

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

TERRITORY OF THE VIRGIN ISLANDS
3rd TO 6th OCTOBER 2023

JUDGMENTS

Case Name: [1] Canadian Bank Note Company Limited
[1] CBN St. Lucia Inc.

v

[1] Cage St. Lucia Ltd.
[2] The National Lotteries Authority

[SLUHCVAP2023/0002]
(Saint Lucia)

Date: Thursday, 5th October 2023

Coram: The Hon. Dame Janice M. Pereira DBE, Chief Justice
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]

Appearances:

Appellants: Ms. Renee St. Rose, Ms. Shari-Ann Walker and Ms. Marie-Ange Symmonds

Respondent: Mr. Garth Patterson KC with him Ms. Taylor Laurayne for the 1st respondent

Mr. Fidel Michel for the 2nd respondent

Issues: Civil appeal - Adducing fresh evidence - Inducement of breach of contract - Trial judge's grant of ex parte interim injunction - Whether Cage guilty of nondisclosure and/or unfair presentation

in obtaining the injunction on an ex parte basis -
Trial judge's assessment of serious issues to be
tried and damages as an adequate remedy -
Whether the learned judge erred in the exercise of
his discretion by continuing the injunction

Result/Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is allowed and the orders of the judge made on 6th January 2023 are set aside.
2. Cage shall pay CBN's costs of the appeal and in the court below to be assessed if not agreed within 21 days of this order.

Reasons:

1. The test for considering whether fresh evidence should be allowed at the hearing of an appeal consists of three stages: (i) it must be shown that the new evidence could not have been obtained with reasonable diligence for use at the trial in the lower court, (ii) the evidence is such that if admitted would probably have an important influence on the result of the appeal, though it need not be decisive, and (iii) the evidence must be apparently credible though it need not be incontrovertible. The appellants' application for permission to adduce fresh evidence satisfies the three limbs of the test as the evidence could not have been obtained with reasonable diligence before the inter partes hearing in December 2022, parts of the new evidence had an important

influence on the appeal and there was nothing to suggest that the new evidence was not credible. The new evidence listed in paragraph 4 of Mr. Gooding's affidavit in support of the application is admitted with the exception of items (i), (v) and (xv).

Ladd v Marshall [1954] 3 All ER 745 followed; Guy Joseph v The Constituency Boundaries Commission et al SLUHCVAP2015/0013 (delivered 1st October 2015, unreported) followed.

2. The duty of full and frank disclosure on an ex parte application includes making proper inquiries, disclosing all material facts whether for or against the applicant, and presenting the application objectively and fairly which includes presenting both sides of the argument. The duty is owed to the court, not the attorney's former client. Generally, where there is a breach of this duty by the attorney, the court will not allow his client to keep the benefit of the ex parte order regardless of the state of the client's knowledge of the nondisclosure or if he contributed to the breach in any way.

Brink's-MAT Ltd v Elcombe and others [1988] 3 All ER 188 followed; Boreh v Republic of Djibouti [2015] EWHC 769

(Comm) and Hytec Information Systems Ltd v Coventry City Council [1997] 1 WLR 1666 followed; Halifax Mortgage Services Ltd v Stepsky and another [1996] Ch. 207 distinguished.

3. An attorney should withdraw from representing a new client as soon as it becomes apparent to him that he has information acquired from representing a former client that is relevant and material to the ex parte application on which he is now appearing. There was a material nondisclosure and/or an unfair presentation by Mr. Mark Maragh and Cage when Cage applied for the ex parte injunction and did not disclose that Mr. Maragh, who was appearing for Cage as a junior counsel, had previously acted for the NLA in connection with the disputed matters, and that he had information relating to these matters. When there is such a finding, the ex parte injunction should be set aside and not be re-granted unless there are special circumstances. There are no special circumstances in this case.

Behbehani and Others v Salem and Others [1989] 1 WLR 723 followed; Alexander Tuguchev v Vitaly Orlov and others (No 2)

[2019] EWHC 2031 (Comm) followed; *Ti Cadeau v Sampson Samuel* DOMHCV2015/0257 (delivered 1st July 2016, unreported) considered;

4. In order to succeed in an application for an interim injunction, the applicant must satisfy the court that: (i) there is a serious issue to be tried, (ii) damages will not be an adequate remedy and (iii) the balance of convenience favours the grant of an interim injunction pending the trial of the action. On the assessment of the pleadings and evidence, the Court agreed with the learned trial judge that there were serious issues to be tried. This satisfies the first limb of the test. The Court however disagreed with the judge's finding that the losses to Cage would be immeasurable and irreparable. The issue of quantification would not arise until the end of the trial when the party's rights have been determined. By then there would likely be evidence from Cage about the losses it has suffered and will continue to suffer as a result of the refusal to continue or re-grant the injunction. The evidence of Mr. Gooding includes a method of quantifying the potential losses as and when the need arises. The potential losses to Cage are quantifiable and therefore damages would be an adequate remedy.

Cage has failed to satisfy the second principle of the American Cyanamid test, which is another reason for discharging the injunction.

American Cyanamid Co v Ethicon Ltd [1975]
UKHL 1 applied.

Case Name:

**The Landings Proprietors Unit Plan No. 2
of 2007 also known as (The Landings
Body Corporate or the Landings BC)**

v

**The Development Control Authority
and
Two Seas Holdings Limited**

**[SLUHCVAP2019/0019]
(Saint Lucia)**

Date:

Friday, 6th October 2023

Coram:

**The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Eddy Ventose, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

**Mr. Richard Harwood KC with him Ms. Renee St.
Rose and Ms. Marie-Ange Symmonds**

Respondents:

**Ms. Marcellina Jouavel holding papers for Mr.
Dexter Theodore KC**

Interesting Party:

**Mr. Garth Patterson KC with him Mr. Mark Maragh
for Two Seas Holdings Limited**

Issues:

Applications for conditional leave to appeal to His Majesty in Council - Applications made before amendments to Constitution of Saint Lucia coming into effect on 9th March 2023 - Parties not consenting to matters being transferred to the Caribbean Court of Justice - Standing to apply for leave to appeal to Privy Council - Whether Two Seas as an interested party had standing to apply for conditional leave - Appeal as of right - Section 108(1)(a) of the Constitution - Whether Two Seas' proposed appeal involved directly or indirectly a question respecting its property or a right of the prescribed value or more - Section 108(2)(a) of the Constitution - Whether the questions involved in Two Seas' and the DCA's intended appeals are of great general or public importance or otherwise

Result/Order:

IT IS HEREBY ORDERED THAT:

1. The application by the DCA under section 108(2) of the Constitution for conditional leave to appeal to his Majesty in Council is dismissed with costs to the Landings.
2. The application by Two Seas under sections 108(1) and 108(2) of the Constitution of Saint Lucia for conditional leave to appeal to His Majesty in Council is dismissed with costs to the Landings.
3. All costs to be assessed unless agreed within 28 days.

Reasons:

1. A claimant is required to include in the claim form or in the statement of claim, a short statement of all the facts on which he or she relies. This means that the claimant must state all the facts necessary for the purpose of formulating a complete cause of action. A detailed witness statement or a list of documents is not a substitute for this requirement. Further, a claimant must plead and particularise any item of damage which represents out-of-pocket expenses or loss

of earnings, incurred prior to the trial, and which is capable of substantially exact quantification. Specifically, a claimant is required to include or attach to the claim form or statement of claim a schedule of any special damages claimed. A failure to include a particular out-of-pocket expense or pre-trial loss of earnings in the schedule of special damages attached to the claim form or statement of case or to amend the statement of case to include particulars of a claim for such expense or loss in the schedule of special damages will disentitle a defaulting claimant from recovering the claimed sum. In this case, Mrs. Hodge's claim was not amended to include a claim for loss of earnings from the farm or Mrs. Hodge's food vending business nor was it in any schedule of special damages attached thereto. In the circumstances, the learned judge's award of special damages of EC\$225,000.00 made to Mrs. Hodge for loss of earnings from the farm and the award of US\$20,250.00 made to her for loss of earnings from her food vending business is disallowed.

Rules 8.7(1) and (2) of the Civil Procedure Rules 2000 applied; Rule 8.9(5) of the Civil Procedure Rules 2000 applied; *Ilkiw v Samuels and others* [1963] 1 W.L.R. 991 applied; *Perestrello E Companhia Limitada v United Paint Co Ltd.* [1969] 3 All ER 479 applied; *Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack* [2010] UKPC 15 applied; *Steadroy Matthews v Garna O'neal* BVIHCVAP2015/0019 (delivered 16th January 2018, unreported) applied.

2. If a claimant has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this

damage, thus showing the defendant the case he has to meet and assisting him in computing payment into court. Thus, where general damages are claimed, the statement of case should identify all the heads of loss that are being claimed. The claimant may not otherwise rely on any allegation or factual argument which is not set out in the claim but which could have been set out there, unless the court gives permission, or the parties agree. In this case, the statement of claim and attached schedule contained no reference to any actual loss of earnings or any projected future loss. The amounts described in the schedule of special damages attached to the statement of claim as 'loss of earnings' were explained to be pre-trial expenses. The allegations of continuing loss of earnings or future loss of earnings were not "sufficiently made" in the statement of case. Accordingly, the sum of EC\$300,000.00 awarded to Mrs. Hodge for loss of future earnings from the farm and the sum of US\$27,000.00 awarded to her in respect of loss of future earnings from her food vending business is disallowed.

Rule 8.7(1) of the Civil Procedure Rules 2000 applied; *Daly v General Steam Navigation Co Ltd*. [1980] 3 All ER 696 considered; *Keithley George and Francis Trading Agency Limited v Gerald Khoury Antigua and Barbuda* Civil Appeal No.19 of 2004 (delivered 25th April 2005, unreported) applied; *Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack* [2010] UKPC 15 applied.

3. What amounts to strict proof of special damages is to be determined by the court by reference to the particular circumstances of the case. An appellate court is slow to interfere with findings of fact and credibility by the first instance judge and should not

interfere with the trial judge's conclusion of primary facts unless satisfied that he was plainly wrong. Similarly, an appellate court is slow to interfere with assessments of general damages save in cases where the trial judge has applied the wrong principle or is otherwise clearly wrong. The judge's decision to award Mrs. Hodge special damages was based on his assessment of the credibility of Mrs. Hodge on the issue and it is not possible for this court to say that the judge's conclusion that he should accept her evidence is plainly wrong. Similarly, there is no basis to interfere with the learned judge's award for general damages which is within the range of awards made for pain and suffering and loss of amenities in comparable cases within the jurisdiction.

Attorney General v Peter Badoo [2020] JMCA Civ 10 considered; Sidney Binda v Juan Caliste et al GDAHCV2014/0097 (delivered 10th February 2016, unreported) considered; Ratcliffe v Evans (1892) 2 QB 524 considered; Ilkiw v Samuels and others [1963] 1 W.L.R. 991 applied; Mutual Holdings (Bermuda) Limited and others v Diane Hendricks and others [2013] UKPC 13 applied; Biogen Inc v Medeva plc [1997] RPC 1 applied; Fage UK Ltd. v Chobani UK Ltd. [2014] EWCA Civ 5 applied; Martin Alphonso et al v Deodat Ramnath BVI Civil Appeal No. 1 of 1996 (delivered 21st July 1997, unreported) applied.

4. Having regard to the awards made in comparable cases in Anguilla and in the wider Eastern Caribbean jurisdiction, the fact that the nuisance had ceased since the date of the assault, and the fact that the courts generally award modest sums in nuisance in categories of cases involving loss of amenity to land for a transitory period, an award of \$20,000.00 to \$25,000.00

was fair in the circumstances. The counter-appeal is accordingly allowed.

Elton Scatliffe et al v Dwite Flax BVIHCV2010/0053 (delivered 26th October 2017, unreported) considered; West Indies Concrete Co. Ltd. v Cutelyn Carty- Rey et al AXAHCV2014/0049 (delivered 12th August 2019, unreported) considered; Bone and another v Seale [1975] 1 W.L.R 797 applied; Moeliker v A Reyrolle and Co Ltd. [1977] 1 All ER 9 applied.

APPLICATIONS AND APPEALS

Panel 1

Case Name:

Multibank FX International Corporation

v

[1] Von der Heydt Invest S.A

[2] Mex Clearing Limited

[3] Mex Securities S.A.R.L

[BVIHCMAP2023/0016]

(Territory of the Virgin Islands)

Date:

Tuesday, 3rd October 2023

Coram:

**The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal**

Appearances:

Applicant:

Mr. Malcolm Arthurs

Respondents:

**Mr. Alexander Cook, KC with him Mr. Alex Hall
Taylor, KC**

Issues:

Application for adjournment - Whether any good reason has been advanced for the application for an adjournment - Whether the respondents will be prejudiced if the application for adjournment is granted - Application for leave to appeal - Appeal against case management decision - Whether the judge's case management decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong - Whether the appeal has a reasonable prospect of success

Type of Order

Oral Decision

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

1. The application for adjournment is refused with costs to be paid by the applicant to the respondent to be assessed by a judge of the Commercial Court if not agreed within 21 days.
2. The application for leave to appeal is hereby refused.
3. Costs of the application for leave to appeal, which includes the costs for preparing for the appeal since the application is rolled up with the said appeal, shall be borne by the applicant to the respondent to be assessed if not agreed by a judge of the Commercial Court within 21 days.

Reason:

The Court first considered an application for an adjournment made by the applicant to have the hearing of the application for leave to appeal adjourned to the next sitting of the Court in the Territory of the Virgin Islands or alternatively to a convenient sitting in another territory. The respondent opposed the application.

The Court considered the submissions and the material before it and was not persuaded that it ought to accede to the adjournment request. The Court noted that there had been no good reason advanced by the applicant for the grant of the adjournment. Therefore the application for the adjournment was refused.

The Court then heard the application for leave to appeal. The Court was not persuaded that the applicant has shown any realistic prospects of success on its grounds of appeal put forward. The Court firstly noted that the decision being appealed is quintessentially a case management decision which judges routinely make in the exercise of their powers under Part 26 of the Civil Procedure Rules 2023. Judges are tasked with managing cases so as to ensure that it is in furtherance of the overriding objective and to enable the court to deal with cases justly, fairly, expeditiously and giving to it a proportionate amount of the court's resources. Case management decisions by their very nature are decisions which courts will make to ensure that it deals with and manages cases in ways which best suit the justice of the case.

Unless a party can demonstrate that the decision of the judge is plainly wrong or outside the generous ambit of the judge's discretion, the Court of Appeal will not interfere with the judge's case management decision. The Court was satisfied that the judge did not err in the exercise of his case management powers in splitting up the trial of various issues in the case and in the claims in the way he did in furtherance of the overriding objective and in seeking to ensure that the case proceeds to trial in an expeditious manner, given the very substratum of the case which asserts an abuse of the court's process and the need for expedition in the court treating with issues of that nature. The Court reiterated and applied the principles outlined in Saint Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited Civil Appeal No.6 of 2002 (delivered 31st March 2003, unreported) that the CPR expressly entrusts

the High Court with the power and responsibility to actively manage its cases. Great deference is paid to a judge's exercise of discretion in case management decisions. Accordingly, 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 Court was of the view that such a threshold had not been met in this case. For those reasons, the Court refused the application for leave to appeal.

Case Name:

**Panel 2
Greater Sail Limited**

v

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

**[BVIHCMAP2022/0070]
(Territory of the Virgin Islands)**

**Heard together with
Greater Sail Limited**

v

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

**[BVIHCMAP2022/0071]
(Territory of the Virgin Islands)**

Heard together with

**[1] Greater Sail Limited
[2] Li Jianpiing (also known as Gigi Lee
[3] Mai Fan**

v

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

**[BVIHCMAP2022/0072]
(Territory of the Virgin Islands)**

Date: Tuesday, 3rd October 2023

Coram: The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Robert Levy, Justice of Appeal [Ag.]

Appearances:

Applicants: Mr. John Carrington, KC with him Mr. Andrew Emery

Respondents: Mr. David Chivers, KC with him Mr. Nicholas Burkill and Mr. Rondelle Keller

Issues: Application for extension of time for leave to appeal - Finding by 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 - Application for stay of proceedings - Whether the learned judge considered irrelevant matters, failed to give the appropriate weight to the evidence before him and wrongly made findings in the absence of evidence as it related to the issues in the court below.

Type of Order: N/A

Result / Order: IT IS HEREBY ORDERED THAT:
Judgment is reserved

Reason: N/A

Case Name: Panel 1
[1] Tensigma Limited (In Liquidation)
[2] Julian Svirsky
[3] Denis Donin

v

Arman Oyekenov

[BVIHCMAP2022/0064]
(Territory of the Virgin Islands)

Date: Wednesday, 4th October 2023

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

Appearances:

Appellants: Mr. Robert Nader and Mr. Ben Giblin for the 2nd and 3rd Appellants
Mr. Andre McKenzie holding a watching brief on behalf of the Receiver of Tensigma Limited

Respondent: Mr. Stephen Ryan

Issues: Interlocutory appeal - Appeal against receivership and Unless Orders - Whether the judge erred in not allowing the appellants an opportunity to be heard - The overriding objective - Unless Orders -

Whether the unless order made on 6th October, 2022 is bad in law and should be set aside - Whether the notice period for the hearing was insufficient - Whether there was a failure to comply with the requirements of CPR 26.4 (2) - Whether the hearing in the court below was subject to serious irregularities that amounted to circumstances such as to warrant setting aside of the appointment of the receiver and the unless order - Whether the court erred in not granting the appellants an adjournment to seek to retain new counsel in the particular circumstances then existing

Type of Order:

N/A

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

1. The parties are to file submissions of a maximum of 3 pages with authorities on the issue *“what should be the effect on an order where the court finds there has been a procedural irregularity that may have led to unfairness”* within 14 days of today’s date.
2. Judgment is reserved.

Reason:

After consideration of the matter the Court determined that the matter warranted a written judgment. In anticipation of preparing reasons, the Court found that it could benefit from supplemental submissions with authorities on the effect on an order where the court finds that there has been procedural irregularity leading to unfairness. Judgment was thereby reserved.

Case Name:

Panel 2
Caldicott Worldwide Ltd.
v
[1] Siong Beng Seng
[2] Ching Hui Huat

**[3] Springfield Investments & Nominees
PTE Ltd.**

**[BVIHCMAP2023/0009]
(Territory of the Virgin Islands)**

Date:	Wednesday, 4th October 2023
Coram:	The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mde. Esco Henry, Justice of Appeal [Ag.] The Hon. Mr. Robert Levy, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Mr. Stephen Moverley Smith KC
Respondent:	Mr. Timothy Collingwood KC with him Mr. Iain Tucker
Issues:	Interlocutory appeal - Arbitration Clause - Whether the judge erred in staying the issue of whether dividends were improperly withheld from the appellant on the basis that it touches on the conduct of the company - Whether the trial judge failed to recognise the limited scope of the Court of Appeal's judgment delivered on 23rd March 2023 - Whether the trial judge failed to recognise that the Court of Appeal's judgment delivered on 1st June 2021 expressly recognised that proceedings against the shareholder respondents could proceed notwithstanding that claims against the appellant company should be stayed
Type of Order	N/A
Result / Order:	IT IS HEREBY ORDERED THAT: Judgment is reserved.
Reason:	N/A
Case Name:	Tobago House of Assembly

v

**[1] Richard Graham also called Rick
Graham
(Trading as Original Canopy Tours
Enterprises Limited)
[2] Darren Hreniuk
(Trading as Original Canopy Tours
Enterprises Limited)**

**[BVIHCMAP2022/0074]
(Territory of the Virgin Islands)**

Date:	Wednesday, 4th October 2023
Coram:	The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mde. Esco Henry, Justice of Appeal [Ag.] The Hon. Mr. Robert Levy, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Ms. Hazel-Ann Hannaway Boreland with her Ms. Jhneil Stewart
Respondents:	Mr. Richard Graham in person Mr. Darren Hreniuk in person
Issues:	Interlocutory appeal - Freezing order - Whether there is a real risk that the respondents will dissipate their assets outside of the ordinary course of business if the order is not made
Type of Order:	N/A
Result / Order:	IT IS HEREBY ORDERED THAT: Judgment is reserved.
Reason:	Counsel for the respondents indicated that he was recently retained and that he required time to file submissions on behalf of the respondents.

Accordingly, the Court granted his application for an adjournment.

Case Name:

Darryl Frett
V
The Commissioner of Police
[BVIHCMAP2022/0002]
(Territory of the Virgin Islands)

Heard together with:

Tarik Aaron
V
The Commissioner of Police
[BVIHCMAP2022/0003]
(Territory of the Virgin Islands)

Date: Thursday, 5th October 2023

Coram: The Hon. Dame Janice M. Pereira DBE, Chief Justice
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]

Appearances:

Appellants/Applicants:	Mr. Terrence Williams and Mrs. Karlene Thomas-Lucien
Respondent:	Ms. Khadija Beddeau

Issues: Application against abuse of process - First appellant's conviction of keeping a firearm without a license - First appellant's sentence of 73 months imprisonment - Second appellant's conviction of possession of a controlled drug with intent to supply - Second appellant's sentence of 52 months imprisonment - Magistrate's failure to conduct a recognizance hearing - Magistrate's failure to make a determination on bail pending appeal - Section 165(1) of the Magistrate's Code of

Procedure - Magistrate's failure to provide reasons for the decision - Section 165(2) of the Magistrate's Code of Procedure - Whether Magistrate's delay in providing reasons breached the appellants' right to protection of the law - Whether delay is a basis for finding abuse of process- Whether the applicants' detention pending appeal contravenes their right to trial within a reasonable time and right to liberty- Whether the circumstances warrant the granting of bail pending appeal

Type of Order:

Oral decision

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

- 1. The records of appeal in respect of both appeals and all papers in respect of the appeals are to be filed and served on the applicants, in the case of Mr. Aaron, by 31st December 2023, and in the case of Mr. Frett, by 15th November 2023.**
- 2. In the event that there is failure by the Magistrate to comply with the time limits set out in paragraph 1, the Court shall be at liberty to revisit the reliefs sought in the applications and to make any further order or orders thereafter as may be considered necessary to meet the justice of the cases.**
- 3. The hearing of the appeals is set down for hearing during the week of the Court of Appeal's sitting in Saint Vincent and the Grenadines commencing 29th January 2024.**
- 4. The grant of bail at this stage is denied in respect of both applicants.**

Reason:

The applications filed on 30th May 2023 are grounded in respect of breaches of the applicants'

rights to trial within a reasonable time as well as breaches of their right to liberty in terms of the constitutional guarantees under the Constitution of the Territory of the Virgin Islands, and whether there was an abuse of process warranting the quashing of the conviction and sentence in respect of each applicant. Mr. Aaron was convicted on 8th June 2022 and Mr. Frett was convicted on 8th March 2022.

The Court heard the arguments put forward by both parties but the Court was not persuaded at this stage that the circumstances and the history of the matters amounted to an abuse of process. It may be that this can be revisited at a later date if there is a further delay in the processing of the records and papers of the appeal.

The Court noted that a period of approximately one year and four months has elapsed since the conviction and sentence of Mr. Aaron. In respect of Mr. Frett a period of one year and seven months has elapsed since his conviction and sentence. Based on the second affidavit of Ms. Annette Williams-Sylvester filed on 3rd October 2023, the record of appeal and papers in respect of the appeal which would include reasons for the learned magistrate's decision should be ready by the end of December 2023 for Mr. Aaron and by the second week of November for Mr. Frett.

The Court also noted that Mr. Aaron has been sentenced to 52 months imprisonment for possession of a controlled drug with intent to supply and based on his date of conviction, his earliest date of release would be 7th April 2025. Mr. Frett was sentenced for 73 months for keeping a firearm without a license and based on his date of conviction, his earliest date of release would be 6th May 2026.

While the Court viewed with grave concern the procedural errors committed by the learned magistrate in not affording a hearing to the applicants in respect of the entry into of a recognisance as clearly contemplated by the

conjoined effects of sections 165 and 166 of the Magistrate's Code of Procedure Act Cap 44, regard can clearly be had to this failure at the hearing of the appeal itself. This is contemplated in R v Pigott (2015) 88 WIR 299; Tapper v Director of Public Prosecutions of Jamaica [2012] 1 WLR 2712 and Solomon Marin v The Queen [2021] CCJ 6.

In considering whether bail should be granted pending the hearing of the appeals, the Court was guided by the principles set out in The State v Lynette Scantlebury (1976) 27 WIR 103 and like cases. It is well established that when bail is sought following a conviction, different considerations apply and exceptional circumstances must be shown to the court in order for the court to grant bail at that stage of the trial process.

The Court was not satisfied that the fact of the procedural error made by the learned magistrate or the portion of the sentence which may be served by the time the appeal is heard rises to exceptional circumstances at this time. The Court recognised that there has been delay but does not consider that it reaches the level at this stage of an inordinate delay in either matter.

Case Name:

John Forster Emmott

V

Michael Wilson & Partners, Ltd.

**[BVIHCMAP2017/0002]
(Territory of the Virgin Islands)**

Heard together with

Michael Wilson & Partners, Ltd.

V

John Forster Emmott
[BVIHCMAP2017/0003]
(Territory of the Virgin Islands)

Heard together with

Kazholdings Incorporated
Kazholdings LLP

V

[1] John Forster Emmott
[2] Michael Wilson & Partners Ltd

[BVIHCMAP2017/0005]
(Territory of the Virgin Islands)

Date: **Friday, 6th October 2023**

Coram: **The Hon. Mde. Vicki Ann Ellis, Justice of Appeal**
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Eddy Ventose, Justice of Appeal
[Ag.]

Appearances:
Applicant: **Mr. Michael E. Wilson, representative of Michael Wilson and Partners Ltd.**

Respondents: **Mr. John Forster Emmott in person**
Mr. Jomokie Phillips for Kazholdings Incorporated and Kazholdings LLP.

Issues: **Application to strike out notice of appeal - Civil Procedure Rules 2000 69B.4(4) - Failure of applicant to be represented by a legal practitioner in commercial matters in accordance with CPR 69B.4(4) - Whether the notice of application has been properly brought and whether it can be entertained by the Court**

Type of Order: **Oral decision**

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

- 1. The notice of application filed on 17th January 2023 is dismissed with no order as to costs.**
- 2. BVIHCMAP2017/0002, BVIHCMAP2017/0003 and BVIHCMAP2017/0005 are set down for case management before the Chief Registrar.**

Reason:

Before the Court was a notice of application filed on 17th January 2023 in which the applicant sought an order that the notice of appeal filed by the respondent on 9th January 2017 against the judgment and order of Wallbank J be struck out and dismissed with indemnity costs in favour of the respondent and the KH Group to be assessed if not agreed. The application also sought an interim payment on account of such costs to be paid within 14 days.

The notice of application did not set out the grounds of the application but it was supported by three affidavits sworn to by Michael Earl Wilson who asserted that he is a director of the branch in Kazakhstan, the Representative Office in Azerbaijan and an employee of the applicant. He further asserted that he is authorised to make affidavits on behalf of the applicant.

The following affidavits were filed: (i) the first affidavit of Michael Earl Wilson filed on 17th January 2023; (ii) the second affidavit of Michael Earl Wilson filed on 15th September 2023 and (iii) the third affidavit of Michael Earl Wilson filed on 26th September 2023. All of the affidavits have the same recital at paragraph one.

An important preliminary issue arose from the notice of application, i.e. whether the notice has

been properly brought and whether the same can be entertained by this Court.

As indicated, the application recites that it is brought by the applicant, Michael Wilson and Partners Ltd. which is an incorporated entity/body corporate and that application dated 9th January 2023, is signed by Mr. Michael Earl Wilson in his capacity as solicitor admitted in England and Wales, New South Wales, Victoria and Australia.

Mr. Michael Earl Wilson represented and confirmed before the Court that he is not a duly admitted member of the bar of the Territory of the Virgin Islands entitled to practice law here. It follows that he is not able to appear as counsel in these proceedings or indeed in any proceedings before the Court.

The notice of application is therefore defective as it offends Civil Procedure Rules 2000 69B.4(4). This provision specifically disapplies the residual discretion afforded to the court under the provisions of CPR 22.3 and mandates that bodies corporate must be represented by a legal practitioner in all commercial matters. The term legal practitioner must be deemed to mean a person who is able to practice law under the laws of the particular state where he purports to act, and the Virgin Islands Legal Profession Act Cap 13 section 13.2 makes clear that no person may practice in the Virgin Islands unless his or her name has been entered into the roll in accordance with that Act.

Given the representations advanced by Mr. Michael Earl Wilson, the Court was of the view that he could not purport to act as legal practitioner. It follows that the notice of application has not been advanced by a legal practitioner on behalf of this applicant. It follows further that Mr. Michael Earl Wilson is not able to execute the notice of application in the way that he purported to do so and that Mr. Michael Earl Wilson cannot appear on behalf of this company in these open court proceedings.

During the course of the proceedings the Court was referred to an authority from the BVI High Court; JSC Mezhdunarodniy Promyshlenniy Bank et al v Lenux Group Limited Claim No. BVIHC (COM) 2020/0188 (delivered 19th January 2021, unreported). Having reviewed that authority the Court was not satisfied that it assisted Mr. Wilson. Rather, paragraphs 9 to 16 of that judgment confirmed the clear position set out in CPR Part 69B.4(4).

The Court therefore determined that the notice of application filed on 17th January 2023 is in fact a nullity and should accordingly be dismissed.

The Court was also concerned about the in the manner which the listed appeals have progressed and made a further order that the matters be listed before the Chief Registrar for case management.