

THE EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

Saint Lucia
Wednesday, 23rd August 2023

JUDGMENTS

Case Name:

Edmund Estephane

v

**McDowell Broadcasting Corporation
(MBC) Limited**

**[SLUHCVAP2022/0002]
(Saint Lucia)**

Date:

Wednesday, 23rd August 2023

**Coram for
delivery:**

**The Hon. Mde. Gertel Thom, Chief Justice [Ag.]
The Hon. Mde Margaret Price-Findlay, Justice of
Appeal
The Hon. Mr. Gerard Farara, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Ms. Candace Fletcher

Respondent:

Mr. Horace Fraser

Issues:

**Interlocutory appeal – Service – Rule 5.7 of the
Civil Procedure Rules – Service of originating
documents on a company – Whether service of the
claim form and other supporting documents on
the receptionist of the respondent at its usual
place of business constituted proper service –
Rule 26.9 of the Civil Procedure Rules – Whether
the court has the jurisdiction under CPR 26.9 to
cure procedural irregularities in service -
Prescription – Whether the appellant's purported
service on the respondent was sufficient to**

interrupt prescription – Interpretation Act – Whether the learned master erred in considering section 23 of the Interpretation Act on the matter of who may be served as the provision is only relevant where an Act is silent on the manner of service

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal is allowed.**
- 2. The claim form and accompanying documents are deemed properly served on the respondent.**
- 3. The matter is returned to the High Court and will proceed in accordance with the CPR.**
- 4. The appellant is to be awarded costs on the appeal, such costs to be assessed by a judge or master of the court below, if not agreed within 21 days of this order.**

Reasons:

- 1. A court must carefully examine CPR 5.7 and the Companies Act with respect to the issue of service and not nitpick in order to find technicalities which put litigants out of the doors of court. For true justice to be done, matters must be allowed to come to court for final determination. Courts are interested in hearing substantive matters and unless a procedural breach proves fatal to a claim the court will use its powers under the CPR in order to have matters heard. In this case, the appellant conducted a search at the Registry of Companies and found the respondent's registered address to be 'John Compton Highway, Castries, St. Lucia'. This address was ambiguous and without a more specific address, service of the claim on the registered office of the respondent proved difficult, if not impossible. The appellant therefore served the receptionist of the respondent at its**

usual place of business. Nonetheless, it is clear that the respondent, received the claim form and the accompanying documents as it filed an acknowledgement of service within the time prescribed by the rules of court. Even though the service in this matter might have been considered procedurally irregular, it satisfied the purposes of service as it engaged the attention of the respondent who actively participated in the proceedings thereafter.

Hoddinott v Persimmon Homes (Wessex) Ltd [2007] EWCA Civ 1203 applied; *Lapierre v Andrew* (1983) 45 A.R. 220 (QB) applied; *Barbara Angela Reid v Melroc Investments Limited t/a Access Cambio* [2019] JMSC Civ 244 applied; Rule 5.7 of the Civil Procedure Rules 2000 considered.

2. CPR 26.9 is a provision of the rules which can be used beneficially where there has been no prejudicial effect to the other party. This Court will not allow style to triumph over substance in circumstances where no prejudice is visited on the other party. In this matter, there was no prejudice to the respondent as a result of what was, in effect, a procedural error. The respondent was not deprived of any knowledge of the fact that proceedings had been commenced against it or what the nature of the claim made against it was. In fact, they entered an acknowledgement of service. Furthermore, CPR 5.7 imposes no sanction for non-compliance with the procedures for service. The learned master therefore erred in finding that the provisions of CPR 5.7 prevented him from invoking the court's inherent powers under CPR 26.9 to correct what amounted to an irregularity in service. The learned master ought to have exercised the discretionary powers granted to the court by virtue of CPR 26.9 and deem that service in the matter was proper and that

service took place before time became prescribed.

Steele v Mooney and others [2005] 1 WLR 2819 applied; Texan Management Limited & Others v Pacific Electric Wire & Cable Company Limited [2009] UKPC 46 applied; Bupa Insurance Limited (trading as Bupa Global) v Roger Hunter [2017] JMCA Civ 3 applied; Bank of Baroda, GCC Operations and Others v Nawany Marine Shipping FZE and Others [2016] EWHC 3089 (Comm) applied; Rule 26.9 of the Civil Procedure Rules 2000 applied.

- 3. The Interpretation Act is a statute of general application in the interpretation of other statutes. It provides that when an Act is silent as to how service is to be effected, such service may be effected by one of the various means set out in the Interpretation Act. As both the CPR and the Companies Act set out very clearly the parties on whom documents ought to be served on behalf of a company, there ought to have been no recourse to the Interpretation Act in these particular circumstances and the learned master erred in so doing.**

Section 23 of the Interpretation Act Cap. 1.06, Revised Laws of Saint Lucia 2020 considered; Part 5 of the Civil Procedure Rules 2000 considered.

Case Name:

Geminis Investors Limited

v

**Goods Technology Starting International
Limited**

**[BVIHCMAP2022/0020]
(Territory of the Virgin Islands)**

Consolidated With:

Geminis Investors Limited

v

**[1]Goods Technology Starting
International Limited**

[2] G-Force Intl Co Ltd

**[BVIHCMAP2022/0043]
(Territory of the Virgin Islands)**

Date: **Wednesday, 23rd August 2023**

**Coram for
delivery:** **The Hon. Mde. Gertel Thom, Chief Justice [Ag.]
The Hon. Mde Margaret Price-Findlay, Justice of
Appeal
The Hon. Mr. Gerard Farara, Justice of Appeal
[Ag.]**

Appearances:

Appellant: **Mr. John McCarroll SC**

Respondents/Applicants: **Ms. Lauren Peaty holding papers for Ms. Sara-
Jane Knock**

Issues: **Interlocutory appeal- Application to adduce fresh
evidence on appeal – Ladd v Marshall principles-
Whether the principles in Ladd v Marshall apply in
full vigour in the context of an appeal against a
decision to deny an application to set aside a
statutory demand – Whether evidence could have
been obtained with reasonable diligence for the
use at hearings in lower court proceedings -
Application for security for costs**

Result/Order: **IT IS HEREBY ORDERED THAT:**

1. **Geminis' fresh evidence applications filed in appeals BVIHCMAP2022/0020 and BVIHCMAP2022/0043 on 16th August 2022 are dismissed.**
2. **The Respondents' security for costs application filed on 14th September 2022 is granted.**
3. **Geminis shall pay into Court the Security Sum and the Statutory Demand Costs Order within 7 days of the date of circulation of the written judgment, that date being 25th August 2023, failing which its appeals will be struck out.**

Reasons:

1. **When an appellate court is dealing with an application to adduce fresh evidence, the overall question is whether it is in furtherance of the overriding objective to do justice to permit the applicant to rely on evidence not relied on in the lower court. To determine this, the Court will be guided by the principles established in Ladd v Marshall namely that: 1.) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; 2.) the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; 3.) the evidence must be such as is presumably to be believed, or in other words it must be apparently credible, though it need not be incontrovertible. However, the first limb would be relaxed in an interlocutory application where a full hearing or trial determinative of the claim is yet to take place but would not be where there had been a trial or a full hearing on the merits.**

Ladd v Marshall [1954] 3 All ER 745 applied; Honourable Guy Joseph v The Constituency Boundaries Commission et al SLUHCVAP2015/0013 (delivered 1st October 2015, unreported) considered; Premier Experts London Ltd and another v Rajwani [2022] EWHC 1188 (QB) applied; BEC Limited v A2 et al BVIHCMAP2022/0044 (delivered 9th September 2022, unreported) applied; AIB Finance Ltd v Debtors [1998] 2 All ER 929 considered; Bilzerian v Weiner et al SKBHCVAP2019/0028, SKBHCVAP2019/0030, SKBHCVAP2019/0031, SKBHCVAP2019/0032, SKBHCVA2019/0033 (delivered 21st July 2020, unreported) applied; Abernethy v Hotbed Ltd [2011] EWHC 1476 (Ch) distinguished; WWRT considered; Angel Wise Limited v Stark Moly Limited BVIHCVAP2010/0030 (delivered 13th February 2012, unreported) considered; Heavy Duty Parts Ltd v Anelay Vendort [2004] EWHC 960 (Ch) distinguished; re a Debtor [1996] 1 WLR 379 considered.

- 2. In the context of insolvency proceedings concerning a company in the BVI, a decision on an application to set aside a statutory demand is a final order. It is not a step in the winding up of a company and the winding up can take place separate and apart from the issuing of a statutory demand. It is not a claim in the true sense and so, it is not the “early stage of litigation” so as to warrant a relaxation of the Ladd v Marshall principles. Being of the nature of a final order, it would not be unreasonable to expect an applicant to deploy reasonable diligence to put all the evidence forward which he seeks to rely on to support his application to set aside the demand. The**

Ladd v Marshall principles therefore apply in their full rigour in the circumstances.

Ladd v Marshall [1954] 3 All ER 745 applied; BEC Limited v A2 et al BVIHCMAP2022/0044 (delivered 9th September 2022, unreported) applied.

- 3. In this case, Geminis had all the information necessary to instruct Mr. Miller before the hearing of the application and with reasonable diligence they could have procured the opinion and sought to have it adduced before the lower court. In relation to the Substantive Appeal, there is no dispute that the opinion was available at the hearing of the extension of time and default judgment applications and Geminis chose not to rely on it. To allow a party to deliberately withhold evidence in the lower court and then seek to rely on it in an appeal would be contrary to the overriding objective. Accordingly, the first limb of Ladd v Marshall also fails in both the Statutory Demand Appeal and the Substantive Appeal.**
- 4. The role of an expert in the construction of foreign documents is that the expert merely proves the foreign rules of construction and the court itself determines the meanings of these documents. In examining the opinion, there is nothing to say that the rules of construction under New York law differ materially from the rules under BVI law. Although Mr. Miller's opinion would be likely to be regarded as credible given his years of experience and credentials, to fulfil only one of the three limbs of Ladd v Marshall would not be sufficient to allow the**

evidence to be adduced. Given the foregoing, the application adduce fresh evidence is dismissed.

Ladd v Marshall [1954] 3 All ER 745 applied.

5. The court may order a claimant to put up security for the defendant's costs if the court is satisfied, on an application for security for costs, that there is a significant risk of the defendant suffering an injustice by having to pay to defend the proceedings with no real prospect of being able to recover his costs if he is eventually successful. The court may also make such a security for costs order subject to conditions. In this case, apart from the Evenstar shares and the sums in a Japanese account, Geminis has denied having any assets in the BVI and has failed to provide other evidence of their financial status. Further, the Evenstar shares (at the time of the judgment of the learned judge) were worth less than the amount due under the Demand and the Court has no updated evidence as to their current value. Geminis has also failed to pay any of the previous lower court orders and has failed to provide any explanation for this. There is a significant risk of the respondents suffering an injustice by having to pay to defend proceedings on appeal, with no real prospect of being able to recover their costs if they were eventually successful. In all the circumstances of the case, it would be just for the security for costs application be granted.

Rules 26.1(3), 26.1(4) and 62.17 of the Civil Procedure Rules 2000 applied; Dr. Martin

**Didier et al v Royal Caribbean Cruises Ltd
SLUHCVAP2017/0051 (delivered 18th
September 2018, unreported).**

Case Name:

**Kenneth M. Kryś
(as Liquidator of Fairfield Sentry Limited
(in liquidation))**

v

Farnum Place LLC

**[BVIHCVAP2013/0014]
(Territory of the Virgin Islands)**

Date:

Wednesday, 23rd August 2023

**Coram for
delivery:**

**The Hon. Mde. Gertel Thom, Chief Justice [Ag.]
The Hon. Mde Margaret Price-Findlay, Justice of
Appeal
The Hon. Mr. Gerard Farara, Justice of Appeal
[Ag.]**

Appearances:

Applicant:

Mr. Alistair Abbott

Respondent:

**Ms. Allana-J Joseph holding papers for Mr.
Richard Evans**

Issues:

**Motion for conditional leave to appeal to His
Majesty in Council – Appeal as of right – Whether
the decision of this Court dismissing the appeal is
a final decision within the meaning of section
3(1)(a) of the 1967 Order so that the applicant may
appeal as of right – 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 – Delay in the delivery of judgment –
Whether the decision of Bernstein J in the US**

Bankruptcy Court disapproving the sale of the SIPA claim to Farnum, Hellerstein J's affirmation of Bernstein J's decision and the SCCA's affirmation of Hellerstein J's decision were material events post-dating the hearing of the appeal which ought to have been considered by this Court in the appeal – Whether the delay in excess of 7 years between the hearing of the appeal and the handing down of the judgment is another consideration in favour of this Court granting leave to appeal to His Majesty in Council

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. The application for conditional leave to appeal to His Majesty in Council is granted upon the following conditions:**
 - a. the applicant within 90 days of the date hereof do enter into good and sufficient security in the sum of 500 pounds sterling for the due prosecution of the appeal, such security to consist of a deposit of the said amount at the court office;**
 - b. within 90 days of the date hereof, the applicant takes the necessary steps for the purposes of procuring the preparation of the records, the settling of such records with the solicitors for the Respondents to this application, and the certification of the record by the Registrar of the Court of Appeal;**
 - c. the record shall be prepared in accordance with rules 18 to 20 of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 and its Practice Direction 4.2.1 to 4.3.2 and Practice Direction 5; and shall be transmitted to the Registrar of the Judicial Committee of the Privy Council without delay where final**

permission to appeal has been granted.

2. The applicant shall make an application to the Court for final permission to appeal to His Majesty in Council, supported by the certificate of the Registrar that the security for costs ordered herein has been given within the time prescribed by this Order to the satisfaction of the Registrar.
3. Costs of the application for leave to appeal to the Privy Council shall be costs in the appeal to the Privy Council.

Reasons:

1. Once an order is made in an application which is a pre-requisite for commencing substantive proceedings or is made in relation to extant proceedings, such an order would be considered an interlocutory order. However, there may be orders which are sui generis, which emanate from stand-alone proceedings unrelated to any overarching substantive proceedings and would accordingly be regarded as a final order. As long as the order is made in proceedings connected to a larger substantive claim, it cannot be considered final unless the issues on the larger substantive claim are resolved by that order, regardless of the way in which the corresponding application is determined. In this case, Mr. Krys' application for sanction to take steps in the appeal to the SCCA and by extension his appeal against Bannister J's refusal of the application were made within the winding up proceedings against Sentry. The application and the appeal were not made independent of substantive or overarching proceedings and more pointedly, whichever way they were decided would not have resolved the issues or rights between the parties as it concerns the

substantive liquidation proceedings. Accordingly, the order emanating from Mr. Krys' application for sanction to appeal to the SCCA and/or the order from the ensuing appeal must be considered interlocutory orders and he does not therefore have an appeal as of right to His Majesty in Council pursuant to section 3(1)(a) of the 1967 Order.

Rule 62.1(3)(b) of the Civil Procedure Rules 2000 applied; *Nam Tai Electronics Inc v David Hague et al* BVIHCVAP2003/0012 (delivered 21st September 2004, unreported) followed; *Nigel Hamilton-Smith et al v Alexander Fundora* ANUHCVP2010/0031 (delivered 31st August 2010, unreported) followed; *Harvest Network Limited v CHC Investment Holdings Limited* BVIHCMAP2018/0007 (delivered 23rd November 2020, unreported) followed; *Becker v Marion Corporation* 1977 AC 271 distinguished; *BEC Limited v A2 et al* BVIHCMAP2022/0044 (delivered 9th September 2022, unreported) distinguished.

2. This Court's consistent approach to granting an application for conditional leave to appeal to the Privy Council under the 'or otherwise' limb involves circumstances where the Court considers that, outside of any matters involving great general or public importance which fail to arise on the intended appeal, there remain questions of law on which the Court could benefit from a definitive statement of law from the Privy Council or there is some doubt as to the correctness of the Court's decision. In the instant case, having regard to the findings of the Court of Appeal in assessing the trial judge's approach to the application for sanction it does not appear that the above includes any questions which require

clarification, or questions which were not considered by the trial judge. This Court was cognisant that it was not an unawareness or confusion on legal principles which informed the trial judge's decision but the particular circumstances of the case which led him to exercise his discretion the way he did. This Court also appears to have been seized of the relevant legal principles and the factual circumstances which led it to agree with how Bannister J decided to exercise his discretion on the application for sanction. On this basis, it would not appear that there remains any question of great general or public importance which requires ventilation before the Privy Council and therefore leave to appeal ought not to be granted on this basis.

Olasemo v Barnett Ltd (1995) 51 WIR 191 applied; Renaissance Ventures Ltd et al v Comodo Holdings Limited BVIHCMAP2018/0005 & BVIHCMAP2018/0008 (delivered 8th October 2018, unreported) followed; Flavio Maluf v Durant International Corp et al BVIHCMAP2021/0025 (delivered 11th May 2022, unreported) followed.

3. Delay in the delivery of a judgment, however excessive, cannot on its own call into question the soundness of the court's judgment, and is not, in and of itself, an issue of great general or public importance or otherwise within the meaning of section 3(2)(a) of the 1967 Order. However, there may be cases where excessive delay is accompanied by circumstances which may have had a significant impact on the outcome of the appeal. In this case, the delay was accompanied by the fact that the SCCA judgment had not been considered at

all by the Court and there may be some doubt as to the accuracy of the Court's judgment on appeal. This is so particularly where the applicant would have achieved what he intended in the SCCA appeal and the Court's judgment would in effect withdraw, ex post facto, the sanction which formed the basis on which he was able to pursue the SCCA appeal in the first instance to actual completion. Accordingly, given the unique factual matrix of this case, there is a sufficient basis on which the applicant may be granted conditional leave to appeal to the Privy Council under the 'or otherwise' limb of section 3(2)(a) of the 1967 Order.

Byers and others v Chen Ningning [2021] UKPC 4 applied; Joseph et al v Alicia Francios; Matty et al v Alicia Francios SLUHCVP2011/0025; SLUHCVP2012/0037 (delivered 21st August 2012, unreported) followed; Emmerson International Corporation v Viktor Vekselberg et al BVIHCV2019/0020 (delivered 27th July 2023, unreported) followed.

APPLICATIONS

Case Name:

David Phillip

v

**Joseph Phillip
(As Administrator of the Estate of Celina
Phillip also known as Celina Montoute)**

**[SLUHCVP2022/0003]
(Saint Lucia)**

Date: Wednesday, 23rd August 2023

Coram: The Hon. Mde. Gertel Thom, Chief Justice [Ag.]
The Hon. Mde Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Gerard Farara, Justice of Appeal [Ag.]

Appearances:

Applicant: Mr. Horace Fraser

Respondent: Mr. George Charlemagne

Issues:

Application for leave to appeal to the Caribbean Court of Justice (Appellate Jurisdiction) pursuant to Section 108(1)(a) of the Constitution of Saint Lucia, as amended - Whether applicant satisfies requirements for leave to appeal to CCJ - Whether the matter involves a sum in excess of \$25,000.00 being the prescribed limit set out at section 108(1)(a) and (5) of the Constitution of Saint Lucia

Application for stay of execution of judgment pending appeal to the Caribbean Court of Justice - Whether there will be a risk of injustice if a stay of execution is not granted - Whether the applicant's appeal has a realistic prospect of success - Whether a finding of bad faith on the part of the applicant would preclude him from obtaining a stay of execution

Type of Order: Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The applicant is granted leave to appeal the judgment of this Court delivered on 27th July 2023 in SLUHCVAP2022/003 pursuant to Section 108 (1)(a) of the Constitution of Saint Lucia as amended.
2. The execution of the said judgment is stayed pending the hearing and

determination of the appeal to the Caribbean Court of Justice pursuant to Rule 10.9(1) of the Caribbean Court of Justice (Appellate Jurisdiction) Rules, 2021.

3. The applicant is to provide security for costs pursuant to Rule 10.7 of the Caribbean Court of Justice (Appellate Jurisdiction) Rules, 2021 in the sum of \$7,500 within 90 days of the date of this order.
4. The applicant is to comply with rule 10.7(2)(b) the Caribbean Court of Justice (Appellate Jurisdiction) Rules, 2021 for leave to appeal.
5. Upon compliance with the conditions herein stated, the Registrar of the Supreme Court shall issue a Certificate of Compliance in conformity with Form 2A, Schedule 3 of the Caribbean Court of Justice (Appellate Jurisdiction Rules) 2021 and, within 7 days of its issue, serve copies of the said Certificate on the intended appellant and the intended respondent and shall notify the Registrar of the Caribbean Court of Justice.
6. Costs in the matter to be costs in the appeal.

Reason:

Upon hearing counsel for the applicant and the respondent on the applicant's application for leave to appeal to the Caribbean Court of Justice and on the application for a stay of execution of the judgment, the Court was of the unanimous view that the applicant had met the requirements for the grant of leave to appeal to the Caribbean Court of Justice and for a stay of execution of the judgment pending the hearing and determination of the appeal.