellant's entitlement to default judgment for some other remedy - Whether the learned master erred by dismissing the request for entry of default judgment - Whether the learned master erred by refusing to grant judgment in default for some other remedy and by granting the extension of time to file the defence - Whether the learned master erred in her application of the principles in *Lux Locations Ltd v Yida Zhang*

Type of Order:

Oral Judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.
2. Costs of the appeal shall be borne by the appellant to the respondents fixed in the sum of \$2500.00 to be paid on or before 11th March 2024.

Reason:

This was an appeal against the learned master's decision to dismiss a request for entry of default judgment, refusing to grant default judgment for some other remedy and extending time for filing of the defence. The appellant (being the claimant in the court below) initiated a claim against the respondents by claim filed on 5th December 2022. On 9th December 2022, the respondents filed an acknowledgement of service. The defence was due on 3rd January 2023, but by then no defence had been filed. On 9th January 2023, the appellant filed a request for entry of default judgment. On 13th January 2023 at 8:30am, the respondents filed a defence and counterclaim, and sought an extension of time (and relief from sanctions) for filing their defence.. On the same day, at 12:37pm, the appellant filed an application to determine the terms of judgment pursuant to CPR 12.10(4) and (5). The master, by judgment dated 4th April 2023, granted the extension of time to file the defence, disregarded the request to enter default judgment and refused to grant judgment for any other remedy on the claimant's application.

The appellant contended that the master erred by granting the extension of time and by failing to determine or by dismissing the applications filed by her. The Court read the written submissions of both parties and heard the oral submissions of counsel for both parties. The respondents argued that the decision in *Lux Locations Ltd v Yida Zhang* [2023] UKPC 3 did not confirm that the decision in *Glenford Rolle v Stephen Lander* DOMHCVAP2013/0025 (delivered 20th October 2014, unreported) was correct. It pointed to the distinguishing features of Rolle from those in Lux. The Court was of the view that the situation in Rolle was different to that in Lux since in Rolle, the claim was for a specified sum of money, and therefore the process would have been triggered by a request for entry of judgment in default, without the need for the filing of an application under CPR 12.10(4) and (5). The request therefore would have sufficed and the court office could have entered the default judgment as no defence had been filed in the time prescribed or at all. The Court explained that in Lux the court office could not have entered the default judgment until a determination had been made on an application under CPR 12.10(4) and (5). Further, the position here was not the same as in Lux as by the time the application under CPR 12.10(4) and (5) had been made, the defendants had filed their defence albeit belatedly, and an application for extension of time. There was therefore material requiring consideration by the Court in deciding whether or not default judgment should be granted or whether the defendants should be allowed to defend the claim on the merits.

Having regard to both the oral and written submissions of the parties, the Court was of the view that the master did not err by granting the extension of time application for the respondents to file their defence. The master also did not err by disposing of the appellant's other applications having regard to the circumstances before her. Since this was a claim for some other remedy this Court was of the unanimous view that she had proper regard to Lux and correctly applied the principles emanating from Lux. The unanimous decision of the Court of Appeal was therefore that the appeal be dismissed with costs to the respondents.

