

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SPECIAL SITTING

SAINT LUCIA
Friday, 22nd December 2023

JUDGMENTS

Case Name:

Lawvington Forbes

v

**The Attorney General of Saint Christopher and
Nevis**

**[NEVHCVAP2022/0012]
(Saint Christopher and Nevis)**

Date:

Friday, 22nd December 2023

**Coram for
delivery:**

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

Appearances:

Appellant: Mr. Eustace Nisbett

Respondent: Ms. Rivi Lake

Issues:

Interlocutory Appeal – Part 56 of CPR - Constitutional relief – Section 5 of the Constitution of Saint Christopher and Nevis – Deprivation of constitutional right to personal liberty - Appellate interference with trial judge’s discretion – CPR26.3(1)(b) - Whether the learned judge erred in striking out the appellant’s constitutional motion for the deprivation of his personal liberty on the basis that his remand/detention was by an order of a court

Result/Order:

1. The appeal is allowed and the order of the learned judge dated 21st September 2022 is set aside.
2. Paragraph 3 of the Originating Motion filed on 7th April 2022 is restored and the matter is remitted to the High Court for further case management.
3. The appellant shall have his costs of the hearing before the High Court and two-thirds of those costs in the appeal, such costs to be assessed by a judge or master, if not agreed within 21 days from the date of this judgment.

Reasons:

1. While Part 26 of the Civil Procedure Rules 2000 (“the CPR”) grants judges the power, as part of their extensive case management powers, to strike out parts of a statement of case if it discloses no reasonable ground for bringing or defending a claim, this power must be exercised with the utmost caution. Striking out a claim is a draconian measure that should be used sparingly and proportionately, especially when a judge is attempting to strike out a claim without the benefit of the evidence being tested and the issues dealt with at a trial. Where issues remain arguable or the full context is not thoroughly explored, judges should avoid prematurely exercising their power to strike out a portion of a claim.

Part 26 of the Civil Procedure Rules 2000 applied; *Glenworth Emmanuel v Stephen Isidore DOMHCVAP2014/0018* (delivered 11th August 2015, unreported) followed.

2. This Court will be slow to interfere with case management decisions of judges in the court below. However, the Court will, nonetheless, intervene when it becomes evident that there is a real risk of injustice to one of the parties involved, or if the presiding judge has made a decision or

order which exceeds the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

Multibank FX International Corporation v Von Der Heydt Invest SA BVIHCMAP2022/0024 (delivered 5th July 2023, unreported) followed.

3. The circumstances of the appellant's initial detention by the police prior to the him being brought before a Magistrate was not considered by the learned judge in striking out paragraph 3 of the Originating Motion. In doing so, the learned judge committed an error of law such that this Court ought to set aside the strike out order. This is an issue which ought to be inquired into at a full hearing, where the trial judge would have the benefit of hearing the testimony of the witnesses on both sides, including their evidence being tested under cross-examination, and in considering fulsome arguments from counsel for both parties on all the issues which have been raised. If the appellant's initial arrest and detention is found to be unlawful, the trial judge would then be able to determine whether his continued detention, whether it was by an order of the court or otherwise, continued to be unlawful. The learned judge therefore erred in striking out paragraph 3 of the appellant's Originating Motion.
4. Section 5(1) of the Constitution guarantees a person's right to personal liberty save as may be authorized by law in the cases specified at sub-paragraphs (a) to (k). Sub-paragraph (b) creates an exception for individuals deprived of their liberty in execution of a court's sentence or order in respect of a criminal offence of which he or she has been convicted. The learned judge in his order appears to have struck out the relief claimed at

paragraph 3 of the Originating Motion under section 5 of the Constitution on the basis of the exception provided for in sub-paragraph (b) of section 5(1) or upon some principle of law as to the effect of detention by court order on a person's right to claim for deprivation of his or her personal liberty guaranteed by section 5. He found that the appellant's remand/detention was by an Order of the Court and therefore no claim for breaches of section 5 of the Constitution can succeed. However, on the facts of the instant matter, an order of the court refusing bail does not satisfy the exception in subsection (b) of section 5 of the Constitution. The appellant was never convicted of the criminal offence with which he was charged and for which he was deprived of his personal liberty for 1,314 days. Accordingly, there was no basis upon which the learned judge could conclude, pursuant to section 5(1)(b), that the order of the court refusing bail and remanding the appellant into custody was sufficient to bar him from making a claim for the deprivation of his personal liberty or would render any such claim unsustainable in law. Thus, his order is blatantly wrong, such that this Court must interfere to set it aside.

Section 5 of the Constitution of Saint Christopher and Nevis ("the Constitution") Cap. 1.01, Revised Laws of Saint Christopher and Nevis 2009 applied; *Betaudier v Attorney General of Trinidad and Tobago* considered.

5. Sub-paragraph (f) of section 5 (1) of the Constitution provides for an exception to the right not to be deprived of one's personal liberty '[u]pon reasonable suspicion of his or her having committed, or being about to commit, a criminal offence under law'. At this stage of the proceedings, it is not for this Court to make any

conclusive determination as to the reasonableness or not of the suspicion of the police or the lawfulness of the appellant's arrest. Nor is it for this Court to determine whether the appellant's detention, if initially unlawful, continued to be unlawful after he had been remanded into custody pursuant to an order or orders of a court. However, the evidence and the points canvassed before this Court raised issues which suggest that the appellant has at least an arguable case, that his initial arrest and detention by the police was unlawful and his right to personal liberty guaranteed by section 5 of the Constitution was breached, and that his continued detention by order of the court was also unlawful. By striking out paragraph 3 of the appellant's claim for constitutional relief under section 5, the learned judge deprived the appellant of the right to have his claim to such a breach of his constitutional right fully ventilated at a trial.

Al Fayed and others v The Commissioner of Police of the Metropolis and others [2002] All ER (D) 51 (Aug) considered.

Case Name:

Wycliffe Baird

v

[1] David Goldgar

[2] Paul B. Coburn

[3] Caribe (Realties) Canada Limited

[4] Immeubles Caribe Canada LTEE

[5] Betts Realty Limited

[SKBHCVAP2019/0038]

(Saint Christopher and Nevis)

Date: Friday, 22nd December 2023

Coram for delivery: The Hon. Mr. Mario Michel, Chief Justice [Ag.]
The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Gerard St. C Farara, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Christopher Hamel-Smith SC with him Mr. Terence Byron and Ms. Talibah Byron

Respondents: Ms. Midge Morton and Ms. Maurisha Robinson

Issues: Civil Appeal – Interlocutory Application - Application to strike out or dismiss appeal for abuse of process or want of prosecution – Inherent jurisdiction of the court to guard and protect its process from abuse by litigants - Delay in filing record of appeal – Factors to be considered in striking out appeal for want of prosecution – Length of delay- Whether delay in filing record of appeal was inordinate - Reasons for delay – Whether there are good reasons for the delay – Merits of Appeal – Prospects of success on appeal – Prejudice to the litigants – Furthering the overriding objective

Result/Order: IT IS HEREBY ORDERED THAT:

1. The respondents’ application filed on 13th October 2022 is granted.
2. The appeal is struck out as an abuse of process and/or dismissed for want of prosecution.
3. The respondents are awarded costs on the application, to be assessed if not agreed within 21 days.
4. The stay of execution granted by the single judge on 24th March 2020 and affirmed by the Full Court on 12th June 2020 is set aside.
5. Costs are awarded to the respondents on the stay application granted by the single judge on 24th

March 2020 in a sum to be assessed if not agreed within 21 days.

Reasons:

- 1. Courts have an inherent jurisdiction to guard and protect their processes from abuse by litigants. This they can do either by the use of the strike out weapon to strike out claims or appeals as abuses of the process of the court when litigants flout the rules, orders, and procedures of the court or by dismissing claims and appeals for want of prosecution when litigants fail to pursue their claims or appeals expeditiously. The factors that the court must consider in determining whether to dismiss an appeal for want of prosecution are: (i) the length of the delay; (ii) the reasons for the delay; (iii) the merits of the appeal; and (iv) the prejudice to the litigants.**

Rules 26.3 and 62.20(1) of the Civil Procedure Rules, 2000 applied; Hunter v Chief Constable of the West Midlands Police and others [1982] AC 529 considered; The Barbuda Council v The Attorney General et al ANUHCVP1994/0012 (delivered 15th January 2004, unreported) followed.

- 2. As to the length of delay, while it is correct that no notice of availability of the transcript was sent out by the court office and so the respondents never knew that the transcript was available until 14th July 2021, the appellant knew of its availability and had obtained a copy of it since April 2020. It is the appellant who is responsible for the progression of his appeal by filing and serving the record of appeal and his skeleton argument upon receipt of the transcript. Even after it was found out by the respondents that the transcript had been obtained, it took the appellant another 20 months before he actually filed the record of appeal. This cannot be and is not in keeping with the overriding objective and in particular, ensuring that matters are dealt with expeditiously. On these facts and the applicable law, the appellant's delay in filing the record of appeal was inordinate.**

3. The reasons put forward by the appellant for the delay are not good ones. There is no explanation by the appellant as to why between the date of receipt of the transcript in April 2020 and the revelation and acknowledgement of his receipt of it on 14th July 2021, nothing was done by him to progress the appeal. There is also no explanation as to why between 14th July 2021 and the status hearing on 13th June 2022 nothing was done to progress the appeal. The explanation proffered by the appellant as to why the record of appeal was still not filed even after the date stipulated in the status hearing order (6th September 2022), that 'some pages are illegible', lacks cogency. Additionally, the appellant never availed himself of the other avenues open to him to enable his appeal to be progressed, including applying for an extension of time to file the record of appeal and his skeleton arguments, or filing what might have been an incomplete record of appeal and seeking to amend it once the missing documents were located and the illegible papers were replaced or at least rendered decipherable. Accordingly, there is no satisfactory explanation or reasons for the delay in filing the record of appeal.
4. Having considered the merits of the appeal, in terms of the relative strengths and weaknesses, the Court finds that the appellant does have an appeal that is at least arguable. Nevertheless, this factor alone would not warrant dismissing the strike out application. The Court must have regard to all the factors and the circumstances of the case.

First Domestic Insurance Co. Ltd. et al v Industrial Enterprises Ltd. et al DOMHCVAP2014/0024 (delivered 27th May 2020, unreported) followed.

5. With respect to the issue of prejudice to the litigants, the respondents have suffered and continue to suffer prejudice because of the appellant's inordinate and unreasonable delay in progressing the appeal. The respondents have been prejudiced by being denied the full benefits of their success in the court below since 30th July

2019. Further, with a stay of execution being granted in the court below and subsequently affirmed by this Court, the respondents have never been able to fully enjoy the benefits of the judgment which was given in their favour. The fact that the respondents have already received part of the amount due does not negate the fact that they were the successful parties in the lower court and ought not to be unreasonably deprived of any of the fruits of their success. This is an unsatisfactory state of affairs which does not advance the overriding objective to deal with cases justly and to ensure that matters are dealt with expeditiously, and this Court cannot continue to countenance it.

6. In view of all the circumstances, the inordinate, inexcusable, and prejudicial delay by the appellant in progressing his appeal is an abuse of the process of the court, on the basis of which the appeal should be struck out. The inordinate, inexcusable and prejudicial delay in the conduct of the appeal by the appellant also amounts to a want of prosecution of the appeal on the basis of which the appeal should be dismissed as well.

Case Name:

Calvin Ayre

v

Reuters News & Media Inc.

**[ANUHCVP2023/0029]
(Antigua and Barbuda)**

Date:

Friday, 22nd December 2023

Coram:

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

Appearances:

Appellant: Dr. L. Errol Cort and Ms. Claneisha Gomes

Respondent: Ms. Cheryl-Lee Bolton

Issues:

Civil appeal – Electronic Litigation Portal - Civil Procedure Rules 2000 - Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules, 2019 (“E-Litigation Rules”) - Service of the authorization code – Authorization code to be served together with the claim form and statement of claim - Rule 13 (3) of E-Litigation Rules - Whether service out on the defendant pursuant to an order of the court requiring personal service, also require the claimant to serve the authorization code with the claim form and statement of claim in the proceedings under rule 13(3)(b) of the E-Litigation Rules – Expiration of validity of claim form – Whether invalid claim form incapable of being served – Substitution of a party - Rule 19.4 of the CPR - Whether it was open to master to make order substituting the respondent as the defendant and for service out of the claim form and statement of claim and other documents in the proceedings on the substituted defendant out of the jurisdiction where service of the claim form and statement of claim on the original defendant was deemed invalid and the validity of the claim form had expired without being extended by order of the court - Whether master had the power to set aside substitution and service out order, which order had not been appealed – Rules 9.7(6) and 7.7 (a) and (c) of the CPR - Whether respondent submitted unequivocally to the jurisdiction of the court

Result/Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.
2. Cost in the appeal to the respondent, Reuters News Media Inc., to be paid by the appellant, Calvin Ayre, such cost to not exceed two-thirds of the costs awarded in the court below.

Reasons:

- 1. Service of the authorization code with the originating process is critical to the conduct of civil litigation and is underscored by the fundamental principles of fairness and the overriding objective under the CPR which requires that 'so far as is practicable, the parties are on an equal footing'. Rule 13 (3) of the E-Litigation Rules stipulates that service must be effected by whatever is the applicable Rules of Court, that is whether the applicable rule provides for personal service or substituted service or service under the Hague Convention or by electronic means or some other authorized means. However, in effecting service by the applicable means, the claimant must, at the same time, serve the authorization code generated by the E-Litigation Portal in Form 1 in Schedule 2 to the said Rules. The effect of this latter provision is that in relation to any matter filed on the E-Litigation Portal, which then automatically generates a distinct authorization code, the filing party must also serve the authorization code with the documents to be served.**

Rule 13(3) of the Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules, 2019.

- 2. While it is correct that Master Michel's service out order required the documents to be served personally on Reuters UK, the requirement to serve the authorization code with the claim form and statement of claim was not excluded either by the wording of Master Michel's said order or the provisions of Rule 13 of the E-Litigation Rules. Pursuant to the terms of Master Michel's order, the appellant was required to personally serve on Reuters UK not just the claim form and statement of claim, but also 'the other documents in these proceedings', in addition to a copy of the service out order itself. Second, the authorization code which is to be served pursuant to Rule 13(3)(b) in Form 1 in Schedule 2 is a document in the proceedings to be served according to Rule**

13(3)(b) of the E-Litigation Rules. It is a mandatory requirement of Rule 13(3) of the E-Litigation Rules for the code to be served together with the claim form and statement of claim. Accordingly, Rule 13(3)(b) was not complied with by the appellant and the defect is not cured by serving the code separately at a later date. Rule 13(4) expressly provides that where the authorization code is not served on the defendant in accordance with Rule 13(3), 'service shall be deemed not to have been effected'. Accordingly, no service was effected on Reuters UK of the claim form and statement of claim, and the learned Master was correct to so find.

Flavio Maluf v Durant International Corp and others BVIHCMAP2021/0025 (delivered 13 th January 2022, unreported) followed; Rules 13(3)(b), and (4) Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules, 2019 applied.

3. An invalid claim form is incapable of being served, and incapable of being the subject of a Part 19.4 application for substitution of a new defendant in place of an existing defendant, unless the claim form had been effectively served on the existing defendant during the period of its validity prescribed by rule 8.12, or the validity of the claim form had been extended pursuant to rule 8.13 so as to be current when the application and order for substitution and service out had been made by the court. To extend the validity of the period within which a claim form may be served, an application must be made by the claimant under CPR 8.13 and within the current period of the claim form's validity, whether the original period or an extended period. This invalidity cannot be cured absent an application by the claimant to do so. That application must be made during the current validity of the period for service, unless resort is had by the claimant to the court being requested, pursuant to its powers under CPR 26.1(6), to dispense, in exceptional circumstances, with compliance with the period or periods stipulated at CPR 8.13(a) for doing so; or, also in exceptional

circumstance and in an appropriate case, to dispense with service of the claim form pursuant to the court's power to do so under CPR 7.8B. Further, where the validity of a claim form has expired without being extended and the claim form has not been served during the period of its validity, the claimant can resort to refiling the claim giving rise to a new period of validity for the purpose of effecting service on the named defendant. Alternatively, having refiled the claim form, the claimant can apply to the court to dispense with its service on the defendant or a particular defendant pursuant to CPR 7.8B if he can demonstrate, to the satisfaction of the court on affidavit evidence, that there are exceptional circumstances why the court ought to make such an order. In this matter, there has been no application to extend the validity period of the claim form pursuant to CPR 8.13, and no application made under rules 26.1(6) or 7.8B, nor any refiling of the claim.

Rules 8.13, and 7.8B and 26.1(6) of the Civil Procedure Rules 2000 applied; Flavio Maluf v Durant International Corp and others BVIHCP2021/0025 (delivered 13 th January 2022, unreported) followed; Jayson Stickings and another v RBC Royal Bank of Canada ANUHCVP2021/0023 (delivered 6 th July 2022, unreported) followed; Abela v Baadarani [2013] UKSC 44 considered.

4. Rule 19.3(6) of the CPR is nothing more than a power to make certain consequential directions in circumstances where the court has been satisfied that it ought to grant an application for substitution of a party to extant proceedings. Such an order may not be made in circumstances where the validity of the period for serving the claim form has expired without being extended pursuant to CPR 8.13, and the claim form had not been validly and effectively served on the existing defendant during the period of its validity for effecting service. Where the claim form has been validly and effectively served on the existing defendant during the period of its validity, the court's jurisdiction

over the claim and the existing defendant would already have been grounded or invoked, as it is by service of a claim form being effected that the court jurisdiction over the matter or cause and the person or persons named as defendants flow.

Rule 19.3(6) of the Civil Procedure Rules 2000 considered.

5. The Court, having found the claim form in these proceedings was invalid and incapable of being served on the substituted defendant, Reuters USA, and accordingly, that the court did not have jurisdiction to try the claim, the learned Master had the power under CPR 9.7(6) to set aside its service on Reuters USA, discharge Master Gardner-Hippolyte's order dated 2nd December 2021 and to strike out the claim. Further, there being no order prior in time extending the validity of the claim form for service, the court had no jurisdiction to try the claim against the substituted defendant, Reuters USA. This accords with the meaning and effect of rule 9.7(6) and the court's powers thereunder consequent upon making a declaration that the court has no jurisdiction or will decline jurisdiction to try the claim. Further, there was ample power under rule 7.7(2)(a) and (c) where the respondent, having been served out of the jurisdiction, could apply, as it did, to set aside service of the claim form on it, and for Master Michel to set aside such service (including the service out order) having found that service of the claim form whose validity had expired without being extended by the court, is not permitted under the CPR. Accordingly, the High Court does not have jurisdiction to try the claim.
6. Pursuant to CPR 19.3(1) the court has the power to add or substitute a party without an application. However, where the application is made under rule 19.3 to substitute a party where the existing party's interest or liability has passed to the new party (which is not the case here), it may be made without notice. In the instant matter, there was no evidence before the court, that the appellant's application filed 11 th May 2021 to substitute

Reuters USA as the defendant in these proceedings was served on the original defendant Reuters UK. The only evidence is that such an application had been foreshadowed in correspondence from the appellant's lawyers to the lawyers for Reuters UK, who took the stance, as communicated in a letter dated 23rd March 2021, that their client was not 'in a position to consent to your proposed application pursuant to Part 19.4 of CPR 2000'. Accordingly, there is no merit in this issue and ground of appeal.

Rules 19.2, 19(3), 19.4 of the Civil Procedure Rules 2000 considered.

7. The applicable test and legal principles to be considered when determining whether a party has submitted to the jurisdiction of the court or waived its right to challenge jurisdiction is that the act or step taken in the proceedings must be 'wholly unequivocal' of a submission to jurisdiction when viewed through the lens of the 'disinterested bystander with knowledge' of the pertinent factors. When so viewed, it must be capable of or consistent only with one conclusion, that is, submission to jurisdiction. If when so viewed it is capable of two different interpretations, one consistent with a submission to jurisdiction and the other not, then it does not meet the test, and the court must conclude that the defendant has not, by that step or those steps in the litigation, submitted to the court's jurisdiction to try the claim.

Alexander Katunin and another v JSC VTB Bank BVIHCMA2015/ 0004 0007 (delivered 20th June 2016, unreported) followed; SMAY Investments Ltd and another v Sachdev and others [2003] EWHC 474 applied.

8. In this case, notwithstanding the 'difficulty' with the learned Master's use of the words 'it matters not' at paragraph [58] in his judgment, an application by a defendant to extend time to file the defence without an express reservation as to jurisdiction, is one of the factors, and an important

relevant factor as demonstrated by the 'modern trend' in the cases, for the court to weigh when applying the test of the 'disinterested bystander with knowledge' in determining whether the defendant has, by the steps he has taken in the litigation, unequivocally, submitted to or waived his right to challenge jurisdiction. The remainder of the Master's statements to the effect that the absence of an express reservation on jurisdiction does not 'automatically mean that Reuters USA is automatically deemed to have waived its right to dispute jurisdiction', was correct as a matter of general principle.

9. The learned master correctly had regard to the purpose for which the respondent's application for the extension to file the defence had been made as set out in the notice of application and in the supporting Massicot Affidavit. The stated purpose was to facilitate out of court settlement negotiations concerning a proposal made to the respondent by the appellant at the time of effecting service of the claim form and statement of claim on the lawyers for Reuters USA in Antigua and Barbuda. As the affidavit demonstrates, Reuters USA sought the extension to enable its lawyers to receive instructions on this settlement proposal from the respondent, and for discussions and negotiations to have a chance to be completed, which may then obviate the necessity to file a defence. There is no legitimate basis of principle or otherwise upon which it can be said that the Master erred or got this blatantly wrong, such that this Court ought to make a contrary finding and set aside his decision. Settlement talks or negotiations between parties to litigation are to be encouraged by the court, and not strictly circumscribed by the specter of a likely deeming of submission to jurisdiction or waiver of the right to challenge jurisdiction in applying for an extension of the period for filing the defence without an express reservation on jurisdiction. This is an important factor which places the respondent's application in a particular context and which, when viewed objectively through the lens of the 'disinterested bystander with

knowledge', can lead to the conclusion that the application absent such reservation was not unequivocally consistent with a submission to jurisdiction. At minimum, this factor is capable of giving rise to two conclusions, one consistent with no intention to submit to the court's jurisdiction and the other supportive of and consistent with such a submission.

10. Furthermore, the basis upon which it has been concluded that the claim form was invalid is the failure to effect proper service of it on the original defendant, Reuters UK, within the period of validity of the claim form, there being no extension of that validity period by a court. Accordingly, at the time of the respondent's application to extend time for filing the defence, the claim form's validity had already expired and no proper service on Reuters USA could be effected. Accordingly, the substituted defendant, Reuters USA could not have submitted to the jurisdiction of the court in relation to an invalid claim form. In such circumstances, the alleged waiver and submission to jurisdiction could not be considered to have met the test, and the decision of the learned Master ought to be upheld on this ground also, albeit one which was raised for the first time before this Court by counsel for the respondent.

Case Name:

**[1] Chemical Manufacturing and Investment
Company Limited**

[2] The Roserie Company Limited

v

**First Caribbean International Bank (Barbados)
Limited**

**[SLUHCMAP2021/0003]
(Saint Lucia)**

Date:

Friday, 22nd December 2023

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

Appearances:

Appellants: Mrs. Cynthia Hinkson-Ouhla

Respondent: Mrs. Zinaida McNamara-Phillip

Issues: Commercial appeal – Appellate court’s interference with findings of fact – Debt – Lawfulness of the overdraft on the Current Account - Rate of interest on principal sum – Eastern Caribbean Central Bank Guidelines on the rate of interest on overdrafts – Fiduciary duty – Whether the Bank owed fiduciary obligations to appellants – Propriety of the demands made by the Bank for repayment of the loans and the effect of the demands on the issue of prescription – Late evidence – The admission and consideration of the evidence by the learned trial judge after delivery of judgment

Result/Order: IT IS HEREBY ORDERED THAT:

1. The appeal is allowed in part.
2. The order for the repayment of the Principal Sum of \$ 58,172.32 is affirmed.
3. The 1st appellant shall pay interest on the Principal Sum at the rate of 14.5% from 12th February 2005 to the date of the final order on 16th August 2021, and thereafter at the statutory rate of 6% per annum until payment.
4. The amounts comprising the Principal Sum are not secured by the Hypothec except the \$5,753.35 that was advanced before the Bank demanded payment of the demand loan on 28th October 2003. Accrued interest on this amount is also secured.

5. Each party shall bear their own costs of the appeal and in the court below.

Reasons:

1. When there is an express agreement between a bank and its customer for the customer to have overdraft privileges on his account, the bank is obliged to honour cheques drawn on the account even if the account does not have sufficient funds to meet the cheque. When there is no agreement between the customer and the bank for an overdraft facility and there are insufficient funds in the account to pay a cheque drawn on the account, the cheque is treated as an offer to the bank to either honour the cheque using the bank's funds and putting the account into overdraft, or returning the cheque unpaid. If the bank honours the cheque and the account goes into overdraft, the overdraft will be on the bank's usual terms as to interest and other charges on an overdrawn account. The bank's usual terms on overdrafts will not apply if there is a contrary agreement with the customer. The judge erred by treating this case as analogous to one where the customer issues a cheque when there are insufficient funds in the account to cover the cheque. This is not what happened in this case and the Bank's rights were circumscribed by its terms and conditions for the use of the Barclaycard. In the circumstances, the findings of the judge that the Bank was entitled to charge interest on the overdraft on the Current Account at its standard rate for overdrafts is reversed. The Bank was entitled to charge interest on the monies used to honour the Barclaycard charges only on the terms of its credit card contract with Chemico.

Lloyds Bank plc v Voller [2000] 2 All ER (Comm) 978, 982, CA applied; Office of Fair Trading v Abbey National Bank plc [2008] EWHC 875 (Comm)

applied; Emerald Meats (London) Ltd v AIB Group (UK) Ltd [2002] EWCA Civ 460 applied.

2. The evidence led by the Bank about its standard rate of interest is contained in paragraph 12 of the witness statement of Mr. Small where he said, 'the first defendant (Chemico) failed and or refused to pay the overdraft which continued to accrue interest at the rate of 25% per annum'. The trial judge found that Mr. Small's evidence is that the Bank's standard practice is to charge 25% on overdrafts. However, this is evidence of the rate that the Bank was charging Chemico on its overdraft. It is not evidence of a general practice for charging interest on an unauthorised overdraft. Based on the trial judge's nuanced treatment of the evidence, and the paucity of the evidence on the issue, this Court can review the trial judge's finding as she appears to have misapprehended the evidence or was wrong in making the finding of fact. The Bank's evidence falls short of proving that it had a standard practice for charging interest at 25% per annum on an unauthorised overdraft.
3. Chemico had the benefit of the purchases made by the Barclaycard and agreed in its evidence that Chemico had an obligation to pay its credit card bills. In the circumstances, Chemico is liable to repay the \$58,172.32 that was advanced by the Bank to pay the Barclaycard charges from which it benefited.
4. A party wrongfully deprived by another of money to which the first party is entitled ought to be compensated for his loss, not just by an award to him of the sum of money to which he was entitled, but so too by an award of the time value of the money from the date of its appropriation to the date on which it is ordered to be paid by him. Chemico is liable to repay the amounts advanced

by the Bank to settle the credit card charges with interest. The Bank's claim for interest on the overdraft at 25% per annum is rejected and there is no evidence of the rate of interest on its credit cards. However, there is evidence of the rate of interest on demand loans of 4% per annum above the Bank's base rate of 10.5%. Using this rate of interest, Chemico shall repay the principal sum of \$58,172,32 with interest at the rate of 14.5% per annum from 12th February 2005 to the date of the final order on 16th August 2021, and thereafter at the statutory rate of 6% per annum on the outstanding balance of the principal sum until payment in full.

Civil Code of Saint Lucia Chap 4:01 Revised Laws of Saint Lucia 2020 applied; Andrey Adamovsky et al v Andriy Malitskiy et al BVIHCMAP2014/0022 (delivered 3rd February 2017, unreported) followed.

5. Clause 2 of the Hypothec provides that there should be no advances after the Bank demands payment of 'the Debts'. The Debts include the outstanding balance on the demand loan, payment of which was demanded by the letter of 28th October 2003. The Bank demanded payment of what was at least part of 'the Debt'. This was sufficient to trigger clause 2 and any payments or advances made after 28th October 2003 are not secured by the Hypothec. The credit card charges made before 28th October 2003 are secured by the Hypothec. These are the payments of \$5,320.51 and \$432.84 made on 17th September 2003 and 18th October 2003 respectively. The total amount of \$5,753.35 is secured by the Hypothec and the payments of \$44,467.04 made after that date are not secured.