

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

Antigua and Barbuda
5th – 9th June 2023

JUDGMENT

Case Name:

Chia Hsing Wang

v

[1] XY

[2] XYZ

[3] Floreat Real Estate Limited

Heard together with:

[1] XYZ

[2] Chia Hsing Wang

and

[1] Real Assets (RA) Global Opportunity Fund
I Ltd

[2] Floreat Real Estate Limited

[BVIHCMAP2022/0055]

[BVIHCMAP2022/0056]

(Territory of the Virgin Islands)

Date:

Tuesday, 6th June 2023

Coram for
Delivery:

The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mr. Gerard St. C Farara, Justice of Appeal
[Ag.]

Appearances:

Appellants: Mr. James Collins KC with him Mr. Andrew Willins and Ms. Tamara Cameron

Respondents: Mr. Tom Mountford, Ms. Marlena Valles, Mr. William Hare, Mr. Alistair Abbott and Mr. Christopher Bromilow for Floreat Real Estate Limited
Mr. Simon Hall holding a watching brief for the joint provisional liquidators
Mr. Rondelle Keller holding a watching brief for XYZ

Issues: Interlocutory appeal – Application to adduce fresh evidence – Principles in Ladd v Marshall – Whether documents that did not exist at the time of hearing should be allowed as fresh evidence – Whether documents would have important influence on court’s determination of issues in court below and on appeal – Appointment of receivers over shares held by XYZ in RAGOF – Appointment of joint provisional liquidators (JPLs) in RAGOF - Whether judge erred in his general observations so as to reach a misconceived conclusion about the real purpose for bringing the Receivership and JPL applications and the artificiality of proceeding with the applications ex parte – Exercise of court’s discretion to appoint receivers - Whether it is just or convenient to grant Receivership Order – Factors of particular case to be considered in deciding just or convenient – Duty of full and frank disclosure and fair presentation – Judge’s finding of a breach of the duty of full and frank disclosure at the ex parte Receivership and JPL applications – Non innocent breaches of duty - Principles to be applied when dealing with breaches of duty of full and frank disclosure at ex parte hearing for interim relief – Whether the risk of forced redemption raised by counsel misled ex parte judge - Alternative remedies to Receivership and JPL Orders available – Judge’s discharge and refusal to regrant Receivership and JPL orders – Whether errors in judgment vitiates judge’s conclusion that Receivership and JPL orders ought be set aside and not regrant

Result / Order: IT IS HEREBY ORDERED THAT:

1. Appeal No. BVIHCMAP2022/0055 is dismissed.

2. Appeal No. BVIHCMAP2022/0056 is also dismissed.
3. The orders made by the judge below discharging the Receivership Order made on 26th August 2021 and the JPL Order dated 1st September 2021 are confirmed.
4. The appellants' first, second and third fresh evidence applications are dismissed except to the limited extent permitted under this judgment.
5. The stay of the judge's discharge of the Receivership Order and the JPL Order granted pending the determination of these appeals is discharged with immediate effect.
6. Floreat Real Estate Limited, the respondent in both appeals, shall have its costs in the court below, in the appeals, and in relation to the three fresh evidence applications, such costs to be assessed by a judge of the Commercial Division, if not agreed by the parties within 21 days of the date of delivery of this judgment.

Reasons:

1. The Ladd v Marshall criteria are principles and not rules or special rules to be strictly applied by the court. Accordingly, a party seeking to adduce fresh evidence does not have to show some special ground for the grant of permission to rely on such evidence in the appeal. However, the Ladd v Marshall criteria are to be applied with considerable care and in accordance with the overriding objective of doing justice. The court must also bear in mind that an application to admit fresh evidence in relation to an appeal from a decision in an interlocutory matter is not another opportunity for the losing party to invite the court to rehear the application on the basis of either evidence in existence but not adduced before the court below and which the party seeking to adduce and to rely on it could not have discovered with reasonable diligence; or

additional or new evidence not in existence at the time of the first instance hearing.

Thune and Another v London Properties Ltd and Others [1990] 1 WLR 562 at 571 considered; Banks v Cox (unreported), 17th July 2000; Court of Appeal (Civil Division) Transcript No. 1476 of 2000, C.A considered; Ladd v Marshall [1954] 1 WLR 1489 applied.

2. The first limb of the Ladd v Marshall criteria is that the fresh evidence sought to be relied on in an appeal must have existed at the time of the trial or hearing in the court below, but which could not have been obtained with reasonable diligence by the applicant. However, in exceptional circumstances, the court has a discretion to admit, at the appellate stage, evidence which did not exist (essentially 'new' evidence) at the hearing of an interlocutory application, where such evidence is capable of further strengthening the court's determination of an issue or finding. Such circumstances are exceptional, and there must be compelling reasons why 'new' evidence ought to be admitted.

Ladd v Marshall Adam Bilzerian et al v Terrence Byron et al SKBHC VAP2019/0032 (delivered 21st July 2020, unreported) followed; Staray Capital Limited et al v Cha, Yang (also known as Stanley) BVIHCMAP2013/0009 (delivered 14th July 2014, unreported) followed.

3. The English Claim claim form, the letter from Carey Olsen dated 20th September 2022, the English Judgment dated 22nd February 2022, the JPL 4th and 5th Reports and Borelli Cayman 3 which the appellants sought to adduce as fresh evidence in the first fresh evidence application, do not satisfy the Ladd v Marshall criteria for admission. As to the claim form in the English Claim, this is not evidence and cannot in any reasonable sense be said to likely have had an important influence on the outcome of the three applications before the learned judge

or the appeals from his orders. Further, there are no exceptional circumstances which would warrant permission being granted for the claim form (which is new in the sense that it did not exist at the time of the hearings in the court below) to be admitted or adduced as fresh evidence in the appeals. Similarly, the letter dated 20th September 2022 from Carey Olsen is not in any sense evidence, but the product of lawyers representing a party to litigation. It has no probative or evidential value whether on its own or together with the English Claim and will have no influence whatsoever on the court's determination of the three applications and the appeals. It fails all three limbs of the Ladd v Marshall principles. As it relates to the English Judgment, this judgment was available at the time of the hearing of the applications in the court below. Even if, as the appellants intimate, the English Judgment could not have been adduced with reasonable diligence prior to the first instance hearings, they subsequently sought, impermissibly, to draw the judgment to the judge's attention after the hearing via a letter from the appellants' counsel. The learned judge therefore could not properly consider the English Judgment when rendering his said decision, which is the subject of these appeals. Accordingly, the English Judgment does not meet the criteria for the first limb of the Ladd v Marshall test. Moreover, as to the importance of the evidence, this Court is not satisfied that the English Judgment which is a judgment of another court, between different parties, is important evidence or evidence of anything that can further advance or have an important influence on the issues in and the outcome on the appeals or the three applications.

4. In relation to Borelli Cayman 3, this document does not satisfy, in particular, the second Ladd v Marshall criteria. It does not, in any material way, advance or add to the important issues dealt with by the learned judge in his judgment. Likewise, the Court is not satisfied that the JPL 4th and 5th Reports would have an important

influence on the result of the appeals. In addition, the JPL 4th and 5th Reports are 'new' evidence which did not exist at the time of hearing of the applications in the court below and the appellants/ applicants have failed to rely on or demonstrate any exceptional circumstances, warranting this Court admitting them as fresh evidence.

5. In relation to Ford 1, which explains the origin and reasons for the usage of the filename 'Project Ninja', the Court is satisfied that this document ought to be admitted and relied on as new evidence in the appeals. The evidence in Ford 1 goes to the judge's inconsequential treatment of the 'Project Ninja' expression in his judgment, particularly the word 'ninja'. If the judge intended to consider this title or filename in his judgment, and to engage in extensive research and analysis of the meaning and purported negative connotations of the word 'ninja', fairness and justice required him to invite, at minimum, short written evidence and submissions from the appellants, and, if necessary, short submissions from FRE on or about its use, and whether he was entitled or ought properly to draw any inferences (adverse or otherwise) from the appellants' use of it when determining any of the issues which were raised on the three applications. Unfortunately, the learned judge failed to do so.
6. As to the appellants' second fresh evidence application, the Amended Claim Form and Particulars of Claim in the English Claim which the appellants' sought to adduce as fresh evidence do not satisfy all three limbs of the test in Ladd v Marshall and are not admitted as evidence in the appeals. The Amended Claim Form and Particulars of Claim in the English Claim were not in existence at the time of the hearing of the applications. Moreover, they are not evidence of wrongdoing, but rather the work product of lawyers representing the JPLs. The causes of action, allegations of facts and wrongdoing which the appellants contend these

documents highlight are all matters for trial which will not, in the Court's view, have an important influence on the result of the appeals. Put another way, the Court is not satisfied that these documents (not being actual evidence of wrongdoing) would take matters much further.

7. The appellants' third application filed 22nd May 2023 to be determined on paper, to adduce fresh evidence in the appeals is also dismissed. The new evidence which the appellants sought to adduce is the Fourth Affidavit of Tamara T. Cameron and the exhibits thereto as "TTC-4". These documents all relate to winding up proceedings before the Grand Court and the making in May 2023 of winding up orders by the Grand Court in relation to two of the three Cayman Funds. This new evidence did not exist either at the time of the hearing of the three applications before the judge below or the hearing and full argument on the appeals. The Court, bearing in mind the principles in which 'new' evidence may be admitted, found no exceptional circumstances warranting the admission of the said affidavit and documents as new evidence in these appeals. The Court was also not satisfied that they or any of them would have an important influence on the outcome of the three applications or the appeals.
8. The appellants' allegations as to the errors and mischaracterisations by the judge in his general observations made about Mr. Wang's real purpose for bringing the Receivership and JPL Applications and the artificiality of Mr. Wang proceeding ex parte to obtain the Receivership and JPL Orders, are without merit and have not been satisfactorily made out so as to undermine the judge's conclusions and to render them patently wrong. The observations and conclusions the learned judge made were reasonable and proper and were open to the learned judge to make on the evidence before him. However, this Court must also consider these observations alongside the judge's other

important conclusions which influenced his decision to discharge and to not regrant the Receivership Order and JPL Order in order to be able to properly assess the correctness of the judge's primary conclusions.

9. The appointment of a receiver is considered a draconian relief which is not to be deployed lightly. Careful consideration must be given to the scope of the court's statutory jurisdiction and the principles which guide the court's exercise of discretion to make a receivership order and on what terms. Section 24 (1) of the Eastern Caribbean Supreme Court (Virgin Islands) Act delimits this power only by what the judge considers is 'just or convenient' in the particular circumstances of the matter.

Section 24(1) of the Eastern Caribbean Supreme Court (Virgin Islands) Act Cap. 80 of the Laws of the Virgin Islands applied.

10. The judge correctly found that he had jurisdiction to appoint receivers. He was therefore obliged to consider factors relevant to the discretionary exercise of the court's power to make a receivership order and whether these factors satisfied him that it was just or convenient to continue or discharge or regrant the Receivership Order. Admittedly, the learned judge erred when he equated the absence of a provision in section 24 dealing with standing to a factor to be considered in the exercise of the court's discretion as to whether it is just or convenient to make a receivership order. This provision goes to the question of standing to apply for a receivership order not to the discretion of the court to make such an order. Notwithstanding this error, the learned judge was entitled to consider the other matters which he did at paragraphs 142 to 146 of his judgment which included, inter alia, Mr. Wang's purpose for invoking the court's receivership and winding up/provisional liquidator jurisdictions; Mr. Wang wanting to use the receivership remedy for the sake of using one of its ancillary

powers (the just and equitable winding up); and that there were potentially less draconian remedies that Mr. Wang could resort to. Furthermore, in relation to the appellants' contention that the judge's conclusion lacked reasons, while the learned judge regrettably did not identify the contentions advanced by FRE which he adopted at paragraph 146 of his judgment in arriving at his conclusion that the circumstances of the case does not render it just or convenient to make the Receivership Order, it is clear that the learned judge dealt with the issue of just or convenient throughout paragraphs 142 to 146 of the judgment. The appellants' criticism of the judge's approach at paragraph 146 does not portray the full picture and does not inexorably lead to a conclusion that the judge's reasons for arriving at his conclusion on the issue of just or convenient are flawed and that the appeal should be allowed purely on the ground of a lack of reasons.

Asean Resources Ltd v Ka Wah International Merchant Finance Ltd [1987] LRC (Comm) 835 distinguished; Mubarak v Mubarak and others [2008] JRC 136 considered; English v Emery Reimbold & Strick Ltd [2002] 1 WLR 2409 considered.

11. In bringing the JPL Application ex parte, the appellants, as applicants, had a duty to make full and frank disclosure, accurate statements or representations of both fact and law, and fair representation of the application. The duty of full and frank disclosure not only relates to the accuracy of statements or representations made to the court, whether in writing or orally, by the applicants and/or their counsel, but extends to disclosing all material facts known to the applicants and which they could have discovered exercising reasonable diligence and inquiries. Importantly, the duty also extends to an obligation, which particularly rests with counsel, to direct the court to the relevant documents and provisions which concern

pertinent issues and matters, and to disclose the possible or likely defences, interpretations or counter-interpretations, and the counter-reasons or counter-arguments against the grant of the relief sought.

Alexander Tugushev v Vitaly Orlov and Others (No 2) [2019] EWHC 2031 considered; Commercial Bank - Cameroun v Nixon Financial Group Limited BVIHCVAP 2011/005 (delivered 6th June 2011, unreported followed; Thelma Paraskevaides et al v Citco Trust Corporation Limited et al BVIHCMAP2018/0046 (delivered 30th March 2020, unreported) followed; Congentra AG v Sixteen Thirteen Marine SA [2008] EWHC 1615 (Comm) considered.

- 12.A ‘deliberate’ or non-innocent non-disclosure amounting, implicitly, to an intention to deceive the court or to mislead the court will, except in exceptional circumstances, be visited with an order discharging the order obtained in breach of the duty of full and frank disclosure and fair presentation and in it not being renewed. Whereas, where the non-disclosure is innocent but material, the order obtained may be discharged and, if discharged, may be renewed or regranted. It follows that if an applicant who is guilty of non-disclosure wishes the court to treat the non-disclosure as innocent, the applicant must explain how the non-disclosure came about. Absent an explanation or proper explanation, there is a strong inference that the non-disclosure was not innocent. The onus lies on counsel, at the earliest opportunity, to correct or withdraw (wholly or partially) any such misstatement or misrepresentation made to the court, especially one made during an ex parte hearing. It is impermissible to allow a judge at an ex parte hearing to proceed to grant the relief sought on the basis of a false, incorrect, or material overstatement or misrepresentation of the client’s case.

Banca Turco Româna S.A. (in liquidation) (acting through its liquidator Fondul De

Garantare a Depozitelor Bancare) v Çörtük and others [2018] EWHC 662 (Comm) considered; Hu Lan v Sundale International Limited et al BVIHCM 2019/0167 (delivered 6th July 2020, unreported) considered.

13. In relation to the issue of full and frank disclosure on the JPL Application, the representation by then leading counsel for the applicant of the risk of forced redemption to the shares in RAGOF if the application was not proceeded with ex parte was a serious breach of the duty of full and frank disclosure and fair presentation and the judge was correct in so finding. Counsel, in his submissions to the ex parte judge, rooted his representation of forced redemption on there being an absolute right to redeem Mr. Wang's shares in RAGOF. He put the position of his client Mr. Wang in more absolute terms and with a much higher degree of certainty and immediacy of risk of a forced redemption of the shares. It was counsel's representations which dissuaded the judge at the ex parte hearing from his already declared course of action of adjourning the JPL Application to facilitate an inter partes hearing. Additionally, the learned judge was not taken to any of the documents which underpin the risk of redemption such as the Articles of RAGOF and, in particular, Regulations 1.1, 4.4 and 20. These provisions, and the possible different interpretations and constructions, were simply ignored and never brought to the attention of the judge at the ex parte hearing. Importantly, no counter-argument to the absolute right to compulsory redemption of the shares was put before the learned judge at the ex parte hearing of the JPL Application by Mr. Wang or his counsel. The judge was correct to conclude that the omission by counsel and Mr. Wang to take the ex-parte judge to the underlying documents and to allude to FRE's likely counter-arguments at the ex parte hearing was deliberate.

14. The duty of full and frank disclosure and fair representation also extended to the appellants

addressing the judge on possible defences and counter-arguments to a winding-up order and to the appointment of provisional liquidators, which would have included possible alternative remedies. This the appellants wholly failed to do at the ex parte stage. In so doing, the appellants committed a serious breach of the duty of full and frank disclosure and fair presentation, as the learned judge correctly found.

15. The appellants' contention that the learned judge erred in failing to give proper reasons for his conclusion that the representation made by Mr. Wang as to the risk of redemption 'was very arguably wrong' and thus ought to be set aside, is not correct and ought to be rejected. The bases given by the judge are well supported on any proper and full reading of the judgment, including that counsel's representation as to a forced redemption was 'very arguably wrong'.

16. As it relates to full and frank disclosure on the Receivership Application, the gravamen of the omission at the ex parte Receivership Application hearing, is that no alternative remedies were disclosed to the learned judge including, and especially, the transfer of the shares to Mr. Wang or to a willing nominee. It was appropriate and necessary for the learned judge to consider alternative remedies not just to appointing receivers, but to a winding up and appointment of provisional liquidators over RAGOF. This is so when looked at in the context that the Receivership Application was the first of the two-stage strategy by Mr. Wang to obtain control of the shares. Mr. Wang and his counsel clearly failed to properly and fully disclose to the learned judge at the ex parte hearing the various alternative remedies, most significantly the transfer of the shares to Mr. Wang or a willing nominee. Additionally, on the issue of forced redemption, while counsel for the applicants had pointed the judge to Regulation 20 of the Articles, this was primarily to show that Mr. Wang did not fit the definition of 'Qualifying Investor' and that this may lead those in charge

of RAGOF to conclude that the fund could force the redemption of his shares. The clear imputation left with the judge was that Mr. Wang's shares needed to be protected by having them put in the hands of court appointed receivers as they were in imminent danger of a forced redemption, when in fact that was not the case on any proper reading of Regulation 20. Furthermore, counsel did not take the judge to the any of the relevant provisions in the Articles, and it was not sufficient to assume that the judge had read Regulation 20 and understood it. Accordingly, the criticisms of the judge's findings of breaches of the duty of full and frank disclosure and fair presentation, leading to his finding that such breaches or omissions were not innocent and that the Receivership Order ought to be discharged, fails.

17. The principles on discharge and regrant of an order obtained ex parte in the face of non-innocent material breaches of the duty of full and frank disclosure and fair presentation are uncontroversial. The general principle is that where material non-disclosure has been established, the court will be astute to ensure that the party in breach is deprived of any advantage which he has received as a result of the breach of duty. Furthermore, where it has been established that the breach was non-innocent, it would be in exceptional circumstances where the order or relief obtained is not discharged. The question of regrant is a matter of discretion in which the court weighs up a number of factors, including the breaches of the duty and the strength of the applicant's case in the substantive proceedings, in determining the ultimate question of what is in the interest of justice. Consequently, the learned judge having found, and this Court having agreed, that the breaches of duty in relation to the ex parte hearing of the Receivership Application and the JPL Application were not innocent and were sufficiently serious and culpable to warrant the immediate discharge of the Receivership Order

and the JPL Order, the appellants were rightfully deprived of any advantage which they had gained as a result of obtaining the said orders in the circumstances in which they did. As such, the learned judge did not commit any error of principle when he discharged the Orders and refused to regrant them. Furthermore, no exceptional circumstances were shown by the appellants before this Court or the court below as to why the general principle and consequence of discharge and no regrant ought not be applied.

APPLICATIONS AND APPEALS

Case Name:

[1] Neil Cave
[2] Simon Butler
[3] Jude Jolie
[4] Daren Weste
[5] Linda De Costa
[6] Kevin Simon
[7] Desroy Demming
[8] St. Rose Verneuil
[9] Richard Jumi
[10] Joseph Nixon

v

The Attorney General

**[ANUHCVP2022/0011]
(Antigua and Barbuda)**

Date: **Monday, 5th June 2023**

Coram: **The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal**

**The Hon. Mr. Gerard St. C Farara, Justice of Appeal
[Ag.]**

Appearances:

Applicants: Mr. Ruggles Ferguson, KC

Respondent: Mrs. Carla Brookes-Harris

Issues:

Motion for conditional leave to appeal to His Majesty in Council - Jurisdiction - Whether the motion for conditional leave to appeal to His Majesty in Council is timely filed in accordance with the West Indies Associated States (Appeals to Privy Council) Order 1967

Type of Order:

Directions

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

- 1. The applicants shall file and serve written submissions on or before Monday 12th June 2023.**
- 2. The respondent shall file and serve written submissions in response on or before Monday 19th June 2023.**
- 3. The hearing is adjourned to the sitting of the Court of Appeal for Grenada during the week commencing 3rd July 2023. Notice to be confirmed by the Chief Registrar.**

Reason:

At the commencement of the appeal, the Court asked both counsel for the applicants and the respondent to address the preliminary issue of whether the motion for conditional leave to appeal to His Majesty in Council was timely filed in accordance with West Indies Associated States (Appeals to Privy Council) Order 1967. Counsel for the applicants intimated to the Court that he needed some time to address the

preliminary issue and asked the Court for permission to file submissions on the issue, at a later date. The Court acceded to the request and made the necessary directions.

Case Name: **Antigua and Barbuda Airport Authority**

v

Antigua Hangers Inc.

**[ANUHCVP2023/0005]
(Antigua and Barbuda)**

Date: **Monday, 5th June 2023**

Coram: **The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard St. C Farara, Justice of Appeal
[Ag.]**

Appearances:

**Appellant/
Respondent:** **Mr. Hugh Marshall**

Respondent/Applicant: **Ms. Sherrie-Ann Bradshaw**

Issues: **Application to strike out notice of appeal - Appeal filed as of right from a final decision - Part 62.4(6) of the Civil Procedure Rules, 2000 - Whether appeal discloses no reasonable grounds of appeal and is utterly hopeless or frivolous - Whether notice of appeal is vague and should be struck out - Whether this is an appropriate case where the Court should exercise its power to strike out a notice of appeal - Costs**

Type of Order: **Oral Decision**

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The application to strike out the notice of appeal is dismissed.**
- 2. Costs to the appellant/respondent in the sum of \$1500.00 to be paid on or before 19th June 2023.**

Reason:

The Court, upon a consideration of the notice of appeal and the grounds therein, was of the unanimous view that the grounds of appeal were grounds which it did not consider to be frivolous or hopeless. Therefore the Court found that the grounds of appeal did not warrant the Court exercising its 'nuclear option' of dismissing the appeal, which was an appeal filed as of right by the appellant/respondent from a trial and judgment of the court below. The appeal will clearly involve considerations of the facts of the case to determine whether the learned judge made errors of law or of mixed fact and law. Accordingly, the Court concluded that the application to strike out the notice of appeal could not be allowed and was dismissed. Costs were also awarded to the appellant/respondent in the sum of \$1,500.00.

Case Name:

Patrick Prendergast a.k.a Paddy Prendergast

v

Ronald Mind

**[ANUHCVP2023/0021]
(Antigua and Barbuda)**

Date:

Monday, 5th June 2023

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard St. C Farara, Justice of Appeal
[Ag.]**

Appearances:

Applicant: Dr. David Dorsett

Respondent: Mrs. Andrea Smithen-Henry

Issues:

Application for leave to appeal – Application for stay of execution - Whether the proposed appeal has a realistic prospect of success - Whether the learned judge erred in refusing to grant an extension of time to the applicant to make an application under CPR 11.18 to set aside orders made in his absence - Whether the learned judge erred in finding that the presence of the applicant at hearings on 13th October 2022 and 9th November 2022 would have made no difference with respect to the orders made on those occasions

Type of Order:

Oral Decision

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The application for leave to appeal and for a stay of execution filed on 11th May 2023 is dismissed in its entirety.
2. Costs of the application to the respondent in the sum of \$750.00, to be paid on or before 20th June 2023.

Reason:

Before the Court was a notice of application filed on 11th May 2023 by the applicant, who was the defendant in the court below. By the notice of application, the applicant sought leave to appeal against the decision and order of a judge of the High Court made on 3rd May 2023 and for a stay pending the determination of the intended appeal. In the notice, the applicant contended that he had a good prospect of success based on the sole proposed ground of appeal which was as follows: The learned judge erred in making the evaluative judgment that the presence of the applicant at hearings on 13th October 2022 and 9th November 2022 would have made no difference with respect to

the orders that were made on those respective occasions.

By order dated 3rd May 2023, the learned judge dismissed the applicant's application for an extension of time to apply to set aside two orders made in the absence of the applicant, dated 13th October 2022 and 9th November 2022. By the order made on 13th October 2022, the learned master, in brief, ordered that the defendant was to file and serve the exhibits to his affidavit in support of his application to set aside the default judgment, together with brief submissions on or before 25th October 2022, failing which the application would stand dismissed without further order. The order further stated that unless counsel for the defendant, or the defendant in person, attended on 9th November 2022, the application shall stand dismissed without further order.

The learned judge below, in her written decision, refused the application to extend time and ordered the applicant to pay the costs of the respondent in the sum of \$1,500.00. This is the order in respect of which leave to appeal was sought from this Court.

It is well established that the standard applicable to an application for leave to appeal is that an applicant must demonstrate, to the satisfaction of the Court, that any appeal would have a realistic prospect of success. The Court considered the written and oral submissions of the applicant, the affidavits and exhibits in support of the application and the authorities relied on by counsel for the applicant, including the decisions of the Privy Council in *Rodriguez Jean Pierre v The King* [2023] UKPC 15 (at paragraph 27) and *Lux Locations v Yida Zhang* [2023] UKPC 3.

The Court particularly considered the submissions by counsel for the applicant that the Court should not only give consideration to the four criteria identified in relation to an application for extension of time but that it would also be necessary to consider the overall justice of the case. In considering the overall justice of the case, counsel for the applicant sought to emphasize the chronological history of the matter as

set out in the affidavit evidence, the written submissions and the judgment in the court below.

Having considered all these matters, the Court was not satisfied that the application rose to the level of a realistic prospect of success. The applicant was unable to demonstrate, to the Court's satisfaction, that the learned judge below erred, that she applied any wrong principles of law or that she failed to give due consideration to matters with respect to which she should have given consideration in rendering the decision.

In particular, the Court noted that, in rendering the decision, the learned judge below considered all four criteria, the length of the delay, the reasons for the delay, the issue of prejudice and the chances of success of the application if the extension of time was granted. The Court also considered that, in respect of the chances of success, the learned judge at paragraph 16, noted that there was no draft defence filed at the time when the orders were made and that there was no basis upon which the learned master could have properly considered the merits of the matter in determining whether to make the orders that are the subject of the instant application for leave to appeal. In all the circumstances, the application for leave to appeal failed, and by extension, the application for a stay of execution also failed.

Accordingly, the application filed on 11th May 2023 was dismissed in its entirety and costs were awarded to the respondent.

Case Name:

Oscar Vargas

v

**Barbara Vargas
CIBC First Caribbean Bank (Barbados) Ltd
Caribbean Union Bank**

**[ANUHCVP2020/0034]
(Antigua and Barbuda)**

Date: Tuesday, 6th June 2023

Coram: The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant/Respondent: Mrs. Chantal Thomas-Marshall

Respondent/Applicant: In person

Issues: Application for relief for exceptional urgency - Enforcement proceedings - Maintenance - Pending substantive appeal - Whether application relates to the substantive appeal before the Court which concerns a varied maintenance order made in 2015 and garnishee orders made in 2020 - Whether application instead concerns a decision made on 23rd February 2023 on a judgment summons application - Whether the present application should have been made to the High Court - Section 33 of the Eastern Caribbean Supreme Court Act - Whether the Court can make an order on the application for relief when the substantive appeal challenging the validity of the orders in the court below has not been determined - Whether Court has jurisdiction to make a decision in an appeal which does not lie before the Court

Type of Order: Oral decision

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The application for relief for exceptional urgency is dismissed.
2. Costs of the application of \$750.00 to the respondent (Mr. Vargas) to be paid by the

applicant within 28 days after the main appeal (ANUHCVP2020/0034) is determined.

Reason:

The parties in this matter have been involved in several proceedings before the High Court and the Court of Appeal. They were married and there are two children of the marriage. The respondent who is the applicant in these proceedings, resides in the United States with the two children.

In 2015, there was an order from the court in Saint Lucia for the husband, Mr. Vargas, to pay maintenance for the two children of the marriage. That order was accepted by Mr. Vargas, who is the appellant/respondent in these proceedings. The order was later varied and Mr. Vargas disputed the varied amount. The orders from the court in St. Lucia were eventually registered in Antigua and Barbuda and Kelsick J (Ag.), in a judgment dated 31st July 2020, confirmed that the orders have been registered in Antigua and Barbuda and that he would not set them aside. There is an appeal against Kelsick J (Ag.)'s order which has not been heard. There is also an application by Mrs. Vargas to strike out the appeal which was heard on 6th March 2023 and a decision is pending.

On 3rd April 2023, Mrs. Vargas filed an application in appeal proceedings ANUHCVP2020/0034 seeking:

“ a. A further order for the payment of arrears accruing after the commencement of enforcement proceedings in the amount of \$86,192.00 of which \$35,000 is to be paid within 14 days of the date of the judgment and the balance of \$51,192 to be paid by 31st July 2023.

b. Dispensing with any procedural requirements under Part 62 or other Part to facilitate further order.”

The Court considered the application and the background to the litigation and noted that the application is not by way of challenging a decision of the lower court. The court has already made a decision as to the payment of the arrears of maintenance, but

the instant application sought to order Mr. Vargas to pay the arrears of maintenance which has accrued since 2021. It is not an appeal from a decision made in the lower court. It is an application made directly to the Court of Appeal for a further order in respect of arrears of maintenance.

The Court, having heard Mrs. Vargas and having read her submissions, as well as having read Mr. Vargas' submissions and heard from his counsel, was satisfied that this Court did not have jurisdiction to deal with this application. Accordingly, the application was dismissed.

Case Name: **Barbara Vargas (nee Pierre)**

v

Oscar Vargas

**[ANUHCVP2023/0009]
(Antigua and Barbuda)**

Date: **Tuesday, 6th June 2023**

Coram: **The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**

Appearances:

Applicant: **In person**

Respondent: **Mrs. Chantal Thomas-Marshall**

Issues: **Application for leave to apply for judicial review -
Application for leave to appeal - Amendment of
maintenance order — Maintenance Orders (Facilities
for Enforcement) Act Cap 257 — The principles in
Pilcher v Pilcher [1955] 2 All ER 644 — Whether the
learned judge acted ultra vires when she ordered the
payment of over \$200,000 in arrears at the rate of about**

\$1200 per month — Whether the judgment is an unreasonable exercise of the judge’s discretion — Whether the judgment was made without a fair hearing — Rule 52.4(c) of the Civil Procedure Rules 2000 (“CPR”) — Whether the judgment is not authorised under CPR 52.4(c) as it does not conform to any of the authorised orders in CPR 52.4(c)(i) to 52.3(c)(v) although the findings of the court about the judgment debtor’s means acknowledges that the judgment debtor is in contempt as he had sufficient means to pay the order when the arrears accrued

Type of Order:

Oral decision

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The application filed on 10th March 2023 for leave to apply for judicial review and, in the alternative, leave to appeal, is refused in its entirety.**
- 2. No order as to costs.**

Reason:

The application before the Court was an ex parte application for leave to apply for judicial review in respect of two orders made by the learned judge on 23rd February 2023 in Claim No. ANUHCV2020/0200 (formerly ANUHMT2018/0107) and, in the alternative, for leave to appeal (“the Application”).

The Court first noted that the subject orders were not suitable for judicial review and, therefore, in that respect, the Application could advance no further.

Consequently, the Court only considered the Application in so far as it related to an application for leave to appeal (“the Leave to Appeal Application”). Both orders which are the subject of the Leave to Appeal Application are in relation to a judgment debt which the applicant sought to enforce by way of judgment summons and an order for sale of land. Regarding the first order, the respondent had been ordered to pay \$1200 per month to reduce the amount

of arrears of maintenance for the children of the marriage. This shall be referred to as the judgment summons order. The second order is for the sale of property in Antigua and Barbuda which is owned by the respondent from which, the proceeds of sale are to be used towards the satisfaction of the amount outstanding on the judgment debt. This shall be referred to as the sale of land order.

The test to be applied on an application for leave to appeal is that the applicant must satisfy the court that the proposed grounds of appeal have a realistic prospect of succeeding in the appeal. The Court noted that the Leave to Appeal Application was not supported by draft notices of appeal, setting out the proposed grounds of appeal and the Court had to glean the grounds from the other documents filed in the application.

Turning first to the judgment summons order there are various issues raised, for example an issue relating to the lawfulness of the amendment of the maintenance orders granted by the courts in Saint Lucia and registered in Antigua. This issue is before the Court in a related appeal and it is not necessary for this Court to make a separate ruling.

On the question of interest, interest was included in the judgment summons application filed in the court below on 16th June 2021. The amount set out in the application was approximately \$370,118.66 which included interest. The amount of interest claimed in the application is \$39,424.66 and this was claimed as judgment interest. The adjusted amount of the judgment summons (to take account of payments by the respondent) is \$270,178.78. The interest was obviously taken into account in the judgment summons order so that the question of interest was considered on the application.

The learned judge considered the evidence before her, including the evidence of the respondent's means and ordered him to pay \$1200 per month to reduce the arrears of maintenance. This was an exercise of discretion by the learned judge and there is no realistic

prospect of setting aside that exercise of discretion if the matter were to advance to an appeal.

In all the circumstances, the Leave to Appeal Application against the judgment summons order was refused and the order that the respondent pay \$1200 to liquidate the arrears on maintenance stands.

As it relates to the sale of land order, the Court was aware, based on the said order that there is no serious issue of interest in this matter. The interest relates to the judgment debt which was dealt with when the Court considered the Leave to Appeal Application in relation to the judgment summons order. The terms of sale by the learned judge were entirely within her discretion. She had all the evidence and the submissions before her and it would be very difficult to upset the exercise of her discretion in setting aside the terms of sale.

Further, the order provided for liberty to apply. If there are any difficulties with effecting the sale by public auction, any party may return to the court and apply under the liberty to apply provision to vary the terms of sale. The Court noted, in particular, the applicant's concern about the six months' period to complete the sale. The Court was of the view that if there is a risk of running out of time and a sale has not been effected, either party may return to the court under the liberty to apply provision to vary the terms of sale.

The proposed grounds of appeal did not disclose a realistic prospect of success and therefore the Leave to Appeal Application in respect of the sale of land order was also refused.

Case Name:

Lester Jones

v

Jumby Bay Island Company

[ANUHLTAP2019/0002]

(Antigua and Barbuda)

Date: Tuesday, June 6th 2023

Coram: The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Kendrickson Kentish

Respondent: Mr. Justin L. Simon, KC holding papers for Ms. Nelleen Rogers-Murdoch

Issues: Civil appeal - Application for adjournment

Type of Order: Adjournment

Result / Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:

1. The hearing of the appeal is adjourned to the next sitting of the Court of Appeal in Antigua and Barbuda scheduled for the week commencing 20th November 2023.
2. The respondents shall file and serve submissions in reply on or before 15th September 2023.

Reason: On the application of the Respondent filed on 5th June 2023 for an adjournment, the respondent's counsel being ill and unable to attend court and there being no objection by the appellant, the Court was of the view that in the circumstances an adjournment of the hearing of the appeal should be granted.

Case Name: Eurenda Jeremiah

v

Karen Firth

**[ANUMCVAP2020/0007]
(Antigua and Barbuda)**

Date: Tuesday, 6th June 2023

Coram: The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant: In person

Respondent: In person

Issues: Magisterial civil appeal - Whether the court exceeded its jurisdiction - Whether the decision of the learned magistrate was unreasonable and cannot be supported having regard to the evidence - Whether the decision was erroneous on a point of law - Whether the appellant was given an opportunity to present her evidence in court

Type of Order: Oral judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is allowed and the judgment of the learned magistrate is set aside.

2. The order is substituted in the following terms:

“The appellant shall pay the sum of \$100.00 to the respondent, together with legal fees in the sum of \$35.00 and costs in the sum of \$300.00, for a total award of \$435.00.”

3. No order as to costs on the appeal.

Reason:

Before the Court was a magisterial appeal which arose out of a claim in which the respondent claimed the sum of \$100.00 as money owed to her by the appellant, along with filing fees in the sum of \$35.00 as well as prescribed costs. The respondent contended that the sum claimed was given to the appellant on 14th August 2020 on the understanding that she was to obtain a return of \$800.00 further to an investment scheme operated by the appellant.

Following a trial, and by order dated 7th October 2020, the magistrate ordered as follows: (i) the appellant is to pay the respondent the sum of \$800.00 representing the expected return after the investment; (ii) costs in the sum of \$300.00; and (iii) filing fees in the sum of \$35.00, representing a total recovery of \$1135.00.

In an amended notice of appeal, the appellant sought to appeal the decision of the learned magistrate on several grounds, namely: (i) the magistrate exceeded his jurisdiction; (ii) the decision was unreasonable and cannot be supported having regard to the evidence; and (iii) the decision was erroneous on a point of law.

The Court, having read and considered the notice of appeal, the evidence filed in support thereof, the record of appeal and the submissions of the appellant, as well as having heard the oral submissions of both parties, was of the view that the appeal should be allowed, and that the judgment of the learned magistrate should be set aside.

The Court was satisfied that the following order should be substituted:

“The appellant shall pay the sum of \$100.00 to the respondent, together with legal fees in the sum of \$35.00 and costs in the sum of \$300.00, for a total award of \$435.00.”

Having reviewed the learned magistrate’s reasons and the transcript of proceedings, the Court came to the determination that the learned magistrate’s decision reflected errors of law and of fact, namely that:

- (i) the sum awarded far exceeded the actual amount claimed by the respondent;
- (ii) the finding that there was a valid enforceable contract is not supported by the evidence before the court; there was no signed agreement and the oral discussions reflected no consensus ad idem between the parties.

The learned magistrate's attempt to apply the principles of promissory estoppel and detriment to the facts of this case was erroneous and had no application to the circumstances of this case. However, having determined that there is no binding and enforceable contract between the parties, the Court was satisfied that permitting the appellant to retain the sum of \$100.00 would amount to an unjust enrichment and determined that the sum should be returned to the respondent.

For completeness, the Court also determined that the appellant's contention that she was not afforded a reasonable opportunity to be heard lacked merit. The record reflects that the appellant had ample opportunity to put her case in defence of the claim.

Case Name: **Multibank FX International Corporation**

v

Von der Heydt Invest S.A

[BVIHCVAP2022/0008]

[BVIHCMAP2022/0032]

[BVIHCVAP2021/0009]

(Territory of the Virgin Islands)

Date: **Wednesday, 7th June 2023**

Coram: **The Hon. Mr. Mario Michel, Justice of Appeal**
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Gerard St. C Farara, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. Hodge Malek KC with him Mr. Caley Wright and Mr. Oliver Clifton

Respondent: Mr. Alexander Cook KC with him Mr. Alex Hall Taylor KC and Mr. Simon Hall

Issues:

Applications for conditional leave to appeal to His Majesty in Council - Section 3(2)(a) of the Virgin Islands (Appeals to Privy Council) Order 1967 - Whether the questions involved in the proposed appeals by reason of their great general or public importance or otherwise, ought to be submitted to His Majesty in Council - Whether the Court erred in concluding that it was necessary to 'disentangle' losses caused by the Worldwide Freezing Order from losses caused by the proceedings generally at this stage - Type of loss relevant to the question of fortification - Intelligent estimate of loss for the purposes of ordering fortification - Standing - Whether the Court erred in determining that the respondent had standing to obtain an injunction on behalf of parties that it did not represent on the basis that it would in the future be entitled in a representative capacity - Whether the Court took into account irrelevant matters and/or failed to take into account relevant matters

Type of Order:

N/A

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

The decisions are reserved.

Case Name:

Multibank FX International Corporation

v

Von der Heydt Invest S.A

**BVIHCMAP2022/0061
(Territory of the Virgin Islands)**

Date: Wednesday, 7th June 2023

Coram: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Gerard St. C Farara, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. Hodge Malek KC with him Mr. Caley Wright and Mr. Oliver Clifton

Respondent: Mr. Alexander Cook KC with him Mr. Alex Hall Taylor KC and Mr. Simon Hall

Issues: Interlocutory appeal - Appeal against order of the learned judge directing that that the hearing of MBFX's application for security for costs be listed after the strike out/summary judgment application ("SO/SJ") filed by VDHI - Whether the learned judge erred in the exercise of his discretion and was plainly wrong in directing the security for costs application to be heard after the SO/SJ application - Whether the learned judge erred in principle in failing to consider the implications of the determination of the Representative Set Aside Appeal on the SO/SJ application - Whether the SO/SJ application can properly be heard prior to determination of the Representative Set Aside Appeal

Type of Order: N/A

Result / Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name: Carlton Kentish

v

Rolston Milton Joseph

**[ANUHCVP2023/0011]
(Antigua and Barbuda)**

Date: Friday, 9th June 2023

Coram: The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal

Appearances:
Appellant: Mr. Kendrickson Kentish

Respondent: Dr. David Dorsett

Issues: Interlocutory appeal - Withdrawal of appeal

Type of Order: Oral judgment

Result / Order:
IT IS HEREBY ORDERED THAT:

1. Interlocutory appeal filed on 23rd March 2023 is withdrawn and dismissed.
2. No order as to costs.

Reason: In light of the indication made by counsel for the appellant in which he sought leave to withdraw and discontinue the appeal, counsel for the respondent indicating that the application is unopposed, and the parties, through counsel, agreeing that there is to be no order as to costs, the Court ordered that the appeal filed on 23rd March 2023 is withdrawn and dismissed.

Case Name: [1] Attorney General of Antigua and Barbuda
[2] David Matthias

v

HMB Holdings Ltd

**[ANUHCVAP2021/0021]
(Antigua and Barbuda)**

Date: Friday, 9th June 2023

Coram: The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal

Appearances:

Appellants: Mr. Anthony Astaphan SC with him Mrs. Carla Brookes-Harris, Mrs. Cherissa Roberts-Thomas and Dr. David Dorsett

Respondent: Mr. Larry Smith, KC with him Mr. Kendrickson Kentish

Issues: Interlocutory appeal - Application for adjournment

Type of Order: Directions

Result / Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:

1. The hearing of the appeal filed on 13th October 2021 is adjourned to the next sitting of the Court of Appeal in Antigua and Barbuda during the week commencing 20th November 2023.
2. The supplemental record bundle containing the transcript and the affidavit (indicating the affiant and the date of filing) shall be filed no less than 21 days before the adjourned hearing of the appeal.
3. No order as to costs.

Reason: Upon hearing counsel for the parties who indicated that the transcript of proceedings and record of appeal

were incomplete, the Court was of the view that the hearing of the appeal should be adjourned to the next sitting of the Court to facilitate the filing of the missing documents. The Court accordingly gave directions for the filing of the supplemental record bundle.

Case Name: **Antigua and Barbuda Fishermen Co-Operative Society**

v

**[1] Phillip Athanaze
[2] Garry Gore
[3] Colin Francis
[4] John Browne
[5] John Tomlinson**

**[ANUHCVP2022/0027]
(Antigua and Barbuda)**

Date: **Friday, 9th June 2023**

Coram: **The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal**

Appearances:

Appellant: **Dr. David Dorsett**

Respondents: **Mr. Justin L. Simon KC**

Issues: **Interlocutory appeal - Striking out - Locus standi - Sections 42, 72, 73 of the Co-operative Societies Act 2010 - Whether the Co-operative Societies Act provides that where a board holding over does not apply under section 42 of the Act for an extension of time to hold an annual general meeting that the sanction imposed by law is that the board is by operation of law removed from office without a replacement board being put in place - Whether the learned judge erred in holding that the appellant's**

Board, elected on 29th July 2014, had no locus standi to bring the proceedings below - Whether the learned judge erred in striking out the appellant's statement of case, when it was the case that the said Board was the only board of the appellant and hence the sole entity entitled to bring proceedings on behalf of the appellant

Type of Order:

N/A

Result / Order:

IT IS HEREBY ORDERED THAT:

Judgment is reserved.