

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

GRENADA
VIDEOCONFERENCE
3rd -7th JULY 2023

JUDGMENTS

Case Name:

Chu Kong

V

- 1. Ocean Sino Limited (in Liquidation)**
- 2. David Yen**
- 3. Chan Pui Sze (Nichole)**
- 4. Roy Bailey**
- 5. John Greenwood**
- 6. Lau Wing Yan**

[BVIHCMAP2022/0041]
(Territory of the Virgin Islands)

Date:

Monday, 3rd July 2023

**Coram for
delivery:**

The Hon. Dame Janice M. Pereira DBE, Chief Justice
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal

Appearances:

Appellant:

Ms. Reisa Singh

Respondents:

Mr. Renell Benjamin for the sixth respondent

**Ms. Marcia McFarlane for the first, fourth and fifth
respondents**

Issues:

**Commercial appeal – Removal of Liquidator –
Voluntary Liquidation – Findings of Fact – Whether due
cause shown - Exercise of discretion to remove the
Liquidators – Costs – Successful party to be awarded**

costs – Whether the costs order made by the learned judge was reasonable – Application to adduce fresh evidence – Ladd v Marshall – Whether the application to adduce further evidence on the appeal should be granted.

Result/Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.
2. The judgment and order of the court below dismissing the Removal Application and ordering costs in favour of the sixth respondent are affirmed.
3. The Respondents will have their costs of this appeal to be assessed, if not agreed by the parties within 21 days of this judgment.
4. The application to adduce further evidence is dismissed.

Reason:

1. It is readily apparent that the appeal against the learned judge's decision that no due cause has been shown for the removal of the liquidators is a challenge to the learned judge's findings of primary fact and/or his evaluation of primary fact. As such, the Court is only empowered to interfere with such conclusions of the judge that (i) fail to take relevant evidence into account; (ii) rely on irrelevant evidence or (iii) are unreasonably or insensibly arrived at. Further, the Court cannot substitute its own decision for that of the court below but can determine whether the correct legal principles were applied and whether on the evidence, the decision of the judge can be justified.

Joint Stock Asset Management Company Ingosstrakh Investments v BNP Paribas SA [2012] EWCA Civ 644 applied; Assicurazioni Generali SpA v Arab Insurance Group (BSC) [2003] 1 WLR 577 applied; JSC BTA Bank v Ablyazov and another [2018] EWCA Civ 1176 applied.

2. The court has a wide discretion as to the circumstances in which it may remove a liquidator and

it is not confined to or dependent on proof of misconduct, personal unfitness or any breach of their statutory obligations. An applicant who seeks the removal of a liquidator must show sufficient good cause or due cause before a judge can consider and determine whether he can exercise his discretion to remove the liquidator. Whether good cause has been shown is to be determined on a case-by-case basis and measured by reference to the real and substantial interests of the liquidation and the purpose for which a liquidator is appointed. The court is required to make an evaluative finding that there was due cause to remove the liquidators from office. In making that assessment the court is required to engage in a balancing exercise that is to (i) ensure that the liquidators carry out their duties competently and impartially, so that the liquidation achieves the purposes for which it was commenced; and (ii) is to discourage unmeritorious applications for the liquidator's removal by disgruntled creditors or members.

Petroships Investment Pte Ltd v Wealthplus Pte Ltd (in members' voluntary liquidation) (*Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* and another, interveners) and another [2018] 3 SLR 687 applied; *AMP Enterprises Ltd v Hoffman* and another [2003] 1 BCLC 319 applied; Andrew R Keay, *McPherson's Law of Company Liquidation* (Sweet & Maxwell, 3rd Ed., 2013) page 486 at paragraph 1-005 applied; re *Sir John Moore Gold Mining Company* (1879) 12 Ch D 325 applied; *Re Edenote Ltd*; *Tottenham Hotspur plc and others v Ryman* and another [1996] 2 BCLC 389 applied.

3. In this case, it is clear that the learned judge fully considered the conduct of the liquidators, the question of the liquidators' apparent and perceived bias, loss of confidence, whether the liquidators failed to act jointly and all other matters raised in the Removal Application. The learned judge correctly applied the relevant legal principles and made appropriate findings that: given the liquidators' statutory duties, the liquidators were obliged to take reasonable steps to rehabilitate their value so that each of OSL's members could receive due value upon a distribution; that the liquidators' decision to investigate and Mr.

Lau's funding of the liquidation in the circumstances cannot be regarded as evidence of bias and that their refusal to adopt his Summary Disposition Proposal was not unreasonable; and that there was doubt as to the authenticity or reasonableness of Mr. Chu's purported loss of confidence. The evidence advanced by Mr. Chu did not support nor constitute grounds for the removal of the liquidators and when taken together the learned judge was entitled to find that there was no due cause shown. The learned judge was therefore correct in not considering and determining whether he should exercise his discretion to remove the liquidators. The learned judge's decisions on due cause and whether to exercise his discretion are therefore not open to review by this Court.

4. Mr. Lau was rightfully joined as a party and had a direct interest in the proceedings, so it was appropriate for him to participate and have separate legal representation. Given that Mr. Lau successfully defended the proceedings, it was reasonable that the general rule be applied - that the unsuccessful party is ordered to pay the costs of the successful party. While the learned judge should have invited the parties to address the issue of costs before making the order, Mr. Chu had ample opportunity to raise the issue earlier but failed to do so. The learned judge's order was therefore well grounded considering the circumstances, and there is no basis for the Court to interfere with the costs order made by the learned judge.

Rampersad and another v Ramlal and others [2022] UKPC 50 applied; English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605 applied.

5. Appellate courts have a discretionary power under its inherent jurisdiction to permit a party to adduce further or fresh evidence that was not available at the hearing before the High Court. In order for such evidence to be adduced, an applicant must satisfy all three limbs of the Ladd v Marshall test. Firstly, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, 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; thirdly, 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. In this case while the evidence sought to be adduced, evidence relating to the liquidator's conduct, is credible and thus satisfies the third limb of the Ladd v Marshall test, the evidence does not satisfy the first and second limbs of the test as (i) it could have been obtained with reasonable diligence and should have been adduced prior to the appeal hearing; and (ii) it would not have had an important influence on the result of the court or in the appeal. Accordingly, the evidence sought cannot be admitted as fresh evidence on appeal.

Ladd and Marshall [1954] 3 AER 745 applied; Premier Experts London Ltd and another v Rajwani [2022] EWHC 1188 (QB) applied; Swift Advances Plc v Ahmed and another [2015] EWHC 3265 (Ch) applied; Mulholland and another v Mitchell [1971] AC 666 applied.

Case Name: **Multibank FX International Corporation**

V

Von der Heydt S.A.

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

Date: **Wednesday, 5th July 2023**

Coram: **The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal**

Appearances:

Appellant:	Mr. Oliver Clifton
Respondent:	Mr. Simon Hall

Issues: Interlocutory appeal – Appellant’s reliance on grounds not mentioned in notice of appeal – Whether MBFX can rely on its fresh submissions – Appeal against case management decision – Appellate court’s exercise of discretion – Whether the Court should overturn the trial judge’s decision to list one application before another

Result/Order: IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.
2. The appellant shall pay the respondent’s costs on the appeal, to be assessed by the court below if not agreed within 21 days.

Reason: 1. An appellant may not rely on any ground not mentioned in the notice of appeal without the permission of the court. While the court is not confined to the grounds set out in the notice of appeal, it may not make its decision on any ground not set out in the notice of appeal unless the respondent has had sufficient opportunity to contest such ground. In this case, VDHI has had adequate time to respond to any additional arguments advanced by MBFX and have done so in their submissions. Thus, even if the Court was minded to disagree with the manner in which MBFX filed its submissions without the permission of the court, and which submissions are at some variance with the grounds identified in the notice of appeal, the Court can still rule on grounds advanced in the submissions which were not necessarily on all fours with the grounds contained in the notice of appeal. In the circumstances, the Court will consider MBFX’s fresh submissions filed on 19th May 2023.

Rules 62.4(8) and (9) of the Civil Procedure Rules 2000 applied; Leroy King v AG of Antigua et al ANUHCVP2017/0011 (delivered 18th September 2018, unreported) applied.

2. Case management decisions are the province of the trial judge and should be accorded the highest respect by appellate courts. An appellate court should

not interfere with the case management decision by a trial judge unless the decision was plainly wrong. 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 test for interfering with a judge's case management decision or order is not whether the Court of Appeal would have exercised its discretion differently or made a different order or come to a different decision; the Court must be satisfied that the decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

Rules 1.1(1) and (2), 1.2 (a) and (b), 25 (f) and (j) and 26.1(2) of the Civil Procedure Rules 2000; *Dufour and Others v Helenair Corporation Limited and Others* (1996) 552 WIR 188 applied; *Employers International and Others v Boston Life and Annuity Company Ltd* Civil Appeal No. 55 of 2007 (delivered 4th July 2007, unreported) applied; *Sergey Taruta v JSC BVIHCPMAP* 2021/0002, *BVIHCPMAP* 2021/0008, *BVIHCPMAP* 2021/0012 (delivered 2nd June 2021, unreported) applied; *St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited* Civil Appeal No. 6 of 2002 (delivered 31st March 2003, unreported) considered.

3. While in some cases justice and fairness would require a strict observance of the first in time principle, such that the application filed first at the court ought to be considered first, that principle does not, however, displace the power of the court to manage its own calendar. A judge must be given flexibility and the power to fix the court's calendar and the order in which applications are heard, particularly in matters of this complex and lengthy nature. In this case, the learned judge clearly considered the arguments on both sides and the implications of both applications and, in the exercise of the discretion accorded to him, he determined that the SO/SJ Application should be heard before the SFC Application, and he could not, in the circumstances, be said to have been plainly wrong in so doing so that his decision could be regarded as being outside of the generous ambit of the discretion

entrusted to him. This Court has no basis, therefore, to upset his findings.

St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited Civil Appeal No. 6 of 2002 (delivered 31st March 2003, unreported) considered

Case Name:

Levar Devere Browne

V

The Chief of Police

**[SKBMCRAP2021/0003]
(Saint Kitts and Nevis)**

Date:

Wednesday, 5th July 2023

Coram:

**The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal**

Appearances:

Appellant:

Mr. Perry Joseph holding for Mr. Chesley Hamilton

Respondent:

Mr. Teshaun Vasquez

Issues:

Magisterial criminal appeal – Appeal against conviction - Possession – Drug trafficking – Section 29(2) of the Drugs (Prevention and Abatement of the Misuse and Abuse of Drugs) Act - Whether, on a charge of possession of controlled drugs with intent to supply, where the drugs are secreted in a container box or other receptacle, the prosecution must prove that the accused knew that the box contained controlled drugs – Constructive possession - Whether a consignee of a parcel which has not been released into his physical custody by Customs officials can be said to be in possession of that parcel and its contents

– No-case submission – Whether the learned magistrate erred in overruling the appellant’s no-case submission – Statutory interpretation – Strict liability - Whether the mens rea of importation requires knowledge on the part of the accused that the parcel or thing being imported contains dangerous drugs - Whether the offences of importation under sections 4(1)(a) of the Drugs Act and sections 103(1)(b) and 108 (1)(a) of the Customs Act are strict liability offences

Result/Order:

IT IS HEREBY ORDERED THAT:

The appeal is dismissed and the appellant’s conviction is affirmed.

Reason:

1. On a charge of possession of controlled drugs with intent to supply, it suffices for the prosecution to prove that an accused knew that he had the container or box in his physical custody or under his control and that there was something in it. That is the degree of knowledge and control that the prosecution is initially required to prove, which vests the accused with the necessary possession of the container and its contents. The burden then shifts to the accused to bring himself within the scope of section 29(2) of the Drugs Act to prove on a balance of probabilities that he neither knew nor suspected nor had reason to suspect that the box contained cannabis.

Section 29(2) of the Drugs (Prevention and Abatement of the Misuse and Abuse of Drugs) Act Cap. 9:08 of the Laws of Saint Christopher and Nevis applied; R v McNamara (1988) 152 JP 390 applied; R v Lambert [2002] 2 AC 545 applied; Salmon v HM Advocate 1998 SCCR 740 applied; DPP v Brooks (1974) 21 WIR 411 distinguished; Bernal and Moore v R (1997) 51 WIR 241 distinguished.

2. It is settled that it is perfectly possible for possession to exist without physical custody. Possession entails that the article must be in the physical custody or under the control of the accused (in legal terms, the actus reus) and the accused must know that the article or thing is in his physical custody or under his control (the mens rea). The evidence

before the magistrate was that a box containing cannabis was brought into Saint Kitts from Miami. There is no dispute that the appellant was the consignee of that box: the bill of lading bore his name, address and his telephone number. As consignee, the appellant was, in law, the importer of that box. As importer, the appellant was the one who caused the box to be imported into Saint Kitts. To cause something to be brought into Saint Kitts is to exercise control over that thing. Though the appellant did not have physical custody of the box, he exercised control over it and was in constructive possession of it. The appellant knew that he had imported the box and that it contained something because he attended the Customs Department and presented the bill of lading, fully intending to take physical custody of the box subject, obviously, to the payment of any applicable customs duties.

Section 2 of the Customs Act Cap. 20.04 of the Laws of Saint Christopher and Nevis applied; DPP v Brooks (1974) 21 WIR 411 applied.

3. The circumstances under which a trial judge may uphold a no-case submission are settled: (a) when there has been no evidence to prove an essential element of the alleged offence or (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it. The criticism that the learned Senior Magistrate misdirected himself in relation to the elements of the offence of possession is unsustainable. The Senior Magistrate clearly appreciated that he was dealing with a 'box possession case' and that the interplay between section 6(3) and sections 29(2) and (3) of the Drugs Act had to be considered. The appellant not having given evidence, and the magistrate by his verdict obviously not having accepted the truth of his statement to the police that he was expecting school supplies, the appellant did not discharge the evidential burden placed on him by section 29(2) to show that he neither knew nor suspected nor had reason to suspect that the box contained cannabis. Accordingly, the no-case

submission was bound to fail, and the learned Senior Magistrate was right to overrule it.

Section 29(2) of the Drugs (Prevention and Abatement of the Misuse and Abuse of Drugs) Act Cap. 9:08 of the Laws of Saint Christopher and Nevis applied; *R v Galbraith* (1981) 1 WLR 1039 applied; *R v Lambert* [2002] 2 AC 545 applied.

4. The law presumes that mens rea is required before a person can be convicted of a criminal offence. However, based on the wording of the sections, the penalties prescribed and the issues of social concern, that presumption is rebutted and the offences under sections 103(1)(b) and 108(1)(a) of the Customs Act and section 4(1) of the Drugs Act are strict liability offences. It was therefore sufficient for the prosecution to prove that the appellant imported a box into Saint Kitts and that the box contained cannabis. As importer, the appellant was the one who caused the box to be imported into Saint Kitts. The importation was complete the moment the box entered the territorial seas of Saint Christopher and Nevis. The appellant knew that he had imported the box and that it contained something because he attended the Customs Department and presented the bill of lading fully intending to take physical custody of the box. This being a strict liability offence, the prosecution was not required to prove that the appellant knew that the box contained cannabis.

Section 2 of the Customs Act Cap. 20:04 of the Laws of Saint Christopher and Nevis applied; Sections 103(1)(b) and 108(1)(a) of the Customs Act considered; Section 4(1) of the Drugs (Prevention and Abatement of the Misuse and Abuse of Drugs) Act Cap. 9:08 of the Laws of Saint Christopher and Nevis considered; *Nurse v Republic of Trinidad and Tobago* [2019] UKPC 43 applied; *Darren Bhola v Canserve Caribbean Limited*, in *Darren Bhola [Customs and Excise Officer II] v Canserve Caribbean Limited and others* TT 2017 CA 34 applied; *Sweet v Parsley* [1970] AC 132 considered; *He Kaw Teh v The Queen* (1985) 157 CLR 523 distinguished; *Customs and Excise Officer Clarence Walker v Iveren Lucy Feese* TT 2011 CA 11 disapplied.

Case Name: **Goldin Investments Intermediary Limited**

V

China Citic Bank International Limited

[BVIHCMAP2022/0010]
(Territory of the Virgin Islands)

Date: **Wednesday, 5th July 2023**

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

Appearances:

Appellant: **Ms. Sarah Latham**

Respondent: **Mr. Romane Duncan**

Issues: **Commercial appeal – Section 157(1)(a) of the Insolvency Act, 2003 – Application to set aside statutory demand – Substantial dispute as to whether debt is owing or due – Whether debt was disputed on genuine grounds and substantial grounds – Interpretation of Deed of Assignment governed by foreign law**

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

1. The appeal is dismissed and the orders of the judge in the court below affirmed.

2. Cost of the appeal to CCBIL to be assessed by a judge of the Commercial Court if not agreed within 21 days from delivery of this judgment.

Reason: 1. Section 157(1)(a) of the Insolvency Act, 2003 is written in mandatory terms. Under this section, the court shall set aside a statutory demand if it is satisfied that there is a substantial dispute as to whether the debt is owing or due. A substantial dispute means that

the debt is disputed on 'genuine (bona fide) and substantial' grounds. The dispute must be genuine in both the subjective and objective sense, which means that the reason for not paying the debt must be honestly believed to exist and based on substantial or reasonable grounds. The court in considering an application under section 157(1)(a) must be satisfied that there is a genuine and substantial dispute which calls for further investigation by a court or some other tribunal with the requisite jurisdiction or authority to do so. In carrying out this assessment, the judge has a duty to carry out a preliminary investigation of the facts to determine whether the dispute which the company has raised about the debt is held on genuine and substantial grounds. An assertion that a substantial dispute exists must be supported by some evidential basis or point of law to demonstrate that the defence or ground relied on is arguably sustainable. Once the judge is satisfied that the dispute raised is not frivolous or thoroughly bad, such that the ground on which the company disputes the debt is or are substantial, he is obligated by section 157(1)(a) to set aside the statutory demand.

Section 157(1)(a) of the Insolvency Act 2003, Act No. 5 of 2003 of the Laws of the Virgin Islands applied; Sparkasse Bregenz Bank AG v Associated Capital Corporation BVI Civil Appeal No. 10 of 2002 (delivered 18th June 2023, unreported) applied; Jinpeng Group Ltd. V Peak Hotels and Resorts Ltd. BVIHCMAP2014/0025 (delivered 8th December 2015, unreported) applied; Re A Company (No 001946 of 1991) [1991] BCLC 737 considered; Donna Union Foundation v Scoboda Corporation BVIHC (COM) 230 of 2018 (delivered 23rd July 2018, unreported) considered; Creata (Aust) Pty Limited v Faull (2017) 125 ACSR considered; Collier v P & MJ Wright (Holdings) Ltd. [2008] EWCA 1006 considered; China Alarm Holdings Limited v China Alarm Holdings Acquisition LLC et al BVIHCV 2008/0385 (delivered 20th April 2019, unreported) considered; In the matter of Universal Property Group Pty Limited [2019] NSWSC 796 considered.

2. While expert evidence of foreign law is a question of fact for the judge, there is no evidence from either expert in this case which suggests that the applicable principles before the courts of Hong Kong when construing a written contract are any different from those under English common law, and indeed, the common law of the BVI. Moreover, the reports from both Hong Kong law experts accepted that the law is the same in Hong Kong and in England. However, this issue as to the correct meaning of clause 2, turns not on expert opinions as to particular principles or provisions of Hong Kong law, but, as the judge opined, on a simple matter of construing the words in clause 2 of the Deed of Assignment in their natural and ordinary meaning within the four corners of the Deed of Assignment. In conducting this exercise, the BVI court is just as equipped to interpret clause 2 of the Deed of Assignment. Accordingly, the learned judge was correct in concluding that the terms of clause 2 were clear, applying the natural and ordinary meaning of the words used therein. Clause 2 of the Deed of Assignment on its plain construction imposes a contractual obligation on GILL to pay the outstanding debt of HK\$990,000,000, the subject of the statutory demand served on it, and GILL's argument to the contrary is so severely lacking in cogency as to be hopeless or thoroughly bad within the meaning of the Sparkasse test.

3. Having found that the meaning of clause 2 of the Deed of Assignment was 'crystal clear' in creating a liability on the part of GILL to pay and discharge the Secured Liabilities, a finding that objectively the reason or ground advanced by GILL was not genuinely believed or held, was not strictly necessary for the learned judge to reach in order to dismiss the Set Aside Application. However, that finding was one open to the learned judge on the evidence before him. It cannot be said persuasively that this finding was blatantly wrong, and ought to be set aside.

Case Name:

[1] Bethelia Francis

[2] Janice Snaggs

v

**Omega Caribe Limited (trading as Oasis Marigot
St. Lucia)**

**[SLUHCVP2022/0010]
(Saint Lucia)**

Date: Thursday, 6th July 2023

Coram: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal

Appearances:

Appellants: Mr. Lorenzo Francis

Respondent: Mrs. Maureen John-Xavier

Issues: Interlocutory appeal – Striking out – Prescription –
Claims made against non-existent entity –
Applications to amend claim to substitute the
defendant – Whether the amendment was sought after
the matter was prescribed – Articles 2122 and 2129 of
the Civil Code – Costs quantification – Prescribed
costs – Appellate interference with costs award -
Whether the master erred in the exercise of his judicial
discretion in calculating the costs by basing the value
of the claim on the special damages claimed only

Result/Order: IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed, and the order of the learned master dated 1st June 2022 is affirmed.
2. The counter-appeal is dismissed, and the costs order of the learned master dated 5th July 2022 is affirmed.
3. Both the appellants and the respondent having been unsuccessful on their appeals, I will make no order as to costs.

Reason:

1. Where a claim is filed against a person or entity which does not exist in law, the claim from the outset is a nullity, as opposed to a mere irregularity. Since the claim has not been properly constituted, any attempt by the claimant to amend the claim cannot be entertained as the court has nothing before it which it can grant permission to amend. Therefore, the appellants' initiation of proceedings against Oasis Marigot St. Lucia, which was not person known to law, gave rise to claims that were incompetent from the outset. Accordingly, the learned master was correct in finding that the effect of the amendments sought by the appellants was to add a new defendant altogether to the proceedings after the matter was prescribed.

Ingall v Moran [1944] KB 160 applied; Lucy v WT Henleys Telegraph Works Co. Ltd (ICI Ltd., Third Party); Wild v Siemens Brothers & Co. Ltd. [1969] 3 All ER 456 applied; Bryan James v The Attorney General SLUHCVP2013/0023 (delivered 22nd April 2014, unreported) distinguished.

2. An action for damages resulting from delicts and quasi delicts is prescribed after 3 years. The debt is absolutely extinguished and no action can be maintained after the time for prescription has expired. Therefore, the right as well as the remedy are extinguished after the 3 years have passed. There is a clear distinction to be made between the situation where a claim is prescribed and one where the limitation period has expired. In a circumstance where a claim is prescribed, the defendant does not need to plead limitation. Once the evidence shows that the prescribed period has passed, the court has no jurisdiction to hear the matter. Accordingly, the learned master came to the correct conclusion that the claims ought to be dismissed.

Articles 2122 and 2129 of the Civil Code of Saint Lucia Cap. 4:01 of the Revised Laws of St Lucia 2013 applied; Bryan James v The Attorney General SLUHCVP2013/0023 (delivered 22nd April 2014, unreported) applied.

3. The appellate court will not interfere with the exercise of the trial judge's judicial discretion unless it

is satisfied that the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or taking into account or being influenced by irrelevant factors and considerations and that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. This appellate approach applies equally to a trial judge's discretion in awarding costs.

Dufour v Helenair Corporation Limited (1996) 52 WIR 188 applied; A.E.I. Rediffusion Music Ltd. v Phonographic Performance Ltd [1999] 1 WLR 1507 applied.

4. General damages are calculated by the court and it is not the claimant's prerogative to dictate the quantum of general damages to the court. As such, where a claimant states a quantified sum for general damages in their claim form and/or statement of claim, the trial judge's calculation of costs associated with that claim may not be based on that quantified sum, but on a quantum arrived through the trial judge's own assessment. Accordingly, the learned the master did not err in calculating the costs awarded to the respondent by basing the value of the claims on the special damages claimed only.

Cornilliac v St. Louis (1965) 7 WIR 491 applied; The Attorney General of St. Lucia v Godfrey Ferdinand et al SLUHCVP2018/0032 (delivered 25th June 2020, unreported) applied; Orin Roberts v Financial and Regulatory Commission SKBHCV2016/0019 (delivered 14th October 2019, unreported) distinguished; Harvey McGregor, McGregor on Damages (19th edn, Sweet & Maxwell 2014) considered.

Case Name:

**Emmerson International Corporation
v
Renova Holdings Limited**

**[BVIHCMAP2019/0001]
(Territory of the Virgin Islands)**

Date: Friday, 7th July 2023

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

Appearances:

Appellant: Mr. Robert Weekes KC with him Mr. Renell Benjamin

Respondent: Ms. Arabella di Iorio and Ms. Jodi-Ann Stephenson

Issues:

Application for conditional leave to appeal to the Privy Council - Worldwide freezing order - Confidentiality club - Section 3 of the Virgin Islands (Appeals to the Privy Council) Order 1967 - Whether the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council - Whether the Court of Appeal erred in law in holding that the decision whether to impose a confidentiality club is a discretionary case management decision - Whether the Court of Appeal erred in law in rejecting Emmerson's submissions that three threshold conditions must be met before the court may order a confidentiality club be imposed - Whether the Court of Appeal erred in law in not finding that even if the threshold conditions were met (and thus that the court were satisfied that the making of a confidentiality club order is necessary), considerable caution is nevertheless required where a confidentiality club is sought in respect of asset disclosure pursuant to a freezing order

Result/Order: IT IS HEREBY ORDERED THAT:

The notice of motion for conditional leave to appeal to His Majesty in Council is dismissed with costs to the respondent to be assessed if not agreed within 21 days.

Reason:

1. The imposition of a confidentiality club and, if so, its terms, generally involves a balancing exercise and the following factors are relevant to the exercise of the court's discretion: (1) the court's assessment of the degree and severity of the identified risk and the threat posed by the inclusion or exclusion of particular individuals within the confidentiality club; (2) the inherent desirability of including at least one duly appointed representative of each party within a confidentiality club; (3) the importance of the confidential information to the issues in the case; (4) the nature of the confidential information and whether it needs to be considered by people with access to technical or expert knowledge; and (5) practical considerations, such as the degree of disruption that will be caused if only part of a legal team is entitled to review, discuss and act upon the confidential information. A party seeking an order for a confidentiality club must provide reasons to the court to exercise its discretion in their favour; merely stating that the information is confidential or sensitive is insufficient.

The Libyan Investment Authority (incorporated under the laws of the State of Libya) v Societe Generale SA & Others [2015] EWHC 550 considered; Porton Capital Technology Funds & 3 Ors v 3M UK Holdings Ltd (2010) [2010] EWHC 114 (Comm) considered.

2. The decisions relating to confidentiality club orders do not establish any 'three threshold requirements' that must be satisfied before the court can exercise its discretion to make a confidentiality club order. What they show is that the basis for such orders is the court's inherent jurisdiction to regulate its own procedure in the interests of justice and that the court in granting a confidentiality club order will seek to do justice between the parties considering their rights and needs. That is the only overarching principle that can be distilled from these decisions. The matters which counsel for Emmerson has termed

‘threshold requirements’, namely that: (i) the applicant must establish the existence of information that is so sensitive that it cannot be satisfactorily protected in any other way; (ii) the applicant must show that the protections arising under the Civil Procedure Rules, 2000 or any express undertakings provide insufficient protection so that there is, despite these measures, a real risk of irreparable harm; and (iii) the applicant must also prove the strict necessity of each aspect of the additional and exceptional protection sought, are not prerequisites for the exercise by the court of its broad discretion to make a confidentiality club order. They are simply three (3) of the many factors or considerations that the court may have regard to in exercising that broad discretion.

The Libyan Investment Authority (incorporated under the laws of the State of Libya) v Societe Generale SA & Others [2015] EWHC 550 considered; Porton Capital Technology Funds & 3 Ors v 3M UK Holdings Ltd (2010) [2010] EWHC 114 (Comm) considered; Bank of America N.A v. Pacific Andes Enterprises (BVI) Limited et al BVIHC(COM) 2016/0132, BVIHC(COM) 2016/0133 & BVIHC(COM) 2016/0134 (delivered 1st December 2016, unreported) considered. Roussel Uclaf v Imperial Chemical Industries plc [1990] RPC 45 considered. Infederation Ltd v Google Inc and other companies [2020] EWHC 657 (Ch) considered; One Plus Technology (Shenzhen) Co., Ltd and other companies v Mitsubishi Electric Corp and another company [2020] EWCA Civ 1562 considered; Al-Rawi and others v Security Service (JUSTICE and others intervening) [2011] UKSC 34; [2011] 3 WLR 388 considered; JSC Commercial Bank Privatbank v Kolomoisky and others [2021] EWHC 1910 (Ch) considered.

3. The confidentiality club order under consideration is a quintessential case management decision of Wallbank J in managing the disclosure requirements made pursuant to the WFO to balance the interests of Emmerson in having the fullest possible access to relevant documents and information against the interests of Renova in preserving their confidential commercial information until the final determination of the application to discharge the WFO. Moreover, even if counsel for

Emmerson was correct that the establishment of the confidentiality club was not discretionary case management decision of Wallbank J, what cannot be disputed was that it was a discretionary decision of Wallbank J. Consequently, the decision of Wallbank J to establish the confidentiality club was certainly of the type of which an appellate court will not interfere with unless Wallbank J took into account irrelevant considerations, or failed to take into account the relevant considerations or that he erred in principle or that he was plainly wrong.

Canary Riverside Estate Management Ltd and others v Coates (Circus Apartments Ltd intervening) [2021] EWHC 1505 (Ch) considered; Dufour v Helenair Corporation Limited (1996) 52 WIR 188 followed.

4. The decisions that considered the law relating to confidentiality clubs show that no difficult question of law is involved, and that the law relating to confidentiality clubs is not in dispute. Therefore, the application falls within the ambit of one of the bases on which this Court will not usually grant leave to appeal as no serious issue of great general or public importance arises in law or otherwise for which this Court requires guidance from His Majesty in Council.

Section 3 of the Virgin Islands (Appeals to the Privy Council) Order 1967 S.I. No. 234 of 1967 applied; Martinus Francois v The Attorney General Saint Lucia Civil Appeal No. 37 of 2003 (delivered 7th June 2004, unreported) followed; Renaissance Ventures Ltd et al v Comodo Holdings Ltd BVIHCMAP2018/0005 and BVIHCMAP2018/0008 (delivered 8th October 2018, unreported) followed.

Case Name:

Multibank FX International Corporation

v

Von der Heydt Invest S.A.

[BVIHCVAP2022/0008]

Heard together with:

[BVIHCVAP2021/0009]

**[BVIHCMAP2022/0032]
(Territory of the Virgin Islands)**

Date: Friday, 7th July 2023

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

Appearances:

Appellant: Mr. Oliver Clifton

Respondent: Mr. Simon Hall

Issues: Motions 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 – Fortification of cross undertaking in damages –Type of loss – Whether the Court erred in holding that the only type of loss that was relevant to the question of fortification was loss caused by the coercive or preventive effect of the Worldwide Freezing Order (“WFO”) - Disentanglement of losses - Whether the Court erred in concluding that it was necessary to ‘disentangle’ losses caused by the WFO from losses caused by the underlying proceedings at this stage – Intelligent estimate of loss – Whether the Court erred in finding that no intelligent estimate of the loss could be made from the evidence for the purposes of ordering fortification – Discharge of WFO - Standing - Whether the Court erred in determining that the respondent had standing at the ex parte hearing to obtain an injunction on behalf of parties that it did not then 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 in concluding that the elements for the continuation of the WFO had been made out – Risk of dissipation - Whether the Court failed to properly assess the issue of risk of

dissipation and that such risk must be established by solid evidence – Just or convenient – Whether the judge having failed to consider whether it was just or convenient to grant the WFO the Court erred in concluding de novo that it was just and convenient at the ex parte stage to grant the WFO – Duty of full and frank disclosure and fair presentation – Whether the Court erred in declining to deal with the question of fair presentation in relation to the issue of fortification and to make reasonable inquiries at the ex parte stage – Representative party – CPR Part 21 – Conflict of interest - Whether the Court erred in adopting too narrow an approach in considering the issue of conflict of interest in VDHI - Whether the court failed to properly consider the potential conflict of interest between the Noteholders and their representative VDHI and the Noteholders and VDH AG, a company closely associated with VDHI – Irrelevant factors - Case management considerations – Whether the Court erred in finding that the judge did not base his decision to make the Representative Order purely or mainly on case management grounds

Result/Order:

IT IS HEREBY ORDERED THAT:

1. The Notice of Motion application in Civil Appeal BVIHCVAP2022/0008 – the Fortification Appeal - is dismissed, except that conditional leave to appeal to His Majesty in Council is granted in relation to the questions and issues set out at paragraphs 75 and 76 above only, with costs of the application in the appeal. The said application in the Fortification Appeal 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 five hundred 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 respondent 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 Notice of Motion application in Civil Appeal BVIHCVAP 2021/0009 – the WFO Discharge Appeal – for conditional leave to appeal to His Majesty in Council is dismissed with costs to VDHI to be assessed by a judge of the Commercial Court if not agreed by the parties within 21 days of the date of delivery of this judgment.

(3) The Notice of Motion application in Commercial Appeal BVIHCMAP2022/0032 – the Representative Appeal – for conditional leave to appeal to His Majesty in Council is dismissed with costs to VDHI to be assessed by a judge of the Commercial Court if not agreed by the parties within 21 days of the date of delivery of this judgment.

With respect to the grant of conditional leave to appeal granted above in BVIHCVAP2022/0008 – the Fortification Appeal, a draft order reflecting the grounds stipulated at paragraphs 75 and 76 above shall be prepared and submitted by counsel for MBFX to the Office of the Court of Appeal, with a copy to counsel for VDHI, for final vetting and approval by the Court.

Reason:

1. Section 3(2)(a) of The Virgin Islands (Appeals to Privy Council) Order 1967 (“1967 Order”) stipulates that conditional leave to appeal to the Privy Council may be granted if the matter in issue is one which involves a question or issue of ‘great general or public importance’; or if the issue, while not being considered one of great general or public importance, is ‘otherwise’ of such significance that it ought, nevertheless, to be submitted to the highest appellate

body for its guidance and determination. An applicant for conditional leave to appeal to His Majesty in Council is required to establish that the grounds of the proposed appeal satisfy one or the other of the limbs of the section. In seeking to do so, a particular ground advanced need only satisfy one of the two limbs of the section. Alternatively, certain grounds may fail to satisfy either limb while others may satisfy one or both limbs. In such circumstances, leave to appeal should be granted only with respect to the proposed grounds of appeal which satisfy a limb of section 3(2)(a).

The Virgin Islands (Appeals to Privy Council) Order 1967 S.I. No. 234 of 1967 applied; Renaissance Ventures Ltd et al v Comodo Holdings Ltd BVIHCMAP2018/0005; BVIHCMAP2018/0008 (delivered 8th October 2018, unreported) followed; Imran Siddiqui and others v Athene Holding Limited [2019] CA (Bda) 15, Civ, 22nd November 2019, unreported considered.

2. MBFX's first intended ground of appeal against the Fortification Judgment, that the Court of Appeal erred in holding that the only loss which it could take into account for the purposes of fortification was loss caused by the 'coercive or preventative effect of the freezing injunction', does not raise a difficult or serious question of law, or point to an area of law in dispute, or a legal question the resolution of which poses dire consequences for the public. Likewise, this proposed ground of appeal does not concern a principle of law which is not settled at a level which is authoritative and/or highly persuasive, or with respect to which there are differing views or conflicting dicta either from this Court or the other courts of the region, or in the United Kingdom and the wider Commonwealth. It also does not relate to the interpretation or application of a procedural rule, or the draconian effect of a rule of court, such that it can be said to satisfy the 'or otherwise' requirement under section 3(2)(a). The Court of Appeal relied on settled principles of causation in relation to recoverable loss or likely loss under the cross-undertaking in damages. The principle enunciated by the Court that to be recoverable, the loss must be caused by the 'coercive or preventive effect of the freezing order', is a well-

established and accepted criterion of causation, and the Court was simply identifying this criterion before applying it to the facts of the instant matter.

Martinus Francois v The Attorney General of Saint Lucia Civil appeal No. 37 of 2003 (delivered 7th June 2004, unreported) followed; *Renaissance Ventures Ltd et al v Comodo Holdings Ltd* BVIHCMAP2018/0005; BVIHCMAP2018/0008 (delivered 8th October 2018, unreported) followed; *Pacific Wire & Cable Company Limited v Texan Management Limited et al* BVIHCVAP2006/019 (delivered 6th October 2008, unreported) followed; *Harley Street Capital Limited v Tichigirinski* [2005] EWHC 2471 (Ch) applied; *PJSC National Bank Trust v Mints* [2021] EWHC 1089 Comm applied; *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2015] 1 WLR 2309 applied.

3. The onus is on an applicant for fortification to establish, to the standard of a good arguable case, that the loss in respect of which it seeks fortification of the cross-undertaking in damages would not have been suffered, or is not likely to be suffered, 'but for' the coercive or preventive effect of the injunction. However, MBFX, in its second proposed ground of appeal, asserted that the Court of Appeal, despite upholding the judge's finding that the WFO was a likely cause of MBFX's loss, went on to find *de novo* that the underlying proceedings were an additional or concurrent cause of the loss, but did not make any finding on disentanglement of the loss applying the 'but for' test. This issue concerns, arguably, a reasonable doubt as to the correctness in law of part of this Court's decision – that there were two operative causes or concurrent causes for the loss of the Multibank Bond, which finding was not made by the court below, and if so, how should an applicant for fortification, and ultimately the court itself, treat with the evidence before it on the issue of disentanglement of the alleged loss. It also raises questions of great general or public importance as to whether the approach adopted by the Court of Appeal in dealing with the issue of disentanglement, the standard of proof, and whether that approach may or could have the effect of stifling genuine fortification applications or making them too onerous and difficult to dispose of

within the fairly narrow confines of interlocutory or interim proceedings, was correct. These issues go to matters of substantive law and procedural law, and to the extent to which a judge ought to require cogent and solid evidence of disentanglement of the causes of the loss at the interlocutory fortification stage, as distinct from proof of damages or loss at a trial caused by the coercive or preventive effect of the injunction in circumstances where the freezing injunction is found to have been wrongly granted and has been discharged, and bearing in mind the inherent difficulties which an applicant is likely to be faced with in producing such cogent evidence of disentanglement at that preliminary stage. Accordingly, ground 2, gives rise to questions of great general or public importance which ought to be referred to His Majesty in Council.

Renaissance Ventures Ltd et al v Comodo Holdings Ltd BVIHCMAP2018/0005; BVIHCMAP2018/0008 (delivered 8th October 2018, unreported) applied; Sinclair Investment Holdings SA v Cushine [2004] EWHC 218 (Ch) applied.

4. MBFX's third proposed ground of appeal against the Fortification Judgment, that the Court erred in not coming to an intelligent estimate of loss for the purposes of ordering fortification, does not give rise to a question of great general or public importance, or which 'otherwise' ought to be referred to the Privy Council. MBFX was found by the judge and also by the Court of Appeal, to have produced no cogent evidence of the quantification of the loss of the Multibank Group Bond, and the reliance on the other losses alleged were either abandoned or simply not pursued with any vigour. Accordingly, ground 3 does not satisfy the requirement of section 3(2)(a) of the 1967 Order.

5. The issues raised by MBFX under the first category of its proposed grounds of appeal against the WFO Discharge Judgment relating to VDHI's standing to obtain a WFO, have not pointed to any area of law which remains unsettled, or which is in dispute. The principles relating to the court's jurisdiction to grant equitable reliefs such as freezing injunctions before

commencement of the claim, are well-established, as are the principles applicable to the exercise of that jurisdiction and power by the court at the Stage 1 ex parte stage. It is clear, and not seriously disputed, that in any event, VDHI had standing as the entity managing and controlling the three Noteholder funds, to commence a claim in relation to the setting aside of the Consent Order/Tomlin Order by which or following which the sum of £36.4 million was transferred by MBFX out of the two accounts which they held at Mex Securities as trustees for the Noteholders, to an undisclosed entity in China. This alone clothed VDHI with the necessary standing to apply for the WFO, and was one of the evidential factors taken into account by the judge and by the Court of Appeal in deciding that VDHI had the requisite standing to apply for the WFO on behalf of all the Noteholders. The fact that VDHI was not at Stage 1 appointed, as yet, as a representative party of the wider group of Noteholders, while a matter for consideration, does not detract from or completely undermine VDHI as a person with standing to apply for the WFO at the ex parte Stage 1. In any event, VDHI was subsequently appointed by the court as the representative claimant in the underlying proceedings on behalf of all the Noteholders, and MBFX's appeal against the judge's refusal to discharge the Representative Order was dismissed by the Court of Appeal.

Convoy Collateral Ltd v Broad Idea International Ltd [2021] UKPC 24 applied.

6. MBFX's second category of proposed grounds of appeal against the WFO Discharge Judgment, including considerations of 'risk of dissipation' and 'just or convenient', is transparently another attempt by MBFX to reargue its appeal on its application for conditional leave to appeal to His Majesty in Council. This does not demonstrate, to the requisite standard, how each such ground genuinely can be said to give rise to serious issues of law or serious errors by the Court of Appeal in the WFO Discharge Judgment; and whether, taken individually or cumulatively, to questions of great general or public importance within the meaning of that phrase in section 3(2)(a) of the 1967 Order.

Martinus Francois v The Attorney General of Saint Lucia Civil appeal No. 37 of 2003 (delivered 7th June 2004, unreported) considered; Renaissance Ventures Ltd et al v Comodo Holdings Ltd BVIHCMAP2018/0005;BVIHCMAP2018/0008 (delivered 8th October 2018, unreported) considered.

7. In its proposed appeal against the Representative Judgment, MBFX has not raised any issue or question of great general or public importance relating to the issue of conflict of interest or potential conflict of interest, and to the issue of VDHI not being a fit and proper person to be appointed as a representative party in the said proceedings to represent the interest of the Noteholders, which interest is completely aligned, in having the Consent Order/Tomlin Order set aside on the ground of fraud. The law relating to ‘conflict of interest’ between a representative and those being represented in court proceedings is well-established. The question of where the line of demarcation ought to be drawn, so that if crossed, it would be a disqualifying factor for the appointment of the proposed representative party, is a matter for the courts to determine in their own discretion taking into account the purposive approach to Part 21 of CPR, the element of intended flexibility in the rule, and applying the overriding objective to its interpretation and application to the particular facts and circumstances of each case. These are not issues of great general or public importance, and the applicant has failed to demonstrate that there are any good reasons why this issue ought to be submitted to His Majesty in Council.

Lloyd v Google LLC [2022] AC 1217 applied; La Brea Environs Protectors v The Petroleum Company of Trinidad and Tobago (Petrotrin) [2022] UKPC 22 applied.

Case Name:

- 1. Lau Man Sang James**
- 2. Lung Hung Cheuk**
- 3. Cheung Wing Sum, Albert**
- 4. Ngai Hin Kwan, Albert**
- 5. Yeung Yiu Chong**

6. Zhang Guo Wei

v

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

**BVIHCMAP2021/0034
(Territory of the Virgin Islands)**

Date: Friday, 7th July 2023

Coram: The Hon. Mde. Vicki-Ann Ellis, 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: Ms. Reisa Singh

Respondents: Mr. Jern-Fei Ng KC with him Dr. Alecia Johns and Mr. James Bailey for the first to sixth respondents

No appearance for the seventh and eighth respondents

Issues: Commercial Appeal – Alleged crisis affecting company
- Sale of subsidiary companies to first appellant at

liquidation price – Disposal of company’s receivables amounting to more than 50% in value of assets without approval of shareholders - Section 175 of the BVI Business Companies Act 2004 (“the BCA”) - Whether directors breached their statutory duties owed to the company - Sections 120 to 122 of the BCA – Duty of directors to act honestly and in good faith – Duty of directors to exercise powers for proper purpose - Duty of directors to exercise reasonable care, diligence and skill - Whether judge erred in law and or fact in determining that respondents’ claim against the appellants succeeded - Whether the crisis alleged to be affecting company warranting the sale of its subsidiaries in fact existed - Capitalisation of receivables - Whether judge incorrectly determined that the capitalisation of receivables was not carried out for a proper purpose – Whether judge erred in finding that the capitalisation of receivables was done in breach of section 175 of the BCA – Ratification of breaches of directors’ duties – Full disclosure to be given to shareholders to enable them to ratify breaches by directors of their duties – No ratification of breaches involving fraud on minority – Appellate restraint on challenges to findings of fact- Delay

Result/Order:

IT IS HEREBY ORDERED THAT:

- (1) The appeal is dismissed and the judgment and order of the learned trial judge is affirmed.
- (2) Costs are awarded to the respondents to be assessed in the court below, if not agreed within 21 days from the date of this judgment.

Reason:

1. The duties owed by the directors of a BVI company are set out in sections 120 to 122 of the BCA. Section 120 provides that a director must act honestly and in good faith and in what he believes to be in the best interests of the company. Section 121 mandates a director to exercise his powers as a director for a proper purpose and to not act in a manner that contravenes the BCA or the memorandum or articles of the company. Lastly, section 122 directs that in exercising his powers or performing his duties, a director must exercise care, diligence and skill that a

reasonable director would exercise in the same circumstances.

Sections 120 to 122 of the BVI Business Companies Act, 2004 Act No. 16 of 2004 of the Laws of the Virgin Islands applied.

2. Where there has been a failure by a director or directors to consider the separate interests of their company or where there is a challenge by an applicant as to the 'good faith' of a director, the test becomes an objective one and not simply whether the director believes he was acting bona fide. The court must therefore determine whether an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company. Similarly, where there is a dispute as to whether a director exercised his powers for a proper or an improper purpose, bona fides cannot be the sole test and the court is entitled to look at the situation objectively. Accordingly, in assessing whether the directors have acted in good faith or for a proper purpose, the court will look for independent, objective evidence to test the directors' claim to be acting bona fide and will consider all the evidence concerning the directors' decision-making processes such as the minutes of board and shareholder meetings and reports. In such cases, the reviewing court will expect such material to exist to assist it in reaching a determination. The court should further assess whether any one or more factors under the BCA are particularly relevant to the directors' decision.

Mitchell and others v Al Jaber and others [2023] EWHC 364 (Ch) considered; Antow Holdings Limited v Best Nation Investments Limited et al BVIHCPMAP2017/0010 (delivered on 21st September 2018, unreported) followed; Charterbridge Corporation, Ltd v Lloyds Bank Ltd. And Another [1970] Ch. 62 considered; Colin Gwyer & Associates Ltd and another v London Wharf (Limehouse) Ltd and others; Eaton Bray Ltd and another v Palmer and others [2002] All ER (D) 226 (Dec) considered; Nam Tai Property Inc v IsZo Capital LP et al BVIHCPMAP2021/0010 (re-issued 6th October 2021,

unreported) followed; *Smith (Howard) v Ampol Petroleum Ltd* [1974] AC 821 applied.

3. There was ample evidence to support the learned judge's findings that the crisis alleged by the appellants did not exist; that the appellants were acting in breach of their statutory duties under the BCA; and that the sale of the Target Group was done at liquidation price or at a gross undervalue. The sale of the company to Mr. Lau at an undervalue can be regarded as an unusual and extreme decision. Further the Directors, in resolving to approve the sale of the subsidiaries to Mr. Lau, did not seek the most basic and independent advice as to either the true financial status of the Company or the true value of its assets nor did the Directors, in breach of section 175 of the BCA, obtain the appropriate resolution of the shareholders to dispose of more than 50% in value of the assets not in the usual or regular course of business. Any breach by directors of this section 175 requirement is important evidence that the directors have acted in breach of their duty to the Company under section 122 of the BCA (failure to exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances). In all the circumstances, the judge properly and carefully evaluated the evidence before him in coming to his findings and there is no basis on which this Court should interfere. The grounds of appeal challenging these findings are therefore dismissed.

4. There was evidence before the learned judge on which he could properly base his finding that the capitalisation of receivables was not done for a proper purpose but was a deliberate step to have the Company transfer the Target Group to Mr. Lau by way of a sale at a gross undervalue. The capitalisation of receivables was not only done without the benefit of independent accounting and legal advice, as none was sought by the Directors, but resulted in the minority shares held by the respondents in the Company being rendered virtually worthless. Further, the shareholders were not given adequate details of the proposed capitalisation and no majority of the shareholders, or any shareholders, approved it. Accordingly, this Court will not disturb the judge's findings on this issue.

Section 175 of the BVI Business Companies Act, 2004, Act No. 16 of 2004 of the Laws of the Virgin Islands applied.

5. Where directors of a company have acted in breach of their duties, in order for them to be absolved from liability for failure to comply with their duties, full disclosure must have been made to the shareholders so that they are furnished with the full knowledge that they need to enable them to assent to or ratify the breaches of directors' duties. Additionally, such breaches can only be ratified where the breach does not involve a fraud on the minority. In the instant case, the learned judge found that this case was one that involved a fraud on a minority of the shareholders, and that not all the shareholders had received the information needed for a proper consideration of the question whether the directors' decision and conduct should be approved or ratified. Therefore, the purported authorisation and/or approval and/or confirmation and/or ratification was ineffective to relieve the appellants from liability for breach of duty. This was a most stark and gross breach of duty by the Directors who voted for that resolution. The judge's conclusion that the appellants failed to comply with their duty based on the evidence was clearly open to him to make and is not one that no reasonable court would have reached, and the judge was entitled to decide that full disclosure was not provided to the shareholders.

BTI 2014 LLC v Sequana SA and others [2022] 3 WLR 709 considered.

6. The issues in this matter concern important questions of fact to be determined by the court who heard and saw the witnesses and who had the benefit of cross-examination at trial. An appellate court's role is not to substitute its own conclusions for those of the lower court. In the absence of some identifiable error, such as a material error of law, or making a critical finding of fact that has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will only interfere with a

trial judge's findings of fact if it is satisfied that the trial judge's decision cannot reasonably be explained or justified. Upon review of the judge's decision and the evidence which was before him, it cannot be concluded that the findings made by the judge were plainly wrong or findings that no reasonable judge would have reached.

Yates Associates Construction Company Ltd v Blue Sand Investments Limited BVIHCVAP2012/0028 (delivered on 20th April 2016 unreported) followed; Shankar Khushalani et al v Lindsay Mason (Trading as Tropical Home Designs Architectural & Construction Services) GDAHCVAP2016/0017 (delivered 11th June 2021, unreported) followed; Capital WW Investment Limited (in liquidation) acting through its Directors v Tall Trade Limited BVIHCMAP2020/0025 and BVIHCMAP2020/0026 (delivered on 24th January 2022, unreported) followed.

7. The delay of 5 months from the close of trial to when judgment was rendered, was not such that adversely affected the learned judge's assessment of the oral evidence and his findings and decision. The judge gave a detailed judgment which highlighted the salient issues and addressed the law and facts arising therefrom, and it cannot be said that the time between the end of the trial and delivery of judgment was so inordinate as to be inexcusable.

NatWest Markets Plc and another v Bilta (UK) Ltd (in liquidation) and others [2021] EWCA Civ 680 distinguished.

ORAL JUDGMENT

**Jacqueline Charles (Personal Representative
of the Estate of Joshua Thorne, deceased)**

V

Emery Thorne

[GDAHCVAP2020/0014]

Case Name:

Consolidated with:

**Jacqueline Charles (Personal Representative
of the Estate of Joshua Thorne, deceased)**

V

Emery Thorne

[GDAHCVAP2021/0038]

(Grenada)

Date: Friday, 7th July 2023

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

Appearances:

Appellant: Mr. Iain Sandy

Respondent: Mr. Zuriel Francique

Issues: Civil Appeal –Committal application – Failure to comply with order of the court – Contempt of court – Certainty of court order – Strict interpretation of court order - whether a person can be in breach of a court order that is ambiguous – Inherent jurisdiction of the court – Whether the court is limited to making orders listed in rule 53.9 of the Civil Procedure Rules 2000

Result/Order: IT IS HEREBY ORDERED THAT:

(1) The appeals are allowed.

(2) The orders dated 27th October 2020 and 29th November 2021 are set aside.

(3) The committal application is remitted to lower court for trial.

(4) The Respondent shall pay the costs of the appeal of \$750 by 11th August 2023.

Reason:

[1] These appeals arise out of a dispute between the Appellant and the Respondent regarding monies held in a joint bank account in the names of the Appellant and her late father, Joshua Thorne ("the Deceased"), at the former RBTT Bank Grenada Ltd, now the ACB Grenada Bank Ltd ("the Bank")

[2] In or about 2004, the Appellant and the Deceased opened a joint bank account in their names at the Bank ("the Disputed Account"). The Deceased passed away in June 2010 and Letters of Administration to his Estate were granted to the Appellant on 14th July 2010. The Disputed Account was set up with, or at some stage contained, ECD \$500,000.00.

[3] At a later stage the Respondent produced a codicil to the will of the Deceased which, among other things, bequeathed ECD \$100,000.00 to the Respondent. The codicil refers to a will of the deceased dated 29th October 2001. However, the will has not been produced and has not been found. Based on the codicil, the Respondent claimed the ECD \$100,000.00 from the Estate. His request was denied on the grounds that the Deceased died intestate and that he was not a person entitled to a share of the Estate on the intestacy of the Deceased. Further, there was no will and the validity of the codicil was disputed.

[4] In May 2012, the Respondent and Joselle Thorne brought proceedings against the Appellant by a fixed date claim form ("the Action") claiming an account from the Appellant of her administration of the estate. Joselle Thorne eventually withdrew as a claimant in the Action. When the Action did not produce the desired results, the Respondent applied for information regarding the Disputed Account and for an order that the Appellant deposit the sum of ECD \$100,000.00 into court pending the resolution of the

Action. The ECD \$100,000.00 is obviously a reference to the bequest of ECD \$100,000.00 to the Respondent in the codicil.

[5] The application was heard by Aziz J on 10th July 2015. The learned judge ordered that the Respondent produce an up-to-date account of the estate and, importantly for the purposes of these appeals, that “(t)he sum of \$100,000 ...be deposited in the court in an interest-bearing account, until final determination of the substantive claim.” (“the July 2015 Order”). There was confusion regarding the meaning of the second part of the Order requiring the deposit of ECD \$100,000.00, but Aziz J held another hearing on 11th July 2016 to clarify the meaning of the July 2015 Order. Whatever the judge decided was not recorded in a formal order of the court. Instead, what was recorded was a note by the court clerk in a manuscript at the back of the file as follows:

“Monday, 11 July 2016. In Chambers No 1. Before J S. Aziz. Ms C Joseph for the Deft. Ms Edwards QC for the second (claimant) - Clarification of the order 10/7/15. As to paragraph 2 – the sum of \$100,000 to be deposited into court to be held into an interest-bearing a/c from the joint a/c held at RBTT which contained the sum of \$500,000 according to the codicil. As to paragraph 1 – to provide an amended a/c as it was at the time of the order as of 10 July 2015 when the (sic) order was made showing when it was open and an up to date balance. Matter to be listed for court 3 by the Registrar. (Sgd) C Charley.”

[6] The Appellant had produced an account dated 7th October 2015 and an amended account dated 15th January 2016 in purported compliance with the first part of the July 2015 Order of Aziz J. However, she did not comply with the second part of the Order. Her response to the second part of the Order was that it was impossible for her to comply because there was no account that fit the description in the July 2015 Order.

[7] On 18th November 2015 the Respondent applied to the court for an order that the Appellant be punished for her contempt of court for failing to comply with the July 2015 Order. The stated ground of the application

is that the July 2015 Order directed, inter alia, that there be an account of the monies in the Disputed Account and the Appellant had not complied with the Order by paying the ECD \$100,000.00 into court. The committal application came up for hearing on different occasions and was adjourned from time to time for reasons that this Court does not need to address for the purposes of these appeals.

[8] In support of her position for not paying the ECD \$100,000.00 into court, the Appellant produced a letter from the Bank dated 21st November 2016 stating that as at May 2015 the Appellant did not hold any joint accounts with the late Joshua Thorne at the Bank. Further, there was another account in the name of the Estate of Joshua Thorne which contained \$5,179.37.

[9] At a further hearing of the committal application on 27th October 2020 another judge, Glasgow J, ordered inter alia:

“In respect of the joint account established in the name of Joshua Thorne and Jacklyn (sic) Charles in the month of December 2004 with (the Bank) in the sum of \$500,000, the (appellant) is to provide a statement along with documents as to the amount in that account immediately before the death of Mr Thorne and the amount in that account on the date of the court’s order dated 10 July 2015. Any disparity between the 2 accounts must be explained and in particular dates provided, supported by documents as to when the funds were removed from the account.”

[10] The Appellant adopted a similar position with regard to this order claiming that it was impossible for her to comply with its terms because there was no account at the Bank that matched the description of the account set out in the June 2015 Order. At a further hearing of the committal application on 29th November 2021, Glasgow J made another order, this time ordering the Bank to produce details about the Disputed Account.

[11] The Appellant was dissatisfied with the orders of Glasgow J and appealed to this Court. The grounds of appeal in summary form assert that:

(i) The July 2015 Order as clarified by the further order on 11th July 2016 had been fully complied with and that it was impossible to comply with the order for the payment of ECD \$100,000.00 into court because all joint accounts in the name of the Deceased and the Appellant had already been closed by the time the July 2015 Order was made.

(ii) The learned judge erred in law in making an order by which he sought to clarify the July 2015 Order and part 53.9 of the CPR did not give the learned judge the power to make the order which he did.

(iii) The learned judge erred in making an order that the Appellant produce more detailed accounts when there was no such application before him. All that was before the learned judge was the committal application in respect of the alleged breach of the July 2015 Order. The learned judge should therefore have determined strictly whether the Appellant was in breach of the July 2015 Order of Aziz J.

Grounds iv, v and vi are generally relevant but it is not necessary for the Court to set them out in this decision to dispose of the appeals. They relate to the right of survivorship between the Appellant and the Deceased, the nonexistence of the alleged joint account from which to pay the ECD \$100,000.00, and the allegation that the codicil is invalid.

[12] Learned counsel for the respondent argued fervently that the orders made by Glasgow J are material and necessary to determine what happened to the ECD \$500,000.00 in the disputed joint account. He submitted that the material dates for the Court to consider in terms of the monies in the account are the date of death of the Deceased and the date of the July 2015 order. The learned judge was therefore correct to order that this information be provided and the appeal should therefore be dismissed. The Court does not accept this submission. The relevant date for the court to consider in the committal application is 10th July 2015 when the July 2015 Order was made. The state of the Disputed Account on that date will be important in

determining whether the July 2015 Order was breached by the Appellant.

[13] Learned counsel also submitted that the information ordered by the learned judge was necessary to understand the meaning of the July 2015 Order which needed clarification. This argument does not assist the Respondent. If the July 2015 Order was not clear and needed clarification by further orders of the court, that is sufficient for the judge in the lower court to dismiss the committal application. A person can only be committed for contempt of an order if the meaning of the order is clear and unambiguous. If authority is needed for this basic principle, it can be found in the judgment of Alleyne JA in *William Harry and another v Phillip Mark Vaughn* where the learned justice of appeal set out the basic principles relating to the interpretation and enforcement of orders in committal applications.

[14] This Court has not lost sight of the fact that the lower court was dealing with an application for committal in respect of a breach of the July 2015 Order. The application was not for tracing the monies that were in the Disputed Account or for the Appellant to account for the monies in the Estate of the Deceased. Therefore, what is important is for the lower court to interpret the July 2015 Order either in its original form or as clarified in July 2016, and determine whether the conduct of the Appellant in complying or not complying with the Order was a contempt of court. If it was a contempt, the lower court will determine the appropriate punishment to be imposed on the Appellant.

[15] This Court also bears firmly in mind that the proceedings before the lower court are quasi criminal for contempt of court which could result in the imprisonment of the Appellant. Therefore, the Respondent is required to prove his case not just on a balance of probabilities but to the criminal standard of beyond a reasonable doubt (per Ellis J in *Liao Hwang Hsaing v Liao Chen Toh*). In construing the Order the judge of the lower court will be required to focus on the words used by Aziz J in the July 2015 Order. There appears to be an issue whether the words recorded by

the court clerk in July 2015 reflect what transpired in court on that day. Regrettably there is no transcript or other note of what the judge actually said in court other than the clerk's note. It will be for the judge below to interpret the July 2015 Order primarily with reference to the words used in the Order while having regard to the court clerk's clarification note on the back of the court file as an aid to interpretation. Applying these basic rules of interpretation the judge, trying the committal application, will then have to decide whether it was impossible for the Appellant to have complied with the July 2015 Order (as she contends), and if so, whether she should be found to be in contempt of the court's order. This is not to say that ground (i) succeeds, only that the July 2015 Order is to be construed strictly in accordance with the words used by the Judge, and, if necessary by reference to the clarification recorded by the court clerk.

[16] Ground (ii) is dismissed. In dealing with the committal application the Judge who was managing the case was not constrained by part 53.9 of the Civil Procedure Rules 2000 in terms of the orders that he could make. The judge had an inherent jurisdiction to manage the case as he saw fit and he was not constrained to make only the orders listed in part 53.9.

[17] The Court has said enough to make it clear that ground (iii) must succeed. In dealing with the committal application, the learned judge should have strictly determined whether the Appellant was in breach of the July 2015 Order. He was not required to and should not have made additional orders regarding production of information about the Disputed Account. Such information may be very helpful in tracing the monies that were in the Disputed Account and other accounts that form a part of the Deceased's Estate, but that is not the issue before this Court. The committal application should be decided on the basis of the proper interpretation of the July 2015 Order and the circumstances that prevailed at the time, and whether the Appellant's conduct in not providing information about the disputed account other than it had been closed was sufficient compliance with the July 2015 Order to avoid a finding of being in contempt.

[18] To be clear, this Court is not making findings on the proper interpretation of the July 2015 Order or any other orders that were made by the lower court. The findings of this Court are limited to how the committal application should be dealt with and whether the orders of Glasgow J should not have been made and considered in the committal proceedings.

[19] This is sufficient for the Court to decide that the learned judge erred in making the orders dated 27th October 2020 and 29th November 2021 and these orders must be set aside.

APPLICATIONS AND APPEALS

Case Name:

Lucy Murchie

V

George Martin

**[GDAHCVAP2016/0014]
(Grenada)**

Date:

Monday, 3rd July 2023

Coram:

**The Hon. Dame Janice M. Pereira DBE, Chief Justice
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal**

Appearances:

Appellant:

Mr. Ian Sandy appearing amicus

Respondent:

Melissa Modeste Singh

Issues:

Civil appeal - Application to dismiss appeal for want of prosecution

Type of Order

Oral Decision

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The application filed on 9th February 2023 is allowed.
2. The appeal is dismissed for want of prosecution.
3. Costs are awarded to the respondent fixed in the sum of \$1500.00 to be paid on or before 31st July 2023.

Reason:

The Court was of the view that the appellant has not shown or demonstrated any interest in prosecuting the appeal. The Court accordingly acceded to the application made by the respondent to dismiss the appeal for want of prosecution.

Case Name:

Javid Glasgow

V

The King

**[GDAHCRAP2017/0021]
(Grenada)**

Date:

Monday, 3rd July 2023

Coram:

**The Hon. Dame Janice M. Pereira DBE, Chief Justice
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal**

Appearances:

Appellant: Mr. Jerry Edwin

Respondent: Mr. Howard Pinnock

Issues:

Criminal appeal - Robbery with violence - Appeal against sentence - Whether the sentence was manifestly excessive in the circumstances of the case - Whether the notional sentence fixed in relation to the

circumstances of the case was too high - Whether the learned judge erred in the application of the Eastern Caribbean Supreme Court (Sentencing Guidelines) Rules 2019 - Whether the learned judge ought to have given the appellant the full one-third benefit for pleading guilty at the first practicable opportunity

Type of Order

Oral Judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The appeal against sentence is allowed.
2. The sentence of 15 years is substituted with the sentence of 8 years with credit of 9 months to be given to the appellant in respect of time spent on remand.

Reason:

The Court noted that the sentence imposed was unduly high and considered that the learned judge made an error in principle in starting at a notional sentence of 21 years in relation to the facts and circumstances of the case. The Court determined that a notional sentence of 14 years was a reasonable starting point in the circumstances of this case.

The Court agreed with the factors the learned judge took into account in making her decision but noted that the appellant's prior conviction as a youth should not have been taken into account. The appellant was therefore treated as a person with no prior convictions.

The Court considered that the appellant demonstrated genuine remorse and that he was a young person at the time of the commission of the offence. The Court therefore reduced the 14 years by 2 years and gave the appellant a full one-third discount for the guilty plea entered at the first practicable opportunity, arriving at a sentence of 8 years with credit to be given to the appellant of 9 months spent on remand in respect of the 8 year sentence.

Case Name:	Dave Benjamin
	v
	The King
	[GDAHCRAP2018/0002] (Grenada)
Date:	Monday, 3rd July 2023
Coram:	The Hon. Dame Janice M. Pereira DBE, Chief Justice The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal The Hon. Mr. Trevor Ward, Justice of Appeal
Appearances:	
	Appellant: Mr. Andre Thomas
	Respondent: Mr. Howard Pinnock
Issues:	Criminal appeal - Appeal against sentence - Non-Capital Murder - Guilty plea - Whether the sentence was manifestly excessive in the circumstances of the case - Whether the learned trial judge erred in failing to give any discount for the guilty plea that was entered upon arraignment - Whether the learned trial judge erred by considering that the appellant's denial that he raped the deceased meant that he was not remorseful and that it was an aggravating feature of the offence - Whether the learned trial judge erred by ruling at the end of the Newton Hearing that the deceased was raped - Whether the learned trial judge gave undue weight to her belief that the deceased was raped - Whether the learned trial judge erred in law by not using the benchmark period of thirty (30) years for the offence of non-capital murder - Whether the learned trial judge erred in failing to give due regard to the rehabilitative aim of sentencing in the imposition of the maximum sentence for the offence
Type of Order	Oral judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The appeal against sentence is dismissed.
2. The life sentence is affirmed.
3. The matter is remitted to a judge of the High Court for an assessment of the minimum term to be served by the appellant before review.

Reason:

The central issue in this case is whether the learned judge erred in imposing a life sentence. The appellant submitted that in the circumstances of this case, the judge ought to have used a starting point of 30 years and, after adjustments for aggravating and mitigating factors, an appropriate sentence would have been in the order of 20 years.

The Court was of the view that in determining the appropriate sentence for any offence, the first task is to identify an appropriate starting point or notional sentence. This requires an assessment of the seriousness of the offence by identifying those objective factors which aggravate or mitigate the offence itself, but excluding aggravating and mitigating features personal to the offender. It is true that traditionally within the jurisdiction of the Eastern Caribbean Supreme Court a benchmark of 30 years has been used as a starting point in cases of murder, but this is not to be taken as cast in stone. The particular facts and circumstances of each case must ultimately be what informs the starting point. This is well illustrated in a number of cases to which the respondent has made reference, including *The Queen v Neil Wilson SLUCRD2016/0373 (delivered 23rd November 2017, unreported)*, where a starting point of 40 years was used and from this very jurisdiction, *Sheldon Bain v The Queen GDAHCRAP2016/0007 (delivered 1st November 2019, reissued 8th November 2019, unreported)* where a starting point of 35 years was used.

Before turning to identify the aggravating factors in this case it was necessary for the Court to address the appellant's ground of appeal that complains that the learned judge erred in finding as a fact that the

appellant had raped the deceased and then went on to treat this as an aggravating factor. The resolution of this issue would determine whether it may properly be regarded as an aggravating factor. In summary, the evidence produced at the Newton hearing established the following facts elicited from the medical professionals: (a) the deceased was found partially naked with her panties pulled below her buttocks; (b) sperm-like substance was observed oozing from her vagina; (c) there were bruises about her inner thigh close to the vulva, which Dr. John Layne found to be consistent with rough sexual activity and which evidence the judge seems to have accepted; and (d) the DNA of the appellant was found on vaginal swabs retrieved from the deceased. In the Court's view, these pieces of evidence point clearly and ineluctably to the reasonable inference that the deceased was raped and brutally murdered. The learned judge was entitled to draw that inference from the proven facts. An appellate court will not interfere with a judge's findings of facts or inferences unless they are plainly wrong, in the sense that either there was no evidence to support the finding or the finding was based on a misunderstanding of the evidence or the finding was one that no reasonable judge could have reached. In light of the Court's finding, this ground of appeal must fail. Accordingly, the Court identified the following aggravating factors, namely- (a) the appellant abducted the deceased, (b) the appellant raped the deceased (and the commission of the offence of rape seems to have been the motivation for the appellant's actions), (c) the offence appears to have involved some degree of pre-meditation because the appellant carried a mask and a dangerous weapon and concealed himself in the vegetation before pouncing on his unsuspecting victims, (d) the offence is aggravated further by the savage manner of its execution whereby multiple injuries were inflicted to the body of the deceased, her skull was fractured and she was strangled. Hers must have been a painful and agonizing death.

In the Court's view the nature and number of the aggravating factors present in this case must lead to the characterization of the level of seriousness as exceptionally high. These circumstances warrant a

starting point of life imprisonment. The Court could identify no redeeming or mitigating factors in relation to the offence. The character and personal circumstances of an offender must next be taken into account in the sentencing exercise. The necessity for this arises in order that the court may have due regard to the penological objective of rehabilitation and whether this is attainable. Matters relevant to this task include the antecedents of the appellant, the consideration of probation or psychological or psychiatric reports to gauge whether the appellant is fit for social readaptation and whether or not he has demonstrated genuine remorse.

The Court was of the view that the appellant's personal circumstances are far from stellar. He has a previous conviction for rape and had only completed serving the 7 year sentence in relation to that offence a mere 2 months before committing the present offence. In addition, he has 3 other previous convictions for other offences involving the use of violence. These convictions, which constitute an additional aggravating factor, signify a propensity to offend against the law with alarming frequency and brings into sharp focus the sentencing objective of personal deterrence. The presence of these aggravating factors in relation to the offender serve only to confirm that a life sentence is presumptively appropriate.

This Court was able to identify only one mitigating factor and that is the appellant's guilty plea. Ordinarily when a guilty plea is made at the first practicable opportunity it is usual for the court to credit the defendant with a $\frac{1}{3}$ discount. However, in circumstances where a court has determined that an indeterminate sentence is appropriate a guilty plea does not have the effect of reducing it to a determinate sentence. As was said by the Caribbean Court of Justice (CCJ) in Renaldo Anderson Alleyne v The Queen BB 2019 CCJ 3:

"There can be no doubt that a discount for an early guilty plea is appropriate and warranted where a sentence for a determinate amount of years is contemplated and appropriate. In its recent decision in *Teerath Persaud v. R*, [2018] CCJ 10 (AJ) this Court explicitly considered the

policy reasons and suggested guidelines for awarding such a discount. But the situation is entirely different where an indeterminate sentence such as the sentence of death or of life imprisonment is properly imposed. A discount for an early guilty plea is wholly incompatible with such sentences.”

The question here therefore is whether the judge erred in principle when she determined that a life sentence was appropriate. In the Court’s view, having regard to the large number and nature of aggravating factors as discussed, the judge’s determination that a life sentence was appropriate and her further determination that no discount should be given on account of the guilty plea are unassailable. The Court therefore affirmed the life sentence.

Mr. Thomas invited the Court to impose a tariff. However, the Court did not feel able to embark on that exercise in circumstances where it appears that counsel had admittedly not had sight of the psychiatric report, and neither had the Court. The Court agreed that consideration should be given to imposing a tariff, indicating a minimum term to be served by the appellant before he becomes eligible for release. Although there is no formal system of parole in Grenada the Court was satisfied that the Court has the inherent jurisdiction to impose such a tariff pursuant to the learning in *Renaldo Anderson Alleyne*. The Court was satisfied that the High Court was better placed to conduct that exercise once all the relevant reports (psychiatric reports, prison reports, psychological reports, social enquiry reports and the like) have been made available to counsel. The Court acknowledged that a few of the relevant reports were already available to the court. The Court further determined that counsel should have the opportunity to make representations before the court as to the appropriate tariff.

In those circumstances and for the reasons given, the Court dismissed the appeal against sentence and remitted the matter to a judge of the High Court to assess the minimum term to be served by the appellant before review.

Case Name:

**Paul Amade
v
The King**

**[GDAHCRAP2022/0018]
(Grenada)**

Date:

Monday, 3rd July 2023

Coram:

**The Hon. Dame Janice M. Pereira DBE, Chief Justice
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal**

Appearances:

Appellant: Mr. Jerry Edwin

Respondent: Mr. Howard Pinnock

Issues:

**Criminal appeal - Appeal against sentence - Maim
Appellant pleaded guilty to causing a maim - Appellant
sentenced to 7 years 5 months and 29 days
imprisonment - Whether upon considering the Eastern
Caribbean Supreme Court (Sentencing Guidelines)
Rules 2019 the sentence imposed by the trial judge
was excessive - Whether the trial judge erred in
categorising the consequence of the offence as
Category 2 that being one which caused serious
psychological or physical harm - Whether the trial
judge erred in determining that the use of the
appellant's teeth was equivalent to the use of a weapon
and his culpability was therefore at Level A
seriousness - Whether the appellant was entitled to the
one-third reduction of his sentence on account of him
entering a plea of guilty at an early stage of the
proceedings**

Type of Order

Oral Judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The appeal against sentence is allowed.
2. The sentence of 7 years 5 months and 29 days imposed by the learned trial judge is substituted for 6 years and 6 months.

Reason:

In considering the issue of whether the appellant's teeth could be classified as a weapon or weapon equivalent, the Court found that given the peculiar facts and circumstances of the case and, in particular, the commission of the offence, the appellant's teeth could properly be classified as a weapon equivalent used for the purpose of causing injury to the virtual complainant. As such, the learned trial judge did not err in assessing the culpability of the appellant at Level A seriousness. Accordingly, the Court agreed with the learned trial judge that the appropriate starting point was 12 years.

The Court also agreed with the learned trial judge's decision that having regard to the mitigating factors, a downward adjustment of two years should be applied to the starting point of 12 years, bringing that figure to 10 years.

The Court, however, did not agree with the learned trial judge's decision to apply only a one-quarter reduction to the 10-year sentence. Considering that the appellant entered a plea of guilty at an early stage of the proceedings, the Court was of the view that the appellant was entitled to the full one-third reduction on the 10-year sentence which, when applied, amounted to a total of 6 years and 6 months.

Case Name:

**Dwight Victor
v
The King**

**[GDAHCRAP2021/0016]
(Grenada)**

Date:

Monday, 3rd July 2023

Coram: The Hon. Dame Janice M. Pereira DBE, Chief Justice
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal

Appearances:
Appellant: Mr. Jerry Edwin
Respondent: Mr. Howard Pinnock

Issues: Criminal appeal - Appeal against sentence - The Eastern Caribbean Supreme Court (Sentencing Guidelines) 2019 - Whether the trial judge erred in double counting factors previously considered at Stage 2 of the sentencing exercise - Whether the learned judge erred in concluding that the appellant had breached his position of trust when determining the sentence to be served

Type of Order Oral Judgment

Result / Order: IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.
2. The sentence imposed by the judge in the court below is affirmed.

Reason: The appellant's complaint on this appeal was two fold. Firstly, the appellant contended that at Stage 4 step one of the analysis, the learned judge 'double counted' by considering factors already taken into consideration at Stage 2 of step one of the analysis ("Double Counting Point"). Secondly, the appellant contended that it was plainly wrong for the learned judge to conclude that in committing the offence, the appellant abused a position of trust ("Abuse of Trust Point").

With regard to the Double Counting Point, although it was clear that the two aggravating factors namely, the use of a bladed weapon to inflict injuries and the premeditation of the offence should have been properly applied when considering the level of

seriousness of the offending, it was clear that the learned judge did not apply those factors at that stage. Instead those factors were used at Stage 4 of the analysis in assessing the aggravating features. The Court was therefore not satisfied that this amounted to double counting. The Court was grateful for the indication from counsel for the appellant who conceded that point as well.

With regard to the Abuse of Trust Point, the Court agreed that the learned judge's finding that there was an abuse of a position of trust, was not supported. However, the Court was of the view that there was no doubt that the offence was domestic violence related and involved threats to kill. The Court was satisfied, having regard to all of the other aggravating features, that the reference to the abuse of position of trust would not have affected the matter one way or the other. While this factor ought not to have impacted the court's assessment, the Court was not satisfied that it would have unduly aggravated the sentence. Further, the Court was not satisfied that the sentence imposed by the learned judge was outside the appropriate range for the offence or was excessive.

The Court therefore could not find any basis upon which to interfere with the learned judge's sentence and was satisfied, having regard to all the circumstances, that the appeal ought to be dismissed and the learned judge's sentence affirmed.

Case Name:

Quadriga Office Management Inc.

v

Otway Investment Limited

**[GDAHCVAP2022/0030]
(Grenada)**

Date:

Monday, 3rd July 2023

Coram:

**The Hon. Dame Janice M. Pereira DBE, Chief Justice
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal**

Appearances:

Appellant: Mr. Benjamin Hood
Respondent: Ms. Shireen Wilkinson with Ms. Karah St. Paul

Issues: Interlocutory appeal - Defective pleadings - Appellant's claim struck out for failure to disclose reasonable grounds - Whether on the pleaded case the appellant established that they were impliedly granted an enforceable right to access the respondent's property

Type of Order Oral Decision

Result / Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:

1. The appeal is withdrawn with the leave of the Court with costs to be awarded by the appellant to the respondent in the sum of \$2000.00 to be paid on or before 31 July 2023.

Reason The Court found that given the defective state of the pleadings, it could not be said that the judge was blatantly wrong in exercising his judicial discretion to strike out the claim.

Case Name: Glenroy Barry
v

The King

[GDAHCRAP2017/0019]
(Grenada)

Date: Wednesday, 5th July 2023

Coram: The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal

Appearances:

Appellant: In person
Respondent: Ms. Crisan Greenidge

Issues:

Criminal appeal - Appeal against sentence - Application to amend grounds of appeal - Breach of section 8 (1) of the Constitution of Grenada - Whether the appellant's constitutional right to a fair hearing within a reasonable time was breached due to the delay in the preparation of his transcript and the delay in the hearing of his appeal - Whether the post-sentence delay of approximately 5 years and one month before the hearing of the appeal should warrant a reduction in the sentence of the appellant to the effect of time served

Type of Order

Oral Judgment

Result / Order:

IT IS HEREBY ORDERED AND DECLARED THAT:

1. The appellant's right to a fair trial within a reasonable time was breached.
2. The sentences of 12 years, 2 years and 1 year to run consecutively are confirmed.

Reason:

The appellant appealed against his conviction and sentence by way of a notice of appeal filed on 12th October 2017. During the hearing of the appeal, the appellant indicated that he had abandoned his appeal against conviction and was now appealing only against his sentence on the ground that the delay of 5 years and 1 month in producing the transcripts from his trial amounted to a breach of his constitutional right to have a fair hearing within a reasonable time.

Having heard both parties, and having been apprised of the factors to be taken into account with respect to the delay i.e. (1) the complexity of the matter, (2) the conduct of the litigant and (3) the administrative framework within which the delay was caused, the Court found that there was no good reason for the administrative delay of 5 years and 1 month in the production of the transcripts. The Court considered that the backlog given as a possible reason was not a good excuse, there was no fault to be ascribed to the litigant, Mr. Barry, for the delay, that the case in and of itself was not a complex one and accordingly found that in all the circumstances the delay of 5 years and 1 month was not justified and not reasonable.

The Court held that the appellant's right to a fair trial within a reasonable time was breached and was minded to make a declaration to that effect. Having regard to the circumstances of the case as to whether apart from that declaration any further relief should be granted to the appellant, the Court considered the weight of the interest from public as opposed to private, the proportionality issue and looking at the sentence which the Court considered to be on the lenient side, and might have been minded to increase the sentence rather than reduce it.

However, looking at the totality of the sentence, the Court found that it was not manifestly excessive given the circumstances of the case that the victim was 4 years, 9 years and 11 years of age at the time of the commission of the offence and did not grant a reduction of the sentence. The Court considered that the public interest far outweighed the private interest of the appellant in this case, the serious nature of the offences of which the appellant was convicted and so the Court issued a declaration as to the right to a fair trial within a reasonable time had been violated but granted no further relief. The sentences of 12 years, 2 years and 1 year to run consecutively were therefore confirmed.

Case Name:

Raheeman Joy Frederick

v

1. Phyllis Cecilia Frederick
2. Marva Neptune
3. Zorina Frederick (also in her capacity as personal representative in the estate of Cecilia Phyllis Frederick, deceased)

[GDAHCVAP2022/0023]
(Grenada)

Date: Wednesday, 5th July 2023

Coram: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal

Appearances:

Appellant: Mr. Alban John with him, Mrs. Hazel Hopkin-La Touche

Respondents: Mr. Ruggles Ferguson KC with him, Ms. Danyish Harford for the respondents

Issues: Civil appeal - Conveyance of land - Whether learned judge erred by finding that the sole issue for determination was whether the Registrar had authority to transfer the subject property to Raheeman Frederick and the legal effect of the said Deed - Whether the learned judge failed to recognise that a live issue in the claim was that of payment for the property - Whether the learned judge erred by finding that the property was paid for by anyone other than the appellant - Whether the judge erred by treating the order of Benjamin J as an absolute order - Whether the judge should have had regard to the admission by Zorina Frederick in cross-examination that there were no tenants in the property at the time of its acquisition or purchase by the appellant - Whether the judge failed to recognize that the only part of the property that formed part of the estate of Albert Nicholas Frederick was that small portion of land which was straddled by the building which is the subject of the said Deed - Whether the learned judge failed to have proper regard

to the fact that the appellant was deprived rent having restored the property

Type of Order:

Adjournment

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

The hearing of the appeal is adjourned to the next sitting of the Court of Appeal for the state of Grenada during the week commencing 15th January 2024 or at such earlier date as may be fixed by the Chief Registrar.

Reason:

A question arose during the course of the hearing as to whether or not the parties should discuss the matter with a view to settlement. The parties ultimately agreed that rather than continue the appeal at this juncture, they would enter into settlement discussions. The Court therefore ordered that the matter be adjourned until the next sitting of the Court for the state of Grenada.

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 of Antigua and Barbuda

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

Date: Wednesday, 5th July 2023

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

Appearances:

Applicants: Mr. Ruggles Ferguson KC with him Ms. Luann De Costa

Respondent: Mrs. Carla Brookes-Harris

Issues: Motion for conditional leave to appeal to His Majesty in Council - Computation of time - Whether the motion for conditional leave was filed on time - Rule 3 of the Antigua and Barbuda Appeals to Privy Council Rules - Section 44(2) of the Interpretation Act of Antigua and Barbuda - Withdrawal of application

Type of Order: Oral Decision

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The notice of motion for conditional leave to appeal to His Majesty in Council filed on 3rd April 2023 is withdrawn and dismissed.
2. The respondent shall have its costs in the sum of \$750.00 to be paid within 14 days of the date of this order.

Reason: Counsel for the applicants, Mr. Ruggles Ferguson KC, withdrew his application for conditional leave to appeal to His Majesty in Council upon noting the indication from the Court that the application was

made out of time and that the Court of Appeal had no jurisdiction to grant conditional leave in those circumstances. Accordingly, the motion was dismissed and costs were awarded to the respondent.

Case Name: **Jacqueline Charles (Personal Representative of the Estate of Joshua Thorne, deceased)**

V

Emery Thorne

[GDAHCVAP2020/0014]

Consolidated with:

Jacqueline Charles (Personal Representative of the Estate of Joshua Thorne, deceased)

V

Emery Thorne

**[GDAHCVAP2021/0038]
(Grenada)**

Date: **Wednesday, 5th July 2023**

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

Appearances:

Appellant:	Mr. Ian Sandy
Respondent:	Mr. Deloni Edwards

Issues: **Interlocutory appeal - Committal proceedings - Rule 59.3 of the Civil Procedure Rules 2000 - Whether the**

learned judge erred in law in making the order directing the appellant to provide account numbers and detailed transactions of all accounts held by ABC Grenada Limited in the name of Joshua Thorne and the appellant and in not dismissing the respondent/claimant's committal application - Whether the learned judge erred by making an order unrelated to the committal application, which was the only application before him - Impossibility -

Type of Order

N/A

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved and will be delivered 7th July 2023

Case Name:

Augustine Pascall

V

The Public Service Commission

**[GDAHCVAP2021/0024]
(Grenada)**

Date:

Wednesday, 5th July 2023

Coram:

The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mr. Gerard St. C Farara, Justice of Appeal [Ag.]

Appearances:

Appellant:

Dr. Francis Alexis KC with Ms Olabisi Clouden

Respondent:

Ms. Karen Samuel

Issues:

Civil Appeal - Recusal of Legal Practitioner - The principles under which the Court can make an order removing a legal practitioner as counsel on record for a litigant - Whether the legal practitioner can be restrained from acting on behalf of the appellant - Whether it was appropriate for the legal practitioner who was previously appointed chairman of the Public Service Commission (the Respondent) to represent a litigant in proceedings against the Respondent- Conflict of Interest - Continuing duty of confidentiality- Whether in the circumstances there is a risk that counsel would not be able to perform his duty to the court objectively - The fair minded observer - Whether the fair minded observer would consider as overwhelming certain circumstances in the respondent's objection to the legal practitioner continuing as legal practitioner for the appellant - Duty of Candor - Whether the judge erred in law in giving no or insufficient consideration to the fact that the Respondent was obliged in law to voluntarily disclose to the appellant the information requested by the appellant because of the duty of candor falling upon the respondent applicable in judicial review proceedings

Type of Order

N/A

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

APPLICATIONS AND APPEALS

Case Name:

Kayoy Jarrett
v
The King

**[MNIHCRAP2022/0006]
(Montserrat)**

Date: Thursday, 6th July 2023

Coram: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal

Appearances:

Appellant: In person

Respondent: Mr. Oris Sullivan

Issues: Application for adjournment

Type of Order Adjournment

Result / Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:

The hearing of this appeal is adjourned to the next sitting of the Court of Appeal for the island of Montserrat for hearing during the week commencing 18th September 2023.

Reason: The appellant sought an application for adjournment to allow him to consult with counsel which was agreed to by the respondent.

Case Name: Janien Wilson Louison

v

**Consolidated Contractors Company
Caribbean Incorporated**

[GDAHCVAP2023/0004]

(Grenada)

Date: Thursday, 6th July 2023

Coram: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal

Appearances:
Appellant: Mr. Perry Joseph holding papers for the appellant
Respondent: Mr. Henry Paryag holding papers for the respondent

Issues: Application for an adjournment

Type of Order Adjournment

Result / Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:

The hearing of this appeal is adjourned by consent of the parties to the next sitting of the Court of Appeal for Grenada during the week commencing 15th January 2024.

Reason: Both parties agreed that in the circumstances the matter should be adjourned and the Court granted an order to that effect.

Case Name: Frank Bell

v
Clara Bell

[GDAHCVAP2023/0020]

(Grenada)

Date: Thursday, 6th July 2023

Coram: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal

Appearances:

Applicant/Respondent:	Ms. Deborah St. Bernard with her, Ms. Ssavanna Seales
Respondent/Appellant:	Mr. Henry Paryag

Issues: Application to strike out notice of appeal - Notice of appeal filed out of time - No extension of time sought or obtained - Appellant's failure to prosecute appeal

Type of Order: Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The notice of appeal filed by the respondent/appellant on 30th May 2023 is struck out.
2. Costs to the applicant/respondent in the sum of \$2000.00 to be paid on or before 3rd August 2023.

Reason: On 29th March 2023, Actie J made an order for the partition and sale of a portion of land together with a dwelling house thereon and the distribution of the proceeds of sale between the applicant/respondent and the respondent/appellant (being the claimant and the defendant in the court below). On 30th May 2023, the respondent/appellant filed a notice of appeal of the order of Actie J on the ground that "the learned judge erred in law in failing to assume that in a matter of

justice and fairness, given the particular facts of this case and statements made by the learned justice before the amended fixed date claim was made, the defence should have been considered.”

On 15th June 2023, the applicant/respondent filed a notice of application for an order that the notice of appeal filed by the respondent/appellant on 30th May 2023 be struck out on the ground that “it fails to conform to rule 62.5(1)(c) of the Civil Procedure Rules 2000 (“CPR”).”

Rule 62.5(1)(c) requires that a notice of appeal be filed within 42 days of the date when the order is made but the notice of appeal filed by the appellant in this case was filed 54 days after the order of Actie J was made. In the affidavit filed in support of the application to strike out the notice of appeal, the deponent avers that the Court ought to treat the notice of appeal as a nullity, it having been filed out of time and without the leave of court.

On 28th June 2023 the applicant/respondent filed submissions in support of the application to strike out the notice of appeal citing, among other reasons, the fact that the respondent/appellant filed the notice of appeal 13 days late with no application having been made for an extension of time within which to appeal. At 3:21 pm on 5th July 2023, the respondent/appellant filed a response to the notice of application to strike out the notice of appeal together with an affidavit in opposition to the strike out application.

The Court noted that quite apart from the fact that the respondent/appellant states that he is opposing the notice of application filed on 28th June 2023 when the notice of application was filed on 15th June 2023 and that the response was filed 3 weeks afterwards, the respondent/appellant never filed an application for an extension of time to file the notice of appeal and/or an application to deem the notice of appeal to have been duly filed. The respondent/appellant did not even specifically apply in his response, for an extension of time to file the notice of appeal. Instead, he sought to argue in his response why he should be given an extension of time to file his notice of appeal. In

particular, he contended that he had satisfied the requirements for the grounds of an extension of time, being: (1) that the delay was not inordinate, (2) that there was a good explanation for the delay, (3) that the application for an extension of time has a good chance of success on the appeal, and (4) that there would be no prejudice to the other party if an extension of time was granted.

The Court was of the view that on the facts of the case, one cannot say that the delay of 12 days was inordinate. However, it can be said that the delay of 36 days in seeking an extension of time to file the notice of appeal may have been inordinate. In any event, the reason given by the respondent/appellant for the delay in filing the appeal “was due to a miscalculation of the days” cannot be considered to be a good, far less a compelling reason, for filing the notice of appeal out of time. As to prospects of success, it is very difficult to conclude that the respondent/appellant had good prospects of success on an appeal on a single ground, which the Court confessed it failed to comprehend. On the issue of prejudice, the applicant/respondent was put in a position by the 11th hour filing of the respondent/appellant's response to indicate to the Court, what, if any, prejudice would be occasioned to her by the grant of an extension of time to the respondent/appellant to file a notice of appeal. The respondent/appellant, however, did not himself indicate why he would argue that there would have been no prejudice to the applicant/respondent. Consistent with the plethora of cases where the Court had to consider applications to strike out appeals and to grant extensions of time to appeal, this Court could not but grant the application by the applicant/respondent to strike out the notice of appeal against the order of Actie J and to award costs to the applicant/respondent.

Case Name:

**Everton Elliott
v
Anselm Caines**

[NEVHCVAP2022/0013]

(Saint Kitts and Nevis)

Date: Thursday, 6th July 2023

Coram: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal

Appearances:

Appellant: Ms. Sherry-Ann Liburd-Charles

Respondent: Mr. Perry Joseph

Issues: Application for an adjournment

Type of Order Adjournment

Result / Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:

The hearing of the appeal is adjourned to the next sitting of the Court of Appeal for Saint Kitts and Nevis during the week commencing 23rd October 2023.

Reason: Both parties agreed that the matter should be adjourned to give counsel for the appellant an opportunity to properly consider submissions filed by the respondent and the Court granted an order to that effect.