

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

VIDEOCONFERENCE

SAINT VINCENT AND THE GRENADINES
24th – 28th July 2023

JUDGMENTS

Panel 2

Case Name:

[1] Eldon Wilson
[2] Donnie Camille
[3] Miriam Holt

v

Lance Willie
(Qua Administrator of the Estate of George
Willie)

[SLUHCVAP2020/0006]
(Saint Lucia)

Date:

Monday, 24th July 2023

**Coram for
delivery:**

The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal

Appearances:

Appellants: Ms. Cleopatra McDonald

Respondent: Ms. Lydia Faisal

Issues:

**Civil Appeal – Motor vehicular accident – Assessment
of damages – Special damages – Loss of income
from date of death to date of judgment – Future loss
of income – Jurisdiction of an appellate court to
interfere with an award of damages – Jurisdiction of
an appellate court to allow new points to be taken on
appeal – Whether the master erred when he failed to**

make any deduction for expenses from the deceased's income – Whether the master erred by finding an agreement between the parties on the multiplier of 4 years and award damages for future loss of earnings in the lost years – Whether the master misdirected himself given his findings on the award for loss of earnings from the date of the accident to the date of judgment – Whether the master erred in his calculation of the multiplier and multiplicand in his assessment of damages for loss of income – Interest – Costs

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is allowed in part.
2. The Master's award in respect of special damages in the court below is affirmed save that there is no recovery for the cost of the grant of letters of administration.
3. The Master's award in respect of pre-trial loss of earnings, that is, loss of earnings from the date of death to the date of trial is set aside and the sum of \$43,440.00 is substituted.
4. The Master's award of \$90,720.00 in respect of post-trial loss of earnings is set aside in its entirety.
5. The Master's award of prescribed costs is set aside and the sum of \$5,184.36 is substituted.
6. There will be interest on the total amount awarded at a rate of 6% per annum from the date of judgment until payment.
7. There shall be no order as to costs on appeal.

Reason:

1. Generally, an appellate court will not interfere with an award of damages unless the award is shown to be the result of an error of law or so inordinately disproportionate as to be plainly wrong. Special damages, however, must be specifically pleaded and strictly proved. An appellate court is therefore free to interfere with or set aside any award of special damages for an amount which has not been specifically pleaded and proved.

Flint v Lovell [1935] 1 KB 354 applied; Nance v British Columbia Electric Railway Co Ltd [1951] AC 601 applied; Alphonso v Deodat Ramnauth Civil Appeal No. 1 of 1996 BVI (delivered 21st July 1997, unreported) followed.

- 2. An appellate court has a general discretion on whether to allow new points to be taken on appeal. The decision of whether to permit the new point will ultimately depend upon the analysis of all the relevant factors, including the nature of the proceedings in the lower court, the nature of the new point and any prejudice that would be caused to the opposing party if the new point is allowed. The appellants advanced a new point under the head of special damages but provided no exceptional reasons which would justify the Court in exercising its discretion. Therefore, public policy arguments in favour of finality in litigation demand that these grounds of appeal not be entertained.**

Pittalis v Grant [1989] QB 605 applied; Singh v Dass [2019] EWCA Civ 360 followed.

- 3. Where a living claimant's expectation of life has been reduced due to the defendant's negligence, the claimant is entitled to recover damages for loss of earnings throughout both the period that they are likely to remain alive and for the 'lost years' during which they would have lived but for their injuries. The damages are assessed after deducting the claimant's own living expenses which they would have spent during the lost years. Here, the Master failed to make any deductions to account for the deceased's personal expenses when he was obliged to do so. Therefore, the grounds of appeal on this general issue succeed.**

Pickett v British Rail Engineering Ltd [1980] AC 136 applied; Gammell v Wilson; Furness v B&S Massey Ltd [1982] AC 27 applied.

4. The sum to be deducted as living expenses in a 'lost years' claim is the proportion of the deceased's net earnings that he spends to maintain himself at the standard of life appropriate to his case. Any sums expended to maintain or benefit others do not form part of the deceased's living expenses and are not to be deducted from the net earnings. There are different approaches to the assessment of the multiplicand depending on the state of the evidence before the court. These are: (a) the item-by-item approach; and (b) the percentage approach. It follows that, although the courts have employed a modern practice of deducting a percentage for what the deceased would have spent exclusively on himself, where there is striking evidence which would make the conventional figure (50%) inappropriate, the Court will depart from it. While there was no specific evidence as to the deceased's living expenses, after deducting his contributions to his wife's expenses from his net monthly income (\$1,250.00 - \$1,000), the maximum available for his own personal maintenance was \$250.00. In these circumstances, the deduction of 20% should apply resulting in a multiplicand of \$1,000 per month or \$12,000 per year.

Harris v Empress Motors [1984] 1 WLR 212 followed; Phipps v Brooks Dry Cleaning Service Ltd [1996] EWCA Civ J0711-12 considered; Shanks v Swan Hunter Group Plc [2007] EWHC 1807 (QB) considered.

5. The division of an award into a pre-trial and post-trial assessment or the Cookson v Knowles approach has continued to be applied by the courts in this region despite the pronouncement in Knauer v Ministry of Defence. The starting point in the calculation of the multiplier is the number of years that is anticipated that the dependency would have lasted had the deceased not passed away. The learned Master was therefore correct in

concluding that the dependency must be considered from the date of the accident (presumably the date of death) to the date of assessment i.e., 3.62 years. Applying the multiplicand, the total pre-trial loss would be \$43,440.00 (12,000.00 X 3.62 years).

Cookson v Knowles [1979] AC 556 applied; Knauer v Ministry of Defence [2016] UKSC 9 considered; Cadet's Car Rentals and another v Pinder [2019] UKPC 4 applied; Scott v Attorney General [2017] UKPC 15 applied.

6. The multiplier is related primarily to the deceased person's age and the probable length of his working life at the date of death. In that regard the courts in this region have generally taken the view that the working life of a person in the respondent's sphere of work ends at 65. Applying that ratio, there should be no award made with respect to the post-trial (pre-retirement) loss. In proceeding on the basis that the parties had agreed that a multiplier of 4 years was appropriate, the Master failed to apply the relevant legal principles in determining what if any is the appropriate multiplier for the post-trial loss. Had the learned Master carried out that analysis, he would have considered that there was in fact no agreement between the parties on this issue and that at the point of trial, the deceased would have been 66 years 5 months and 11 days old. It is therefore clear that the award of \$90,720.00 for loss of future income is wholly unsupported and must be set aside.

Alphonso v Deodat Ramnauth Civil Appeal No. 1 of 1996 BVI (delivered 21st July 1997, unreported) followed.

7. Where an award of damages has been adjusted, costs payable must also be adjusted and quantified on the basis of the revised award. The circumstances of this case warrant the value of the claim to be decided based on the amount ordered to be paid. The total value

of the claim would therefore involve the sums of the special damages plus the interest, general damages, and the amount substituted by this Court for pre-trial loss of earnings.

Rule 65 of the Civil Procedure Rules 2000 considered; Cleveland Donald v The Attorney General Civil Appeal No. 32 of 2003 Grenada (delivered 26th July 2004, unreported) followed.

Case Name:

Marius Wilson

v

The King

[SLUHCRA2022/0002]

(Saint Lucia)

Date:

Tuesday, 25th July 2023

**Coram for
delivery:**

**The Hon. Mde. Margaret Price-Findlay, Justice of
Appeal**

The Hon. Mr. Trevor Ward, Justice of Appeal

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

Appearances:

Appellant:

**Ms. Algitha Richelieu holding papers for Mr. Alberton
Richelieu and Mr. Jeannot-Michel Walters**

Respondent:

Ms. Tanya Alexis-Francis

Issues:

**Criminal Appeal – Intentionally causing dangerous
harm – Using a deadly instrument with intent to
cause grievous harm – Appeal against conviction –
No case submission – Whether the trial judge erred in
law in failing to uphold the no case submission on
the basis that the evidence adduced by the
prosecution was so manifestly unreliable that no
reasonable tribunal could safely convict – Summing-
up – Directions to the jury on hostile witnesses –
Whether the trial judge failed to direct the jury on the
evidential value of hostile witnesses – Good
character direction – Credibility limb – Whether the**

trial judge's good character direction derogated from the credibility limb – Appeal against sentence – Whether the appellant's sentence was excessive due to the judge's consideration of irrelevant matters and his failure to adequately take into account the 9-year delay before the commencement of the trial

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal against conviction is dismissed.**
- 2. The appeal against sentence is allowed and is varied to the extent that the sentence imposed by the learned judge is substituted with 3 years for intentionally causing dangerous harm and 2 years for using a deadly instrument with intent to cause grievous harm, both sentences to run concurrently.**

Reason:

- 1. A no case submission is hung on one of two limbs: (i) that the prosecution has failed to establish an essential element of the offence; or (ii) that the evidence adduced by the prosecution has been so discredited or is so manifestly unreliable that no reasonable tribunal could safely convict. In the present case, the no case submission presented to the trial judge was grounded on the second limb. If a prima facie case depended on only the evidence of the hostile witnesses in this case, then the trial judge would have been bound to uphold the no case submission because the hostile witnesses said nothing to implicate the defendant in the commission of the offences. However, in addition to the evidence of the hostile witnesses, the prosecution led uncontradicted direct evidence from Rita Demar that the appellant was seen to have shot Winsbert, and contrary to the appellant's contention, the failure of the prosecution to lead evidence providing context as to how or why the crimes were committed was not fatal to their case. There was also evidence from police witnesses that the appellant was found with a firearm moments after the shooting.**

R v Galbraith [1981] 2 All ER 1060 followed; R v Maw [1994] Crim LR 841 distinguished; McPherson v R Supreme Court Criminal Appeal No. 87/2004 (delivered 7th April 2006) distinguished.

- 2. A witness may be deemed as hostile where that witness gives evidence adverse to the party calling them or fails to make a genuine effort to give evidence on matters reasonably supposed to be within their knowledge. Once a witness is deemed hostile, they may be cross-examined on previous statements they have made, the purpose of which is to show inconsistency between the witness's present testimony and their previous statement, which can have the effect of undermining their credibility. In St. Lucia the trial judge is required to direct the jury that the previous statement is not evidence in the case, and they cannot treat it as such unless the witness confirms specific parts of their previous statement. The trial judge in the present case discharged this requirement and left the jury in no doubt that they could not act on those parts of the hostile witnesses' statements which they claimed not to remember. The additional statement made to the jury that they may form the view that the statements represented the hostile witnesses' recollection at a time when the events were fresher in their minds, must be viewed in the context of the summing up as a whole. When the summing up is viewed as a whole, the jury could not have been in any state of confusion, nor could they have reasonably thought that it was open to them to act on the contents of the witness statements where the hostile witnesses claimed not to remember or which they did not accept. The trial judge had done sufficient to disabuse them of any such notion.**

Section 35 of the Evidence Act Chapter 4.15 of the Revised Laws of Saint Lucia, 2019 applied; R v Stoddart (1909) 2 Cr. App. R. 217, 246 followed; Kayvon McPherson v R Supreme

Court Criminal Appeal No. 87/2004 (delivered 7th April 2006) distinguished; R v Maw [1994] Crim LR 841 followed; R v Pestano and others [1981] Crim LR 397 followed.

- 3. A defendant who has no previous convictions or who is deemed to be a person of effective good character is entitled to the benefit of a good character direction. The trial judge in delivering such a direction must explain the relevance of the defendant's good character to their credibility and their propensity to commit the offence with which they have been charged. In that regard, the good character direction yields two limbs: a credibility limb; and a propensity limb. In the present case, the trial judge delivered both limbs of the good character direction adequately. The appellant's submission that the credibility limb was "seriously diluted" when the trial judge said that "the fact that the appellant was a lawyer did not mean that he was more or less credible than any other witness", did not operate to attenuate in any way the credibility limb of the good character direction. That statement made by the trial judge showed that he was alive to the varying perceptions which people hold of lawyers and the impugned direction was intended to disabuse the jury's mind from the inclination to view lawyers in a discreditable light.**

R v Vye [1993] 1 WLR 471 followed; The Crown Court Compendium Part I: Jury and Trial Management and Summing Up (Judicial College 2023), 11-1 followed; R v Miah [1997] 2 Cr. App. R. 12 followed; Singh v The State [2005] UKPC 35 distinguished.

- 4. An appellate court will not interfere with the judicial discretion of the sentencing court unless: the sentence passed is not justifiable by law; it is passed on the wrong factual basis; it failed to properly take into account some matter; or it was wrong in principle or manifestly excessive. In the instant case, the trial judge did err in sentencing on a wrong**

factual basis when he had regard to the contents of a pre-sentence report, which suggested that the appellant committed the offences when under the influence of alcohol or drugs, in circumstances where no such evidence had emerged at the trial and was not admitted by the appellant at the sentencing hearing. However, practically, that error did not cause the appellant to suffer prejudice because the trial judge regarded it as both a mitigating and aggravating factor which cancelled out each other thereby producing no adjustment to the 12-year starting point.

Dillon Saul v The Queen SVHCRA2008/020 (delivered 25th January 2011, unreported) followed; R v Newsome; R v Browne [1970] 2 QB 711 followed.

5. Delay can be a mitigating factor resulting in a reduction of sentence. This is a discretionary matter for the sentencing judge and requires the judge to make an assessment of the facts to determine if any discount should be made to the sentence. In the present case, the judge's assessment that the appellant contributed to the delay in "some small measure" warranting a reduction of 1 year was not founded in any satisfactory reasoning. The judge failed to adequately take into account the excessive length of delay of 9 years; his own finding that the prosecution did not satisfactorily explain why the appellant's matter went on hiatus for that lengthy period; and his own finding that the appellant contributed to that period in "some small measure". On that basis, the Court is justified in exercising its discretion to reduce the appellant's sentences by two years.

Violet Hodge v Commissioner of Police BVIMCRA2015/0005 (delivered 27th February 2018, unreported) followed; Akim Monah v The Queen GDAHCRAP2021/0015 (delivered 23rd February 2022, unreported) followed.

Case Name:

Kenton Chance

v

Adrian Dasilva

**[SVGMCVAP2021/0006]
(Saint Vincent and the Grenadines)**

Date:

Wednesday, 26th July 2023

Coram:

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

Appearances:

Appellant: Mr. Jomo Thomas

Respondent: Ms. Tonya Da Silva

Issues:

**Magisterial civil appeal – Defamation – Libel –
Defences to defamation – Justification – Fair
comment - Absolute privilege – Qualified privilege -
Whether learned magistrate failed to properly apply
her mind to defences of qualified privilege, fair
comment, and justification**

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal is allowed.**
- 2. The decision of the learned magistrate to award damages and costs to the respondent is set aside.**
- 3. The appellant having prevailed on only one of his five grounds of appeal and, even then, only partially, the parties shall bear their own costs.**

Reason:

- 1. An appellate court would only disturb a finding of fact by the lower court where there was no or only a scintilla of evidence to support the finding of the lower court. Having regard to the evidence in the court below on the basis of which the Magistrate could and did find that the**

words published by the Appellant in I-Witness News, about which the Respondent complained, were not an accurate record of the words spoken by Ms. Chandler in the proceedings before the Senior Magistrate; this Court ought not to interfere with the factual findings of the Learned Magistrate. Accordingly, in so far as ground 3 was intended to challenge factual findings by the Learned Magistrate, this ground fails and is accordingly dismissed.

Watt v Thomas [1947] AC 484 applied.

2. The common law defence of justification is established by proving that the statement made by the defendant is true in substance and in fact. This burden of proof rests on the defendant. The Appellant (who was the defendant in the court below) not having disputed that he published the offending statements and that they were defamatory of the Respondent, the burden would have been on him to prove that the offending statements were true. The Learned Magistrate heard the evidence of the Appellant and his witness and the Respondent and his witness, and although she did not expressly state in her judgment that the offending statements were untrue, importantly, and given where the burden of proof lay, she did not make a finding that the statements were true. The entire thrust of the Learned Magistrate's judgment is that the offending statements were untrue. It cannot therefore be said that the Learned Magistrate did not apply her mind to the defence of justification.
3. The position in Saint Vincent and the Grenadines as it relates to the defence of privilege is still the common law position which gives absolute privilege to accurate reports of statements made in judicial proceedings (reproduced verbatim) but gives only qualified privilege to reports which, though fair and honestly believed by the writer, did not simply reproduce statements actually made in court

by parties, witnesses, advocates and adjudicators in the judicial proceedings. The publisher of the offending statements (which were not reproduced verbatim) could only escape liability if there was no malice, actual or implied, in his publishing of the statements. In this case, the words published by the Appellant in his online newspaper were not proved by him to have been an accurate report of what was said in the proceedings before the Senior Magistrate; and the burden of proof was his to discharge. His published words will not therefore attract absolute privilege.

Reynolds v Times Newspaper Ltd [2001] 2 AC 127 considered.

4. If the Learned Magistrate had fully and properly addressed her mind to the defence of qualified privilege, she was bound to have frontally addressed the question of whether the Appellant's report was fair and would inevitably have come to the conclusion that the statements made by the Appellant in the article in his online newspaper were made on an occasion of qualified privilege when, as a journalist, he was reporting on what he heard said in court by the prosecutor and/or the defendant in a criminal case before the Senior Magistrate. The evidence is uncontroverted that the Appellant was not actuated or motivated by malice; the onus of proof of which would be on the Respondent, who never even alleged it. The appeal is therefore allowed on the Appellant's fifth ground of appeal that the Learned Magistrate erred when she failed to apply her mind to the defence of qualified privilege.

Case Name:

Emmerson International Corporation

v

[1] Victor Vekselberg

[2] Renova Holding Limited

[3] Berdwick Holding Limited

[4] Tiwell Holding AG

**[BVIHCMAP2019/0020]
(Territory of the Virgin Islands)**

Date: Thursday, 27th July 2023

Coram for delivery: The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Robert Weekes, KC with him Mr. Ajay Ratan and Ms. Colleen Farrington

Respondents: Ms. Arabella di Iorio

Issues: Motion for conditional leave to appeal to His Majesty in Council - Discharge of freezing orders - Section 3(2)(a) of the Virgin Islands (Appeals to the Privy Council) Order 1967 - Delay in delivery of judgment - Irreconcilable judgments - Whether the question involved in the proposed appeal is either of great general or public importance, or that is otherwise a matter that should be submitted to His Majesty in Council - Continuation of stay of execution - Whether the stay of the discharge of the freezing orders ought to be continued pending the appeal to the Privy Council

Result / Order: IT IS HEREBY ORDERED THAT:

1. The application for conditional leave to appeal to Her Majesty in Council is granted upon the following conditions:
 - a. the applicant within 90 days of the date hereof do enter into good and sufficient security in the sum of 500 pounds sterling for the due prosecution of the appeal, such security to consist of a deposit of the said amount at the court office;
 - b. within 90 days of the date hereof, the applicant takes the necessary steps for the

purposes of procuring the preparation of the records, the settling of such records with the solicitors for the Respondents to this application, and the certification of the record by the Registrar of the Court of Appeal;

c. the record shall be prepared in accordance with rules 18 to 20 of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 and its Practice Direction 4.2.1 to 4.3.2 and Practice Direction 5; and shall be transmitted to the Registrar of the Judicial Committee of the Privy Council without delay where final permission to appeal has been granted.

- 2. The applicant shall make an application to the Court for final permission to appeal to His Majesty in Council, supported by the certificate of the Registrar that the security for costs ordered herein has been given within the time prescribed by this Order to the satisfaction of the Registrar.**
- 3. The stay of the discharge of the Freezing Orders that was imposed by Jack J [Ag.] by paragraph 10 of the 19th June 2019 Order shall be continued until the determination of Emmerson's intended appeal to the Privy Council.**
- 4. Costs of the application for leave to appeal to the Privy Council and for a continuation of the stay of the order of Jack J [Ag.] dated 19th June 2019 discharging the Freezing Orders shall be costs in the appeal to the Privy Council.**

Reason:

- 1. To satisfy the requirements of section 3(2)(a) an applicant must show that the question involved in the proposed appeal is either of great general or public importance, or that it is otherwise a matter that should be submitted to His Majesty in Council. In construing the phrase 'great general or public importance', the Court usually looks for matters that involve a**

serious issue of law; a constitutional provision that has not been settled; an area of law in dispute, or a legal question the resolution of which poses dire consequences for the public. To qualify under the 'or otherwise' limb of the rule, the matter in question must be one that could benefit from guidance by the Privy Council on the law. However, the regional cases have expanded the matters that can qualify under the 'or otherwise' limb to include matters that are not strictly on the law, for example where there is reasonable doubt as to the accuracy of the Court's decision. When considering the accuracy of the decision of the Court of Appeal, the discretion should be exercised sparingly and with great care. It is not the function of the Court of Appeal to determine the correctness of the matters sought to be appealed. That is the function of the Privy Council.

The Virgin Islands (Appeals to the Privy Council) Order 1967 S.I. No. 234 of 1967 applied; Pacific Wire & Cable Company Limited v Texan Management Limited et al Territory of the Virgin Islands HCVAP2006/019 (delivered 6th October 2008, unreported) considered; Martinus Francois v The Attorney General Saint Lucia Civil Appeal No 37 of 2003 (delivered 7th June 2004, unreported) considered; Olasemo v Barnett Ltd (1995) 51 WIR 191 considered; Attorney General of Trinidad and Tobago v Lennox Phillip et al Civil Appeal No. 155 of 2006 delivered 6th June 2007 considered; Renaissance Ventures Ltd et al v Comodo Holdings Limited BVIHMCAP2018/0005 & BVIHMCAP2018/0008 (delivered 8th October 2018, unreported) considered.

2. The issue of the delay in this case does not involve a serious issue of law. There is no constitutional provision in this case that has not been settled. There are numerous cases in the Commonwealth Caribbean dealing with a person's right to a fair trial within a reasonable time, and the law is settled. The issue in this

application is not whether Emmerson's constitutional right has been breached, but whether the constitutional provision providing redress for that right is unsettled. Counsel for Emmerson has not brought to the Court's attention any authority that says or suggests that section 16(9) of the Virgin Islands Constitution Order 2007 or its equivalent in any other Caribbean jurisdiction is unsettled.

3. The area of law relating to delays in the delivery of judgments is not in dispute. The resolution of the issue of delays in the delivery of the judgments does not pose dire consequences for the public and the Court of Appeal's decision did not break new ground or create new law. It resolved private disputes between the parties to the appeal. Accordingly, the Court is satisfied that the issue of delay in the delivery of judgments is not an issue of great general or public importance within the meaning of section 3(2)(a) of the 1967 Order.

Cobham v Frett [2001] 1 WLR 1775 applied; Al Sadik v Investcorp Bank BSC and others (Cayman Islands) [2018] UKPC 15 applied; Byers and others v Chen Ningning [2021] UKPC 4 applied; Michael Paul Chen-Young (Executor of the Estate of Paul Chen-Young (Deceased)) and others v Eagle Merchant Bank Jamaica Ltd and 3 others 2022 UKPC 30 applied; Section 16(9) of the Virgin Islands Constitution Order 2007 SI No. 1678 of 2007, Laws of the Virgin Islands considered; Martinus Francois v The Attorney General Saint Lucia Civil Appeal No 37 of 2003 (delivered 7th June 2004, unreported) applied.

4. In the circumstances of this case, the inference can properly be drawn that the failure of the Court in the February 2023 Judgment to deal with the September 2020 Judgment and the reinstatement of the Schedule 6 Claims is attributable to the delay in the delivery of the judgment. As such it qualifies as the kind of delay that could make the orders in the

February 2023 Judgment unsafe. Based on the Court's wide powers under the 'or otherwise' limb of section 3(2)(a) of the 1967 Order, the Court entertains a reasonable doubt as to the accuracy of the orders made in the February 2023 Judgment. The February 2023 Judgment could therefore benefit from careful consideration by the Privy Council to determine whether the inconsistency between the two judgments is attributable to delay in the delivery of the February 2023 Judgment.

5. The Freezing Orders are substantial and were put in place initially by Wallbank J [Ag.] to preserve the Respondents' assets pending the determination of the claims against them. The orders were thereafter discharged by Jack J [Ag.] but he granted a stay of the discharge order pending the determination of Emmerson's appeal. Emmerson is now pursuing a further appeal to the Privy Council, and, in the circumstances, it is appropriate to preserve the position by continuing the stay of the Freezing Orders pending the determination of that appeal.

Cukurova Finance International Limited et al v Alfa Telecom Turkey Limited)
BVIHCVAP2010/018 & BVIHCVAP2010/014
(delivered 5th December 2011, unreported)
applied; Rule 39(1) of the Judicial Committee
(Appellate Jurisdiction) Rules 2009 SI No. 224
of 2009 applied.

Case Name:

Nam Tai Property Inc.
v
West Ridge Investment Company Limited

[BVIHCMAP2022/0046]
(Territory of the Virgin Islands)

Date:

Thursday, 27th July 2023

**Coram for
delivery:**

**The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**

Appearances:

Appellant: Ms. Arabella di Iorio

**Respondent: Mr. John Machell, KC with him Mr. Peter Ferrer, Mrs.
Kimberly Crabbe-Adams and Ms. Jhneil Stewart**

Issues:

Commercial appeal – Section 121 of BVI Business Companies Act 2004 – Duty of directors to exercise powers for a proper purpose – Section 120(1) of BVI Business Companies Act 2004 – Tomlin Orders - The Court's approach to applications to enforce Tomlin Orders and to findings made by the lower court in such applications – Deed of Indemnity – Whether the judge erred in concluding that Nam Tai's claim to set aside the Deed of Indemnity on account of West Ridge's involvement in the unlawful means conspiracy did not have a realistic prospect of success – Whether the judge erred in concluding that Nam Tai's claim that West Ridge dishonestly assisted the Kaisa directors in the conspiracy to maintain control of the Company did not have a realistic prospect of success – Whether the Deed is void or otherwise unenforceable, if it was issued for the improper purpose of suppressing West Ridge's evidence and disclosure in the Main Claim - Whether, as a matter of construction, West Ridge's alleged unlawful conduct in participating in the conspiracy and/or dishonest assistance avoided Nam Tai's obligation under the Deed- Whether Nam Tai is entitled to recover its costs and expenses associated with the defence of the Main Claim and the Appeal, and the losses suffered from the Greensill investment - Whether Nam Tai is entitled to set off any amount found due to West Ridge by the damages and loss caused by West Ridge's unlawful conduct - Whether Nam Tai is entitled to a defence of change of position relating to its fees and expenses incurred in the defence of the Main Claim and the losses suffered from the Greensill investment

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.
2. Costs are awarded to West Ridge to be assessed by the court below unless agreed within 21 days.

Reason:

1. A Tomlin order is a form of consent order that embodies the terms on which the parties to an action have agreed to stay the action. The court will approach an application to set aside a Tomlin Order as if it were an application for summary judgment and will grant the relief sought if it has a realistic, as opposed to fanciful, prospect of success. An application to enforce a Tomlin Order is treated as an application for summary judgment under CPR Part 15.6. The object is to winnow out cases that are not fit for trial. The court must avoid conducting a mini trial without disclosure and oral evidence. The court should avoid being drawn into an attempt to resolve conflicts of fact. This does not mean that the court must take at face value and without analysis everything that an applicant says in his statements before the court. In some cases, it may be clear that there is no real substance in the factual assertions made, particularly if contradicted by contemporaneous documents. The court must carry out its own analysis to see if there is substance in the statement before assuming it in favour of the party making the statement.

Heritage Travel and Tourism Limited and another v Lars Windhorst and others [2021] EWHC 2380 (Comm) applied; Easyair Ltd (t/a Openair) v Opal Telecom Ltd [2009] EWHC 339(CH) applied.

2. The tort of unlawful means conspiracy occurs where two or more persons combine and take action that is unlawful in itself with the intention of causing damage to a third party which does cause the intended damage. An

improper purpose is not the same thing as a conspiracy. To make the cause of action for conspiracy complete the pleadings must allege a specific intention by the alleged conspirators to cause pecuniary damage. Nothing short of this specific pleading will suffice. What is essential is that the pleaded case must show a realistic prospect of showing that there was an intention to cause pecuniary harm. A power struggle is not unusual in commercial entities and the methods employed by the competing factions to gain or keep control are not necessarily conspiratorial or dishonest. The fact that the methods used by one of the factions turns out to be improper and in breach of their duty to the company does not necessarily mean that they intended to harm the company. The intention to cause harm to the company, as well as the harm so caused, must be clearly alleged in the pleadings and later proved at the trial. In this case there is no basis to interfere with the Judge's finding that the conspiracy claim failed because the appellant did not plead a proper case of intention to injure and did not have a realistic prospect of showing that the respondent intended to harm the appellant based on the material before the Judge.

Clerk and Lindsell on Torts 21st edition, Sweet & Maxwell applied; OBG Ltd and another v Allan and others [2008] 1 AC 1 considered; Lonrho PLC and others v Fayed and others (No. 5) [1993] 1 WLR 148 applied.

3. The general rule is that a person who renders assistance to a breach of fiduciary duty that causes loss to another person can be liable for dishonest assistance. In this case the elements of dishonest assistance that must be satisfied are: (a) there must be a trust or fiduciary duty owed by the Kaisa directors to the target company (Nam Tai) and the Kaisa directors breached that duty;(b) the breach of duty by the Kaisa directors need not be dishonest because it is the dishonesty of the third party

(West Ridge) that matters; and (c) West Ridge must have acted dishonestly in procuring or assisting the breach. The first element was satisfied by the findings of the Judge in the Main Claim and by the Court of Appeal that the Kaisa directors acted for an improper purpose in breach of their duty to the Company by approving and implementing the PIPE. However, the Judge erred: (i) in finding that there was an issue estoppel regarding the honesty of the Kaisa directors; (ii) by focusing on the dishonesty of the Kaisa directors instead of on West Ridge's dishonesty; and (iii) by finding that West Ridge had to be found to have procured and assisted in the breach. The Judge therefore erred in his treatment of the elements of the cause of action for dishonest assistance and his findings on this issue are set aside.

FM Capital Partners Ltd. v Frederick Marino and another [2018] EWHC (Comm) 1768 applied; Madoff Securities International Ltd (In Liquidation) v Raven and others [2013] EWHC 3147 (Comm) considered.

4. In applying the test of dishonesty, the court must have regard to all the circumstances known to the defendant at the time, and the defendant's personal attributes such as their experience and the reason why they acted as they did. The state of a company's knowledge of the facts and the company's belief in the facts are normally determined by reference to the knowledge and belief of the company's directors and officers. Participating in a project for an improper purpose in breach of section 121 is very different from dishonestly participating in the project in breach of section 120(1). Nam Tai does not have a realistic prospect of showing that the West Ridge's participation in the PIPE was dishonest or that it dishonestly assisted the Kaisa directors in implementing the PIPE for an improper purpose in breach of the Kaisa directors' duty to Nam Tai. The Judge's order that the Deed of

Indemnity as incorporated in the Tomlin Order stands to be enforced is therefore affirmed unless Nam Tai can show on other grounds that the Deed is invalid or that it has a defence to the claims made under the Deed.

5. Nam Tai's invitation to the Court to infer from the pleaded facts that the real purpose of the Kaisa directors in giving the indemnity was to keep West Ridge's evidence out of the Main Claim is not accepted. The allegation is speculative and does not meet even the threshold of showing that there is a realistic prospect of showing that the Kaisa directors acted in breach of their duties under sections 120 and 121 of the BC Act by granting a favorable indemnity to West Ridge in order to keep its evidence out of the Main Claim. There is simply not enough on the pleadings to find that there is a realistic prospect of proving these things or that the West Ridge was aware of the real reason for Nam Tai giving the indemnity.

Pussers Ltd et al v CITCO Banking Corporation N.V. BVIHCVAP2003/0008 (delivered 20th September 2004, unreported) applied.

6. There is no factual basis rising to the level of showing a realistic prospect of success that shows that West Ridge was aware of the decision to invest in Greensill, far less that it should be responsible for any part of the resulting loss. Nam Tai is therefore not entitled to a right of equitable set off because it does not have a realistic prospect of being awarded damages against West Ridge.
7. The allegation in paragraph 40 of the defence that West Ridge is not entitled to restitution of the subscription price of USD\$23,820,798.90 for the shares because Nam Tai changed its position by defending the Main Claim and entering into the Greensill investment does not have reasonable prospects. Nam Tai's pleaded position is that the investment in Greensill was

made using the subscription monies. There is no pleading that Nam Tai spent the subscription monies in good faith believing the money belonged to the Company, or that it would be inequitable to order them to return the funds. The investment was made at a time when all the parties concerned knew or ought to have known that the subscription money was the subject of a dispute in the Ancillary Claim. Therefore, the defence of change of position does not have reasonable prospects of success.

Lipkin Gorman (A Firm) v Karpnale Ltd [1991] 2 AC 548 applied.

Case Name:

Evanson Mitcham

v

The King

[SKBHCRAP2022/0004]

(Saint Christopher and Nevis)

Date:

Thursday, 27th July 2023

**Coram for
delivery:**

**The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**

Appearances:

Appellant: Ms. Talibah Byron

Respondent: Ms. Greatess Gordon- Hazel holding papers for Mr. Teshawn Vasquez

Issues:

Criminal Appeal – Appeal against sentence – Murder committed during the course of a robbery with the use of a firearm – Appellant sentenced to 40 years imprisonment – Whether the sentence imposed by the judge was manifestly excessive – Whether the judge erred in treating the planning of the robbery as an aggravating factor of the murder – Whether the judge erred in treating the vulnerability of the victim

of the robbery as an aggravating factor of the murder – Whether the judge erred in finding that the offence was an organised criminal activity – Whether the judge erred in failing to give any credit for the degree of rehabilitation achieved by the appellant while incarcerated

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is allowed.
2. The sentence is varied by substituting a sentence of 36 years and 6 months for the sentence of 40 years imposed by the judge. The period of 1 year and 4 months spent on remand is to be counted towards the sentence.

Reason:

1. The Sentencing Guidelines deliberately afford a measure of flexibility to judges in recognition that there is a wide variety of circumstances under which an offence may be committed, all of which cannot be captured in a guideline. The planning or premeditation of the murder is expressly listed as an aggravating factor in the Sentencing Guidelines. Where however, a murder is committed during a robbery, and there is no evidence of planning and premeditation of the murder, but instead, there is evidence of planning and premeditation in relation to the robbery, that may be regarded as an aggravating factor of the murder. In this case, when one considers the circumstances surrounding the commission of the murder as a whole, the judge did not err in considering the planning and premeditation of the robbery as an aggravating factor. Also, contrary to the views of the appellant, the judge did not double count by considering this factor when setting the starting point of 40 years; in fact, what the judge did was simply note the fact that the murder was committed during the course of the robbery with the

use of the firearm when setting the starting point.

Paragraphs 11 and 12 of the Eastern Caribbean Supreme Court (Sentencing Guidelines) Rules 2019, Practice Direction No. 3 of 2021: Sentencing for the Offence of Murder (re-issued, 26th November 2021) applied.

2. The vulnerability of the victim is expressly listed as an aggravating factor in the Sentencing Guidelines. Although Ms. Fleming was not the victim of the murder, she was described as a lone female street vendor set upon in a dark alley by 3 masked men, one of whom was armed with a gun, and it was permissible for the judge in the circumstances of the underlying robbery to classify her vulnerability in the manner described, as an aggravating factor of the murder. It would also be illogical to consider the planning of the robbery as an aggravating factor and not the vulnerability of the victim, as they both form part and parcel of the same transaction. The judge did err however in considering “organised criminal activity” as an aggravating factor since he already took into account the planning of the robbery. In addition, the respondent agreed that the judge erred in considering the brandishing of the firearm as an aggravating factor. Having regard to the foregoing, the 8-year uplift to the starting point must be reduced to a 6-year uplift, amounting to 46 years.

Paragraph 12 of the Eastern Caribbean Supreme Court (Sentencing Guidelines) Rules 2019, Practice Direction No. 3 of 2021: Sentencing for the Offence of Murder (re-issued, 26th November 2021) applied.

3. The Sentencing Guidelines identify mitigating factors pertaining to the offender which include, so far as relevant to this

appeal, genuine remorse and good prospects of rehabilitation. Pursuant to a psychiatric assessment and a social inquiry report, the appellant demonstrated remarkable progress and rehabilitation during his many years of incarceration; a fact conceded by the respondent. The judge however failed to credit the appellant for the strides he made over the many years of his incarceration. The significant degree of rehabilitation achieved by the appellant together with his expression of genuine remorse was required to be recognised by an appropriate discount in sentence. Accordingly, a discount of 2 years is appropriate; reducing the sentence from 46 years to 44 years. Additionally, having regard to the constitutional breaches suffered by the appellant which the judge properly took into account, the appellant's sentence should be reduced by a further 7 years and 6 months. The period of 1 year and 4 months that the appellant spent on remand shall count towards his sentence.

Paragraph 15 of the Eastern Caribbean Supreme Court (Sentencing Guidelines) Rules 2019, Practice Direction No. 3 of 2021: Sentencing for the Offence of Murder (re-issued, 26th November 2021) applied.

Case Name:

Antigua and Barbuda Transport Board

v

[1] Anderson Carty

[2] Anique Francis

[ANUHLTAP2020/0005]

[ANUHLTAP2020/0006]

(Antigua and Barbuda)

Date:

Thursday, 27th July 2023

**Coram for
delivery:**

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

The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. George Charlamagne

Respondents: Mr. Anderson Carty holding papers for Ms. Anique Francis

Issues:

Civil appeal – Labour Tribunal – Employment law – Unfair dismissal – Appeal against compensatory award – Whether the Industrial Court erred in its calculation of the respondents’ compensatory award – Immediate loss of wages – Whether the Industrial Court’s award of immediate loss of wages was arbitrary – Compensation for loss of wages to be based on net salary – Mitigation of loss – Employee’s duty to mitigate loss – Employer’s burden to prove failure to mitigate – Whether respondents failed to mitigate their losses – Payment in lieu of wages – Double recovery – Loss of future earnings – Exemplary damages – Whether the conduct of the employer was oppressive, arbitrary or unconstitutional – Manner of dismissal - Whether the manner and circumstances of his dismissal could give rise to any risk of financial loss at a later stage – Loss of Protection – Whether the first respondent is entitled to an award for loss of protection – Thrift Fund entitlement – Whether the Industrial Court erred in its award of thrift fund entitlement to the first respondent – Costs – Section 10(2) of the Industrial Court Act Cap 214 Laws of Antigua and Barbuda – Award of costs by employment tribunal exceptional – Whether the Industrial Court erred in its award of costs to the respondents

Result/Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is allowed in part.
2. The counter-appeal is allowed.
3. No order as to costs in both the appeal and counter-appeal.

Mr. Anderson Carty

4. The Industrial Court’s award of Additional

Pay in Lieu of Notice, being \$7,300.00, is set aside and accordingly, the Industrial Court's award of Loss of Emoluments (also known as Immediate Loss of Wages) is reduced to \$45,225.00.

5. The Industrial Court's award of Exemplary Damages to Mr. Carty being \$25,000.00, is set aside.
6. Mr. Carty shall be awarded \$2,500.00 for Loss of Manner of Dismissal.
7. Mr. Carty shall be awarded \$58,400.00 for Loss of Protection.
8. The Industrial Court's award of Thrift Fund entitlement to Mr. Carty, being \$2,370.39, is set aside.
9. The Industrial Court's award of costs to Mr. Carty, being \$2,500.00, is set aside.

Ms. Anique Francis

10. The Industrial Court's award of 'shortfall' to Ms. Francis being \$2,550.00 is set aside and accordingly, the Industrial Court's award Immediate Loss of Wages is reduced to \$13,000.00.
11. The Industrial Court's award of Exemplary Damages to Ms. Francis being \$2,500.00 is set aside.
12. The Industrial Court's award of Loss of Protection to Ms. Francis, being \$1,534.50, is set aside.
13. The Industrial Court's award of costs to Ms. Francis, being \$2,500.00, is set aside.

Reason:

1. An unfairly dismissed employee may be entitled to an award of immediate loss of wages. This head of compensation represents the loss of wages or pay between the date of the employee's dismissal and the date of trial or judgment. The figure to be used in the calculation of immediate loss of wages or pay is the net salary or wage of the employee. The employee's entire pay packet is considered as the court's assessment under this head is not limited to the employee's basic wage but includes allowances and those items that form

part of the employee's pay packet. Service charges and cash tips do not usually form part of the employees pay packet as they are not wages. Service charges and cash tips only form part of the pay packet where there is a contractual term, whether expressed or implied requiring the employer to distribute the service charge to staff or where there is a statutory mandate. In this case, Mr. Carty's and Ms. Francis' allowances are not or should not be likened to service charges. Further, these allowances formed part of their employment contracts. The terms of employment required the Transport Board to pay both respondents monthly salaries which included these allowances. These allowances, therefore, formed part of their pay packets. The Industrial Court was correct in including Mr. Carty's and Ms. Francis' basic salary and allowances in assessing an award under this head.

Stair Memorial Encyclopaedia, Employment (3rd Reissue) Edinburgh: Butterworths, 1999 applied; *Antigua Village Condo Corp v Jennifer Watt* Civil Appeal No. 6 of 1992 (delivered 7th February 1994, unreported followed; Halsbury's Laws of England Employment (Volume 39 (2021), paras 1-346 applied; *Brownson v Hire Service Shops Limited* [1978] IRLR 73; *Hilti (Great Britain) Ltd. v Windbridge*, [1974] ICR 352 applied; *Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183 applied; *Carlisle Bay Resort v Berlinda Dowe* ANULTAP2015/0002 (delivered 29th November 2022, unreported) explained.

2. An award of immediate loss of wages is only available to an employee who has mitigated his loss between the date of his dismissal and the date of trial or judgment. The employee is under a duty to take proper and reasonable steps to obtain suitable employment during this period. The question whether there has been a failure to mitigate is one of fact to be determined by the tribunal. Further, when an

employer seeks to allege that an employee has failed to mitigate a loss, the burden of proof is upon the employer making the allegations. In this case, it is for the Transport Board to show that Mr. Carty did not take reasonable steps to reduce the loss that he suffered as a result of his unfair dismissal. In this case, Mr. Carty sought alternative employment as evidenced by his 10 applications to various companies, and he formalised and expanded his consultancy practice. While it would have been useful if Mr. Carty had supplied the Industrial Court with proof of his earnings, the burden ultimately rests with the Transport Board that Mr. Carty did not take reasonable steps to mitigate his loss. In relation to Ms. Francis, she made reasonable efforts to mitigate her loss and was successful in finding alternative employment. There was, therefore, evidence before the Industrial Court on which it could base its finding that both respondents took reasonable steps to mitigate their losses during the period.

Antigua Village Condo Corp v Jennifer Watt Civil Appeal No. 6 of 1992 (delivered 7th February 1994, unreported followed; Bessenden Properties Ltd v Corness [1974] IRLR 338 applied; AG Bracey Ltd v Iles [1973] IRLR 210 applied; Cooper Contracting Ltd v Lindsay UKEAT/0184/15 (22 October 2015, unreported); Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498) applied.

3. The employer is to be given credit for all payments it has made to the employee on account of claims for wages and other benefits. This is in compliance with good industrial relations practices. Therefore, sums paid by the employer in lieu of notice should be taken into account in the assessment of an unfair dismissal compensatory award. An employee is not entitled to both payment in lieu of notice and the compensation award during the notice period as this would result in double recovery. In this case, the employer,

the Transport Board, was in compliance with good industrial relation practices as it paid Mr. Carty \$7300.00 as payment in lieu of notice upon his dismissal. The Industrial Court, in awarding immediate loss of wages, should have taken this into account. However, it did not, and the Industrial Court went a step further and awarded an additional sum of payment in lieu of notice. There was no basis for doing so and the Industrial Court erred in so doing. The sum of \$7300.00 representing the payment made in lieu of notice to Mr. Carty by the Transport Board is to be deducted from the award of immediate loss. The award of \$52,525.00 shall, therefore, be reduced to \$45,225.00.

Antigua Village Condo Corp v Jennifer Watt Civil Appeal No. 6 of 1992 (delivered 7th February 1994, unreported followed; *Hilti (Great Britain) Ltd. v Windbridge*, [1974] ICR 352 applied.

4. A court or tribunal in calculating the award of loss of future earnings must consider a series of imponderables, in light of the facts of the case as this is not an area for precise calculations. In this case, Ms. Francis gave evidence that shortly after being unfairly dismissed by the Transport Board she obtained temporary employment for three months, from March 2015 to June 2015. She was then able to obtain temporary employment at Tropical Shipping in October 2015 where she was eventually made permanent in April 2016. At the time of the trial in the Industrial Court, Ms. Francis had been permanently employed. In the Transcript of Proceedings, there is evidence that Ms. Francis made \$3200.00 per month while temporarily employed at Tropical Shipping and \$3600.00 per month when permanently employed. There is no evidence to suggest that Ms. Francis' present employment is any less secure than her former employment and as such there should be no award under this

head. The award of \$2250.00 being the shortfall, is therefore set aside.

Halsbury's Laws of England Employment (Volume 39 (2021), paras 1-346 applied; Norton Tool Co Ltd v Tewson [1973] 1 All ER 183 applied; Adda International Ltd. v Curcio (1976) 3 A.E.R 620 applied.

5. Exemplary damages are awarded or imposed to punish a defendant for their wrongdoing and to deter similar behaviour in the future. Given their nature, exemplary damages may, only be awarded in a limited number of circumstances. These circumstances include: (1) where there has been oppressive, arbitrary, or unconstitutional action by a defendant exercising governmental functions, but—pertinently—not where there has been oppressive behaviour by private corporations or individuals or trade unions; (2) where the defendant's conduct was calculated by him to make a profit for himself; and (3) where exemplary damages are expressly authorised by statute. While the conduct of the Transport Board was harsh and deserving of criticism, and that there was no reasonable basis for dismissing Mr. Carty as a genuine redundancy did not exist, it was not sufficient to enable this Court to declare that it was 'oppressive and arbitrary or unconstitutional.' The matters outlined in the decision of the President of the Industrial Court taken individually or collectively cannot be categorised as oppressive and arbitrary or unconstitutional. There was no basis for the Industrial Court to award \$25000.00 as exemplary damages. In the case of Ms. Francis, there was similarly no basis for the Industrial Court to award the sum of \$2500.00 as exemplary damages. The awards of exemplary damages awarded to both respondents are therefore set aside.

Rookes v Barnard [1964] AC 1129 applied; Cassell & Co Ltd v Broome [1972] 1 All ER 801 HL applied.

6. The court in making an award under the head manner of dismissal considers whether the manner and circumstances of the employee's dismissal could give rise to any risk of financial loss at a later stage by, for example, making him less acceptable to potential employers or exceptionally liable to selection for dismissal. In this case, the circumstances surrounding his dismissal are likely to make him less acceptable to potential employers or more likely to selection for dismissal. Mr. Carty is therefore awarded \$2500.00 under this head. In the case of Ms. Francis, she has not provided any evidence to the Industrial Court this Court of any actions by the Transport Board warranted an award under the head manner of dismissal. There is, therefore, no basis to make an award under the head of loss.

Norton Tool Co Ltd v Tewson [1973] 1 All ER 183 applied.

7. In Antigua and Barbuda, the practice has become accepted that the loss of protection (basic award) is the full equivalent of the employee's entitlement to a statutory redundancy payment as set out in Section C44. In these circumstances, an award for loss of protection should be made to Mr. Carty. Mr. Carty had been employed with the Transport Board for 8 years at the date of his dismissal. Mr. Carty's award for loss of protection would be \$58,400.00. In relation to Ms. Francis, at the time of the trial, she was already in receipt of her severance pay. Further, she provided no evidence as to how much she received nor any evidence to show that she was entitled to any additional sum under this head. There was therefore no basis for the Industrial Court to award her the sum of \$1534.50 under this head. Therefore, the award is set aside.

**C44 of the Antigua and Barbuda Labour Code
Cap 27 of the Laws of Antigua and Barbuda**

applied; *Liat (1974) v Novella Sheppard Civil Appeal No. 6 of 1991* (delivered on 22nd November 1991, unreported) followed.

8. The clauses of the Thrift Fund Agreement make clear that the fund is time sensitive and that the drafters only contemplated that an employee's access both to membership and contributions, be based on or circumscribed by the length of period of employment. Clause 12 is no different. While an employee is 100% vested in his contribution, clause 12 is clear that an employee may only be 100% vested in the Transport Board's contribution after five years. Mr. Carty, who had been a member just short of five (5) years at the time of his dismissal, was not entitled to 100% of the Transport Board's contribution but rather he was only entitled to 75 % of its contribution plus interest according to clause 12. Further, clause 13 of the Thrift Fund Agreement gives the management of the Transport Board the discretion to 'give fair and reasonable consideration to the payment of any part/percentage of its contribution'. However, as Mr. Carty did not satisfy the length of time in the fund as required under clause 12, the management of the Transport Board was entitled to exercise its discretion as it saw fit and so it did. There is no evidence on the record showing that the Transport Board erred in the exercise of its discretion. There was, therefore, no basis for the Industrial Court to usurp this discretion and award a further sum to Mr. Carty, representing the remainder of the contribution that was supposedly withheld. The Industrial Court's award of \$2370.39 is, therefore, set aside.

Wood v Capita Insurance Services Limited [2017] UKSC 24 followed.

9. Section 10(2) of the Industrial Court Act states that the Industrial Court shall make no order as to costs, unless for exceptional reasons. The award of costs by an employment tribunal

is an exceptional course of action and in this case, both Mr. Carty and Ms. Francis have been unable to satisfy that exceptional reasons exist for the court to depart from the general rule. The respondents were unable to satisfy the high threshold to justify the award of costs. The Industrial Court erred in awarding costs to the respondents and as such their awards should be set aside.

Section 10(2) of the Industrial Court Act Cap 214 Laws of Antigua and Barbuda applied; *Salinas v Bear Stearns International Holdings Inc and another* [2005] ICR 1117 applied.

Case Name:

**David Phillip
v
Joseph Phillip**

**[SLUHCVAP2022/0003]
(Saint Lucia)**

Date:

Thursday, 27th July 2023

**Coram for
delivery:**

**The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**

Appearances:

**Appellant: Mrs. Brender Portland-Reynolds holding papers for
Mr. Horace Fraser**

Respondent: Mr. George Charlemagne

Issues:

**Civil appeal – Prescription – Positive prescription –
Negative prescription – Occupation of property –
Land registration – Rectification of the land register
– Good faith – Bad faith – Mistake – Order for removal
or destruction of property – Whether the defence of
prescription was properly pleaded and proved by the
appellant – Whether the judge misconstrued the
defence as one of positive prescription as opposed to
negative or extinctive prescription operating as a bar**

to the respondent's claim – Whether the judge failed to consider the appellant's counterclaim – Whether the judge failed to consider that the appellant had an overriding interest in the land – Whether the judge erred in ordering the removal or demolition of the structures on the land – Section 28g of the Land Registration Act – Articles 372, 374, 2057 and 2066 of the Civil Code of Saint Lucia

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed in its entirety.
2. All of the orders of the learned judge are affirmed; including the orders for the appellant to deliver up possession and vacate the respondent's land within 30 days; for the appellant to be restrained from entering the land after 30 days from the judgment of the court; and for the respondent to be at liberty after 30 days to destroy and discard any and all buildings on the land, excepting that the 30 days will be 30 days from the date of this judgment.
3. The appellant is ordered to pay the respondent's costs on the appeal, to be assessed if not agreed within 21 days; such costs, however, are not to exceed two-thirds of the prescribed costs awarded in the court below.

Reason:

1. The conjoint effect of the Land Adjudication Act and the LRA in Saint Lucia is that first registration of land interrupts any prescriptive rights which have or were being acquired prior to first registration. Accordingly, a period of occupation prior to first registration is not to be counted or reckoned when making a defence or claim based on prescription. In order to rely on the defence of prescription, the appellant was required to not only plead it, but to also lead evidence to satisfy Article 2057 of the Code. On the facts, for the purposes of prescription operating as a defence to the

respondent's claim, the relevant period was from after the date the respondent became the registered proprietor in 1986. Consequently, the appellant's possession from first registration of the title until 2nd March 2012 when the claim was filed, did not satisfy the thirty (30) year prescription period. This was an indispensable requirement if negative prescription were to succeed as a bar to the respondent's claim. Moreover, even if the judge had treated the defence as a claim of negative prescription, it would still fail since the evidence adduced by the appellant was incapable of establishing that the appellant had prescribed against the respondent.

Francis Chitolie et al v St. Lucia National Housing Corporation SLUHCVAP2020/0022 (delivered 13th January 2022, unreported) followed; Moses Joseph et al v Alicia Francois; St. Torrence Matty et al v Alicia Francois SLUHCVAP2011/0025 consolidated with SLUHCVAP2012/0037 (delivered 21st August 2015, unreported) followed; Article 2057 of the Civil Code of Saint Lucia Chapter 4.01 Revised Laws of Saint Lucia 2020 applied.

2. The same elements required to prove positive prescription apply equally to setting up negative prescription as a bar. Article 2057 speaks generally to the elements required for the establishment of prescription whether positive or negative and for any person's title to be defeated by prescription, Article 2057 must be satisfied. Paragraph 9 of the appellant's defence in the court below is not inconsistent with a claim based on negative prescription as it employs the language of Article 2057 which defines both types of prescription. Paragraph 10 of the defence pleads the thirty (30) year period and other elements of prescription and paragraph 11 outlines the appellant's contention that the respondent's title had been prescribed. The learned trial judge's focus on paragraph 10 of the appellant's pleadings together with her

invocation of *Ferdinand James v Planviron (Caribbean Practice) Limited et al* suggests that she viewed the defence as one of positive prescription only and that she had no jurisdiction to hear the claim. She erred in so concluding. While the appellant could not use prescription as a sword, there is no doubt that the appellant could use prescription as a shield. The plain reading of paragraphs 8-11 indicate that the appellant was setting up prescription as a defence to the claim.

Moses Joseph et al v Alicia Francois; St. Torrence Matty et al v Alicia Francois SLUHCVP2011/0025 consolidated with SLUHCVP2012/0037 (delivered 21st August 2015, unreported) followed; Article 2057 of the Civil Code of Saint Lucia applied; *Ferdinand James v Planviron (Caribbean Practice) Limited et al* SLUHCVP2017/0050 (delivered 16th October 2019, unreported) considered.

3. A perusal of the judgment failed to unearth a finding by the judge that the appellant had abandoned his defence. On the contrary, the judgment, at paragraph 16, reveals that the judge considered and rejected the defence. As it relates to the counterclaim and the assertion that the judge failed to consider the issue of mistake in obtaining title, the court has the power under section 98 of the LRA to order rectification of the land register where a mistake is made in the process of registration. Mistake in this context means a mistake in the process of registration. A party alleging mistake must adduce evidence proving it. The appellant had not done so. Paragraph 13 of the counterclaim contained a bare assertion of mistake with no evidence in support. The learned trial judge was therefore correct to dismiss the counterclaim as the pleadings were defective. Furthermore, despite the declaration of mistake being sought, the objective was to obtain rectification of the register which was not permissible where the correct procedure for challenging the decision

of the adjudicating officer was never pursued. The appellant cannot now obtain rectification of the register before this Court. For those reasons, the appellant's counterclaim was unsustainable, and the judge did not err in dismissing it.

Francis Chitolie et al v St. Lucia National Housing Corporation SLUHCVAP2020/0022 (delivered 13th January 2022, unreported) considered; Moses Joseph et al v Alicia Francois; St. Torrence Matty et al v Alicia Francois SLUHCVAP2011/0025 consolidated with SLUHCVAP2012/0037 (delivered 21st August 2015, unreported) considered; Ferdinand James v Planviron (Caribbean Practice) Limited et al SLUHCVAP2017/0050 (delivered 16th October 2019, unreported) considered; Skelton and Others v Skelton (1986) 37 WIR 177 applied; Louisien v Jacob [2009] UKPC 3 applied; Heirs of Hamilton La Force v Attorney General etc al SLUHCVAP1993/0011 (delivered 22nd July 1996) followed; Section 98 of the Land Registration Act Chapter 5.01 Revised Laws of Saint Lucia 2008 applied.

4. Section 28(g) of the LRA provides an exception to section 23 of the same Act insofar as it allows for interests and rights not noted in the register to impeach the absolute title of anyone claiming ownership in the register. One such overriding interest is where the person is in actual occupation of the property at the time. To satisfy this requirement, the appellant must show that there is a right coupled with actual occupation. While the learned trial judge made no express reference to the appellant's claim to an overriding interest, the claimed right was that of prescription, and, having concluded that at its highest, the time of occupation could only be reckoned from the date the title was registered on 26th October 1986, prescription was not made out. Therefore, there was no overriding interest under section 28(g) to be protected. Furthermore, a claim of overriding

interest to occupy the property runs counter to the defence of prescription. Accordingly, ground 3 is dismissed.

Sections 23 of the Land Registration Act Chapter 5.01 Revised Laws of Saint Lucia 2008 considered; Section 28(g) of the Land Registration Act Chapter 5.01 Revised Laws of Saint Lucia 2008 applied; *Ulina Jennifer George v Hillary Charlemagne* SLUHCAP2001/0024 (delivered 3rd April 2003, unreported) followed; *Spiricor of St. Lucia Ltd v Attorney General of St. Lucia and Another* (1997) 55 WIR 123 followed; *Moses Joseph et al v Alicia Francois*; *St. Torrence Matty et al v Alicia Francois* SLUHCVAP2011/0025 consolidated with SLUHCVAP2012/0037 (delivered 21st August 2015, unreported) followed.

5. Good faith is always presumed, and he who alleges bad faith must prove it. Good faith means that the possessor holds a genuine belief that he is really the owner of the immovable property stemming from a transferable title. Article 2066 places the onus on the party alleging bad faith to particularize and prove it. It is the content and substance of the pleadings that are determinative of whether bad faith was pleaded. A careful reading of the respondent's pleadings indicates that they do allege and evidence bad faith on the part of the appellant. To make an order for the demolition of the property on the disputed land, the learned trial judge was required to consider whether the appellant had acted in good faith. Had she done so, she would have ineluctably found that the respondent did plead and prove bad faith. Therefore, the judge did not err in making the final order in the terms she did. This ground is also dismissed.

Article 2066 of the Civil Code of Saint Lucia Chapter 4.01 Revised Laws of Saint Lucia 2020 applied; Articles 367 and 372 of the Civil Code of Saint Lucia Chapter 4.01 Revised Laws of Saint Lucia 2020 considered; *Justin Surage et*

al v Cendra Charles SLUHCV2003/0418 (delivered 26th September 2003, unreported) followed; Gagnon v Loubier [1925] 4 D.L.R. 289 applied; Fast Kaz Auto Supplies Limited et al v The Attorney General SLUHCVAP2018/0040 (delivered 12th June 2020, unreported) followed.

6. Per Michel JA: The decision in Ferdinand James is not to be given a wider reach than is justified by the actual judgment. That judgment has not resulted in any change in the substantive law on prescription in Saint Lucia. Barring the procedural issue as to the entity to which an application for title to land by long possession is to be made, the law in St. Lucia on prescription is and continues to be as set out in the Civil Code, unaffected either by the Land Registration Act or the case of Ferdinand James.

Ferdinand James v Planviron 999(Caribbean Practice) Limited et al SLUHCVAP2017/0050 (delivered 16th October 2019, unreported) distinguished.

Case Name:

**Oris Sullivan
v
Dagrie Wilson**

**[MNIHCVAP2021/0009]
(Montserrat)**

Date:

Friday, 28th July 2023

**Coram for
delivery:**

**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. Sylvester Carrott
Respondent:	Mr. Jean Kelsick

Issues:

Civil appeal – Claim for monies paid – Findings of fact – Appellate interference – Whether the learned judge erred in making a decision on the claim for monies paid and not on the claim for restitution and/or unjust enrichment – Whether the learned judge erred in granting Ms. Wilson’s claim for the sums paid — Unjust enrichment – Whether Ms. Wilson would have made out a claim for unjust enrichment – Elements of a contract – Intention to create legal relations - Whether the judge erred in holding that the monies advanced by Ms. Wilson constituted a loan which was repayable by Mr. Sullivan even though the parties were in a relationship – Whether the learned judge erred in finding that there was an agreement to repay the Debt at the rate of 13% per annum which was later reduced to 5.99% per annum – Whether the learned judge erred in dismissing Mr. Sullivan’s counterclaim – Whether the learned judge erred in ordering the sale of the Toyota Altezza post-judgment and the splitting of the proceeds of sale – Set-off – Whether the Court should set off the sum of \$17,000.00 paid by Mr. Sullivan towards the Toyota Altezza against any judgment made in favour of Ms. Wilson

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. Paragraph 3(a) of the Judge’s Orders is varied to say that the appeal against the order awarding the Debt of \$35,550.00 to the respondent is dismissed and the judge’s order awarding the Debt is affirmed.**
- 2. Paragraph 3(a) of the Judge’s Orders is further varied to say that the appeal against the award of prejudgment interest on the Debt is allowed and the award of interest (calculated at \$17,920.05) is set aside.**
- 3. Paragraph 3(b) of the Judge’s Orders is varied to say that the respondent is awarded prescribed costs of \$5,325.00 on the dismissal of the appeal against the award of the Debt.**

4. The appeal against the dismissal of the counterclaim is dismissed and paragraph 3(c) of the Judge's Orders is affirmed.
5. The counter-notice of appeal is dismissed with no order as to costs.
6. Paragraph 4 of the Judge's Orders is set aside.
7. The Toyota Altezza be sold at market value and the net proceeds be shared equally between the parties on completion of the sale.
8. The parties shall bear their own costs of the appeal.

Reason:

1. It is not uncommon for litigants to advance more than one cause of action in their claim, with one or more being alternative arguments. This case is no different. Ms. Wilson's claim was couched in three ways. The learned judge summarized the claims as one for money paid at the express request of Mr. Sullivan, or alternatively, for restitution and/or unjust enrichment. He then proceeded to deal with the claim as one for money paid to third parties at the express request of Mr. Sullivan. The judge's treatment of the case on this basis cannot be faulted. He referred to the relevant authorities and concluded that this was a claim for money paid by Ms. Wilson at the request of Mr. Sullivan from which he benefitted, and he agreed to repay the amount advanced by Ms. Wilson at his request. It was open to the learned judge to make his decision on any one or more of the claims that were pleaded. He made his decision on the claim for money paid. He did not have to go on to make a further decision on the claim for restitution/unjust enrichment. Accordingly, the appellant's contention that the learned judge treated the case as one of a contract loan simpliciter, is without merit.

**Samsoondar v Capital Insurance Company Ltd
[2020] UKPC 33 applied.**

- 2. The elements of a valid contract are well known. There must be an offer capable of acceptance, an unequivocal acceptance of that offer, and consideration moving from the promisor to the promisee. In ascertaining whether there was a binding agreement to pay interest on the Debt, the court must find an intention to create legal relations. Generally, domestic arrangements between spouses and couples lack contractual force. However, this is a general presumption that may be rebutted by evidence of the real intention of the parties. The following factors are relevant: (a) what the parties said to each other either orally or in writing; (b) the context in which the statements were made; (c) the conduct of the parties; and (d) how grave the consequences would be to the innocent party if the promises made by the other party were to be breached. The claim for interest in this case is based on an oral agreement between the parties. The learned judge made a finding of fact that there was an agreement to repay the Debt at the rate of 13% per annum, later reduced to 5.99% per annum, and Ms. Wilson was accordingly entitled to interest on the Debt. However, there is no evidence, apart from her own recollections of a telephone call made more than a year before, that Mr. Sullivan had agreed to pay 13% interest or interest at any other rate. This is not to say that interest was not discussed. Mr. Sullivan says it was not. But even if it was discussed, there is no other evidence corroborating this claim for an exorbitant interest rate that is more than three times the statutory rate on judgments and more than twice the amount that Ms. Wilson said the banks in Montserrat were charging at the time. The contemporaneous evidence, or lack thereof, does not support a finding that the parties intended to create a binding oral contract to pay interest on the Debt at 13% per annum. Accordingly, the learned judge did not**

take all the circumstances into consideration and as a result, his decision on interest was plainly wrong. The appeal on this ground is therefore allowed, and the award of prejudgment interest set aside.

3. With regard to Mr. Sullivan's counterclaim, apart from the admissions about the Toyota Altezza, he did not produce any evidence to show that the car rental business was jointly owned by him and Ms. Wilson. There is no evidence of any document, agreement, or contribution that he made toward the car rental company apart from the contribution to the purchase of Toyota Altezza. This is compounded by the fact that the company is in Ms. Wilson's sole name. He failed to make out his contention that he was entitled to 50% of the car rental company. The appeal against the dismissal of the counterclaim for at least 50% of the assets of the car rental company is accordingly dismissed.
4. On 22nd July 2021, the learned judge delivered his judgment in open court making the orders that are appealed in this appeal. From that point, he was functus and his post-judgment order should be treated as no more than a method that the parties could consider for resolving the outstanding issue of the Toyota Altezza. However, this Court has the power to make orders in respect of matters that were before the lower court and not disposed of at the trial. As Ms. Wilson is amenable to selling the Toyota Altezza and dividing the profits equally, the vehicle shall be sold at market value and the proceeds be split equally between the parties on completion of the sale. Mr. Sullivan's claim to set off of his contribution of \$17,000.00 towards the purchase of the vehicle against any monies that he might owe Ms. Wilson is dismissed.

Section 20 of the Supreme Court Act Cap. 02.01 of the Revised Laws of Montserrat applied.

Case Name:

**[1] The Officer of the Deputy Governor
[2] Ministry of Agriculture
v
Ashel Brambel**

**[MNIHCVAP2021/0006]
(Montserrat)**

Date:

Friday, 28th July 2023

**Coram for
delivery:**

**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. Renee Morgan

Respondent: Mr. Sylvester Carrott

Issues:

Civil appeal - Appellate interference with findings of fact made by lower court - Doctrine of *res ipsa loquitur* - Whether the learned judge erred in fact and/or law in finding that the doctrine of *res ipsa loquitur* did not arise – Unjust enrichment – Mistake of fact – Mistake of law - Whether the learned judge erred in fact and/or law in holding that the appellants had not made out their case of unjust enrichment based on mistake of fact and law – Constructive dismissal - Whether the judge erred in holding that Ashel Bramble was constructively dismissed – Frustration of employment contract

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal against the judge's order dismissing the appellants' claim in negligence based on the doctrine *res ipsa loquitur* is dismissed and the judge's order is affirmed.**
- 2. The appeal against the judge's determination that the respondent was constructively**

dismissed is allowed and the judge's pronouncement at paragraph 17, to wit, 'Bramble was constructively sacked on 27.03.17, not before' is set aside.

3. The appeal against the judge's reliance on the February 2018 medical report authored by Dr. Sean Smith, is upheld.
4. The appeal against the judge's findings of fact and law regarding mistake as an unjust factor in unjust enrichment, is upheld.
5. The appeal against the learned judge's order dismissing the appellants' claim in unjust enrichment is dismissed.
6. Mr. Bramble shall have his costs of the appeal in the sum of \$5470.00, being two-thirds of the prescribed costs awarded in the High Court

Reason:

1. It is settled law that an appellate court must exercise extreme caution and be slow to overturn findings of fact made by a trial judge, or inferences drawn from such findings. It would interfere with such findings only if satisfied that the lower court's conclusions on the facts were plainly wrong; or if there is little or no adequate evidence to support them; or if the judge did not properly analyse the evidence in its entirety. Among the reasons for this caution is the reality that having seen the witnesses, the trial judge possesses certain advantages over the appellate court in assessing credibility and had a firsthand appreciation of the breadth of the evidence that is not usually available to the appellate court.

Biogen Inc v Medeva plc [1997] RPC 1 applied; Flat Point Development v Mary Dooley ANUHC VAP2015/0029 (delivered 13th March 2019, unreported) followed; St. Kitts Marriott Resort v Deborah Stevens SKBMC VAP2016/0001 (delivered 30th October 2020, unreported) followed.

2. The doctrine of *res ipsa loquitur* allows a claimant to make out a *prima facie* case of negligence against a defendant even if the claimant is unable to show exactly how an accident happens, but can nevertheless demonstrate through evidence, that the accident was more than likely caused by the defendant's failure to use appropriate care for the claimant's safety, unless there is some other explanation. In this case, the judge considered the allegations of negligence and had ample evidence from which to justifiably and sensibly make the factual conclusions that he did and to conclude as a matter of law that the maxim *res ipsa loquitur* was inapplicable to the facts of the present case. The learned judge's questions were relevant to and probative of the factual and legal elements of the *res ipsa loquitur* maxim. The criticisms levelled at him in this regard are unfair and unfounded. The learned judge's ultimate conclusion was therefore reasonable in view of the evidence and the law. It follows that the prayer for damages would fall away and the related arguments do not need to be considered.

Grenada Electricity Services Limited v Isaac Peters Civil Appeal No. 10 of 2002 followed; Halsbury's Laws of England Vol. 33 4th Ed. (Reissue) paragraphs 664-668 at para. 664 applied.

3. A *prima facie* case of unjust enrichment is made out by proving four elements – (a) enrichment of the defendant; (b) at the claimant's expense; (c) the enrichment was unjust; and (d) the defendant has no defence to the cause of action. In deciding whether or not a particular 'enrichment is unjust', mistake of fact and mistake of law are causes of action that can render an enrichment unjust. There is also a general right to recover money paid under a mistake, whether of fact or law, subject to the defences available in the law of restitution, such

as estoppel, limitation, illegality or compromise. In this case, Dr. Smith's opinion (although not adduced) was the sole reason given by the learned judge for concluding that Mr. Bramble thought himself to be unwell. It is also one of the main reasons for his ruling that there was no mistake of fact and hence no unjust enrichment. In those circumstances, the learned judge's determination that unjust enrichment was not made out is undermined by this reliance on a document that was not part of the evidence. The learned judge fell into error in doing so and this led to his further error in relying on it in arriving at his conclusion on the mistake of fact element of the unjust enrichment claim. The learned judge thereby erred in arriving at his determination of the mistake of fact element of the unjust enrichment claim.

Halsbury's Laws of England Vol. 88 (2019), para. 410. applied; Kleinwort Benson Ltd. v Lincoln City Council [1999] 2 AC 349 applied; Kelly v Solari [1835-42] All ER Rep 320 applied; Dextra Bank & Trust Co Limited v Bank of Jamaica [2001] UKPC 50 followed; Kleinworth Benson Ltd v Lincoln City Council and other appeals [1998] 4 All ER 513 applied; Leslie v Farrar Construction Ltd [2016] EWCA Civ 1041 applied.

4. The settled position regarding mistake of fact as an unjust factor is that, where money is paid to a defendant or valuable resources are expended on his behalf by a claimant who did so solely because of a belief that certain facts exist, when in reality they do not, and where the payor would not have otherwise made such payment or granted such benefit to the defendant, unjust enrichment is made out subject to any available defences.

Kelly v Solari [1835-42] All ER Rep 320 and Dextra Bank & Trust 2001] UKPC 50 followed.

5. It is now established that mistake of law is a valid cause of action and is an unjust factor in unjust enrichment. It arises when money or

services are passed from a payor to a payee in circumstances where the payor made the payment only because he erroneously believed that the law required him to do so. If he subsequently discovers and establishes that the law which obtained at the time of payment imposed no such obligation to pay, the payor would have proven his claim for unjust enrichment. It would be unconscionable for the payee to retain the payment and a court would order restitution as in the case of mistake of fact.

Kleinwort Benson Ltd [1998] 4 All ER 513 applied and Leslie v Farrar Construction Ltd [2016] EWCA Civ 1041 applied.

6. When considering the issue of mistake of fact as an unjust factor afresh and the issue of mistake of law (which was not examined by the learned judge), it is clear that the appellants' assertions that Mr. Bramble remained an employee of the GoM up to September 2016 and that he was away on approved leave, is problematic for the appellants, without evidence as to the terms under which the relevant authority approved the extension of paid leave beyond November 2014. The appellants fell short of discharging the burden to establish those facts on a balance of probabilities. This failure wholly undermined their claim that as a result Mr. Bramble was deemed to have abandoned his post, was disqualified by GO 610 from receiving the payments, and that he had been unjustly enriched by receipt of them. The evidence does not support the appellants' contention that the payments after September 2016 were made when by virtue of GO 610 and regulation 30, Mr. Bramble was absent without leave; deemed to have resigned his post and was no longer an employee of the GOM. There is therefore no evidentiary or legal basis for their assertion that the payments were made due to a mistaken belief that he was still an employee after September 2016. Further, the appellants were required to set out in their

pleadings all of the relevant facts on which they rely to establish unjust enrichment. They never claimed that it was a condition of the arrangement with Mr. Bramble, that he continue to receive treatment from Dr. John and Ms. Gillis-Gerard. Their mistaken belief that Mr. Bramble had continued to receive medical care from the doctor and physiotherapist at that time, even if honestly held, is not shown to be based on the contract of employment or other ancillary agreement. The appellants have therefore failed to establish that they made the payments based on the alleged mistake of fact or law. Accordingly, the unjust enrichment claim fails.

7. A contract is frustrated where without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. The doctrine of frustration may apply to a contract of employment which is affected by sufficiently drastic external factors, with the effects that: (i) the contract terminates automatically, without the need for any action by the employer; (ii) there is no right to any back pay from the date of frustration to any later date; and (iii) the fact that termination is by operation of law means that there is no dismissal, which in turn means that the employee cannot claim unfair dismissal or a redundancy payment. The appellants did not by their pleadings or evidence indicate what aspect of the employment contract was incapable of performance after September 2016. On the evidence, the GoM remained ready to assimilate Mr. Bramble into any suitable post for which he was qualified. Further, it was evident that the parties were willing to perform their respective obligations under the contract, albeit with the caveat by Mr. Bramble that he be reassigned to another role. There is no or very little evidentiary support that the employment contract was frustrated, or frustration of the

contract was an unjust factor.

Halsbury's Laws of England Vol. 41 (2021), at para. 735 applied.

8. A court is not required to engage with every legal argument presented in a case. A judge's duty is to address those issues that are indispensable to resolving the dispute and give his reasons. In view of his holdings and the reasons for decision, it was unnecessary for the learned judge to delve into the sub-issue of whether Mr. Bramble's terms of employment allowed for a transfer to another role, if he was unable to drive tractors. The learned judge was not blatantly wrong for making no ruling on this issue. This ground of appeal is therefore dismissed.

Emerson International Corporation v Renova Industries Ltd and others BVIHCP2016/0029 (delivered on 23rd March 2017) followed.

9. It is trite law that a judgment should be confined to the issues which are vital to the resolution of the dispute and that the determination should be restricted to material factual and legal matters. Consideration of constructive dismissal was not essential for resolution of the issues. The learned judge erred in making a finding on a legal matter that was not in dispute. The Court would therefore uphold this ground of appeal and set aside that finding.
10. In determining what costs award to make, the learned judge made remarks as to the GoM's lawyers being salaried, and other matters which attracted criticism on appeal. However, those remarks constitute permissible commentary, are not objectionable and do not invalidate the learned judge's findings of fact or law as contended. The learned judge did not err and was not blatantly wrong in giving expression to those thoughts. The Court would therefore dismiss the related grounds of appeal.

Case Name:

**[1] SAG Motors Ltd
[2] Desmond Carlisle**

v

National Bank of Dominica

**[DOMHCVAP2022/0001]
(Commonwealth of Dominica)**

Date:

Friday, 28th July 2023

**Coram for
delivery:**

**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. Kayla Jean Jacques holding for Mrs. Cara
Shillingford-Marsh**

Respondent:

Mrs. Heather Felix-Evans

Issues:

**Civil appeal– Judgment in default of defence –
Application to set aside default judgment – Inordinate
delay – Judgment debt – Statutory interest on
judgment debt – Whether compound interest –
Whether default judgment irregular - Finality of
litigation – Sale of mortgaged property - Whether the
judge erred in refusing to set aside the default
judgment on the basis of delay only – Sale of land by
mortgagee – Application to set aside sale of
mortgaged property by public auction – Duty of the
mortgagee - Good faith – Whether the judge erred in
failing to deal with the application to set aside the
public auction sale of the mortgaged property – Rules
of the Supreme Court (Revision) 1970 Order 73.4,
Order 2 rule 2(1) and Order 19 rule 9**

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal is dismissed.**
- 2. The sale of the mortgaged property to the
respondent bank on 20th April 2006 stands.**

3. Costs of the appeal to the respondent, such costs to be assessed by a Judge or Master of the High Court, unless agreed within 21 days.

Reason:

1. An appellate court must exercise restraint in determining appeals that challenge the exercise of judicial discretion by a lower court. Thus, for an appeal against judicial discretion to succeed, it must be shown that in exercising his or her discretion, the 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 by 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 of principle the judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 followed.

2. Where a default judgment was entered under the Rules of the Supreme Court (Revision) 1970 ("RSC") pursuant to rule 73.4 of the Civil Procedure Rules 2000 ("CPR") the applicable rules when considering whether to exercise the court's discretion to set aside the default judgment is the RSC. Order 2, rule 2(1) and Order 19, rule 9 of the RSC gives the court the power to set aside any judgment, order or step in any proceedings within a reasonable time. The court below was accordingly entitled or obliged to consider the delay by appellants in bringing the application to set aside default judgment. In determining such an application, a judgment debtor should not be allowed easily to set aside a default judgment where, in particular, there has been a significant or inordinate delay in applying to set aside the default judgment, unless exceptionally

compelling circumstances exist as to why it ought, in the interest of justice, to be set aside. It is only in the rarest and most extraordinary cases, where the reasons for the delay are truly cogent and compelling, that a court may be persuaded to consider setting aside the default judgment where the applicant/judgment debtor has essentially slept on their rights. What constitutes a 'reasonable time' within the meaning of Order 19 rule 9 of the RSC will naturally vary from case to case and will depend on all the circumstances including the reasons for the delay as well as the likelihood of success of any proposed defence. The proposed defence presented by the judgment debtor would need to be remarkably robust, such that its success seems almost guaranteed. Furthermore, the court must determine that allowing the judgment to stand would result in a greater injustice than setting it aside.

Gregory Bowen et al v Dipcon Engineering Services Ltd Civil Appeal No. 12 of 2005 (delivered 22nd May 2006, unreported) followed; Mercurine Pte Ltd v Canberra Development Pte Ltd [2008] SGCA 38 [97] applied; Avanesov v Shymkentpivo [2015] EWHC 394 (Comm) applied; Muir v Jenks [1913] 2 KB 412 considered; Civil Procedure Rules 2000 rule 73.4; Rules of the Supreme Court (Revision) 1970 Order 2 rule 2(1) applied; Rules of the Supreme Court (Revision) 1970 Order 19 rule 9 applied

3. In this case, the application to set aside the default judgment came 11 years and 4 months after the judgment in default of defence was entered against the appellants. During that period, the appellants did not file a defence or draft defence or sought leave of the court to extend the time to file a defence. Moreover, the appellants have never disputed liability for the claim or that they had defaulted on the loan payments under the mortgage with the respondent bank. The only challenge by the

appellants to the judgment is as to the calculation of the quantum of interest on the basis that the judgment sum includes interest on interest. However, it was open to the appellants upon entry of the default judgment to apply to set it aside on this basis and to file a defence or to file an application for correction of the judgment. While it may have been the responsibility of the respondent bank to have any error or irregularity in the judgment corrected, no such error or irregularity was brought to the attention of the respondent bank until over a decade after the entry of the judgment. In these circumstances, the alleged error in the calculation of interest in the default judgment is not so extraordinary as to warrant the setting aside of the default judgment itself, and the learned judge, having considered this, was correct in her conclusion to refuse the application to set aside the default judgment. In doing so, the learned judge considered all the relevant factors and was correct to find that the very late application to set aside the default judgment was an abuse of process by the appellants. There is, therefore, no sound basis for concluding that the learned judge, in exercising her discretion, erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; such that her decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. Accordingly, this limb of the appeal is dismissed.

4. Sections 75 to 97 of the Title by Registration Act provide that a mortgagee can seize and sell encumbered property, where a mortgagor has failed to perform the conditions of the mortgage or encumbrance. In this case, while it was within the discretion of the learned judge to dismiss the application to set aside the default judgment on the basis of delay, that

was not sufficient to justify failing to deal with the application to set aside the public auction sale. The two applications, though contained in one document, were separate and distinct and required individual consideration. Furthermore, the property was not purchased by a third-party bona fide purchaser for value, but by the respondent bank itself. Accordingly, it was incumbent on the learned judge to consider whether there had been a breach of the mortgagee's duties and whether the bank acted in bad faith or exercised any undue influence in the sale. Accordingly, the learned judge erred in dismissing the application to set aside the public auction sale and as accepted by counsel for both parties, the Court of Appeal ought to deal with that limb of the appellants' application.

Sections 75 to 97 of Title by Registration Act Chap. 56:50 of the Laws of Dominica applied.

5. A mortgagee is duty-bound to act in the utmost good faith, exercising a reasonable degree of care and skill when disposing of the mortgaged property by sale. Paramount to this duty is the obligation to obtain the highest attainable price given the prevailing market conditions. However, this duty is to be balanced against the mortgagee's right to sell the property at its convenience and for its benefit. The mortgagee's mixed motives for a sale, including the objective of securing repayment, do not in themselves breach the duty as long as good faith is maintained. Likewise, as long as the mortgagee's assessment of the market value falls within an acceptable margin of error, the duty is not breached. Therefore, a pragmatic approach must be taken to strike a fair balance between the parties' competing interests.

Halsbury's Laws of England Mortgage (Volume 77 (2021)), para 459 applied; Cuckmere Brick Co Ltd v Mutual Finance Ltd [1971] 2 All ER 633 applied; Corbett and another v Halifax plc and

others [2003] 2 All ER (Comm) 384 applied.

6. In this case, the default giving rise to the respondent bank's right to sell the mortgaged property stemmed from the non-payment of the mortgage sum by the appellants. This led to the respondent bank filing a civil claim and taking steps to and obtaining a judgment for the outstanding principal sum and interest under the mortgage, to subsequently entering upon and seizing the mortgaged property, and to applying to the High Court to have it sold by public auction. The respondent after obtaining the default judgment filed a summons in the High Court to settle the Articles of Sale, estimate an upset price, and fix the date for the sale. The auctions, the applications to fix and reduce the upset price, as well as the eventual sale of the property all took place under the control and supervision of the court and with the participation and concurrence, without objection, of the appellants. The process used was transparent and the auction was conducted with the full knowledge and participation of the appellants. It was open to the appellants to bring any concerns or considerations whether as to market value or the upset price or otherwise to the attention of the judge or master. Moreover, the second named appellant, who himself has considerable business experience, appeared in person at a number of the enforcement proceedings. He is not the average litigant in person who may not be able to understand what is taking place in enforcement proceedings or hearings to fix or reduce an upset price. Accordingly, he was more than capable of informing the court of any pertinent happenings at previous auctions and of raising the issue of the need for an updated valuation or seeking legal advice regarding those concerns. Accordingly, the appellants' position throughout the proceedings for the sale of the mortgaged property has been one of acquiescence, and they have only raised the issues concerning the default judgment and

the upset price and sale for the first time at a very belated stage. The appellants have never challenged any order of the learned judge fixing the upset price. Moreover, the subsequent valuation of the mortgaged property done by Sorrel Consulting Limited came after substantial renovations had been carried out by the respondents to the dwelling-house on the property and, allowing for some margin of error, that valuation shows that the property is not valued substantially more than the price for which the property was sold by auction to the respondent bank.

7. An almost five-year delay in seeking to set aside a court connected sale is inordinate. The respondent, to its detriment, made significant improvements to the property and has been utilizing it for its own purposes. To set aside the sale after such a significant passage of time would cause great injustice to the respondent bank, and the appellants have not made out a case to justify the court setting aside the said sale. In light of the foregoing, the respondent bank did not act in bad faith during the sale of the mortgaged property, and the appellants have not made out a case to be compensated in damages. This limb of the appeal is also dismissed.

Case Name:

**Ng Min Hong
v
[1] Soemarli Lie
[2] Success Overseas Finance Limited
("Sofl")**

**[BVIHCMAP2022/0068]
(Territory of the Virgin Islands)**

Date:

Friday, 28th July 2023

**Coram for
delivery:**

**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. Christopher McCarthy

Respondents: Mr. Richard Evans and Dr. Alecia Johns

Issues:

Commercial Appeal – Interlocutory Appeal – Disclosure – Control of documents - Unless Order - Whether the Judge was wrong to conclude that Mr. Ng had control of the relevant documents for disclosure purposes - Whether the judge's conclusion of control was based on an inference that there was an existing understanding or arrangement for Mr. Ng to have free access to the relevant documents - Whether the Judge wrongly relied on 3 specific aspects put forward by Mr. Lie as justifying the inference of an understanding or arrangement giving Mr. Ng free access to the relevant documents for the purposes of the valuation proceedings - Whether on a proper analysis and having regard to the established legal principles, those 3 aspects could not individually or cumulatively justify the said inference - Whether the Judge failed properly to consider whether there was a currently existing understanding or arrangement for Mr. Ng to have free access to the relevant documents

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal is dismissed.**
- 2. The judgment and order of the court below is affirmed.**

The Respondents will have their costs of this appeal to be assessed, if not agreed by the parties within 21 days of this judgment.

Reason:

- 1. The aim of disclosure in civil litigation is to ensure that all the parties to a civil claim are aware of all the documents that have a bearing on the claim. The duty of disclosure in litigation arises under Part 28 of the Civil Procedure Rules 2000 (“CPR”) which**

prescribes the appropriate basis for the disclosure of documents. The key factors which must be borne in mind by a judge contemplating an order for disclosure are “relevance” and “control”. A document is liable to be disclosed if it is directly relevant to the issues that would arise for determination at trial and it arises if the party with control of the document intends to rely on it or if it tends to adversely affect that party’s case; or if it tends to support another party’s case. In this appeal, the question of relevance is not in issue. Instead, the issue of “control” is the gravamen of this appeal and the starting point must be CPR Part 28.2.

Rule 28.2 of the Civil Procedure Rules 2000 applied.

2. In determining whether a “control arrangement” exists, a court is required to undertake a careful analysis of the practical evidence for the existence of an arrangement. It is not sufficient for a litigant, parent company or its subsidiary to merely assert that no arrangement exists or existed. A court must undertake a careful analysis of the practical arrangements in order to ascertain whether documents are within the control of the disclosing party. It is equally important that the court undertake a careful analysis of the practical evidence advanced to refute the contention of practical control. In determining whether documents held by one person are under the practical control of another (where there is no enforceable right of access) the relationship between the parties is irrelevant. It does not depend on there being control over the holder of the documents in some looser sense, such as a parent and subsidiary relationship, what is relevant is whether there is an arrangement or understanding that the holder of the document will have made the relevant documents available for disclosure and inspection.

Ikana Holdings S. De R. L et al v Putney Capital Management Ltd. BVIHCMAP2021/0027 (delivered 24th January 2022, unreported) followed; Schlumberger Holdings Ltd v Electromagnetic Geoservices AS [2008] EWHC 56 (Pat) considered; Lonrho Ltd v Shell Petroleum Co Ltd (No. 1) [1980] 1 WLR 627 considered; Ardila Investments v ENRC [2015] EWHC 3761 (Comm) applied; Pipia v BGEO Group Ltd (formerly known as BGEO Group Plc) [2020] EWHC 402 (Comm) applied; Various Airfinance Leasing Companies and others v Saudi Arabian Airlines Corporation [2022] 1 WLR 1027 applied; Berkeley Square Holdings Limited v Lancer Property Asset Management Ltd & Others [2021] EWCA Civ 551.

- 3. Where a litigant fails to comply with an order for disclosure and advances that he/she did not have the requisite *control* over the relevant documents, which were held by a third party (who objects or does not consent to disclose the same), and should not therefore be required to give disclosure of those documents, the court is entitled to undertake a careful analysis of such assertion and the actual arrangements between the third party and the litigating party in order to ascertain whether documents held by the subsidiary are within the control of the litigating party. The appellant contended there is no existing understanding or arrangement which would afford the appellant free access to the documents in question. The Judge however accepted each of the three bases as submitted by the respondent for justifying the inference that there was in existence an understanding or arrangement between Mr. Ng and the PT PDP Group companies/shareholders entitling him to unfettered access to the PT PDP Group documents for the purposes of the Valuation Proceedings. It is therefore clear that the learned Judge rejected the appellant's contention that he engaged in bona fide efforts to obtain the consent of the PT DPD companies/shareholders. The Judge found that**

there was sufficient evidence from which he could infer that there was an arrangement or understanding that the appellant had free access to the documents. In doing so he would have considered the cumulative effect of the matters advanced by the appellant and arrived at a determination which would, in part have been informed by his earlier findings (in the Main Judgment). In treating with these matters, he would have had to arrive at a conclusion as to the genuineness and plausibility and weight. Accordingly, the Judge did not err in his consideration of the issues that were before him, nor in his approach to the application. There is therefore no basis on which this Court should legitimately interfere with the Judge's finding.

4. The Judge's significant involvement in, and the impressions formed over the course of this protracted litigation between these parties cannot be ignored. The learned Judge would have formed a considered view as to who was in control of the subsidiaries. It is not disputed that the judge has for some 4 ½ years, presided over every aspect of this claim and has been immersed in this complex dispute acquiring a thorough knowledge of the facts and parties. The appellant's contention that the Judge was not entitled to come to his findings of fact cannot be sustained. Applying the appropriate appellate restraint, this Court is satisfied that rather than relying on any one factor as decisive, the learned Judge pulled the relevant circumstantial strands together which he then bound together to arrive at his factual findings. It is clear that the Judge would be certainly more familiar with the details of the case than this appellate court. Guided by the principles governing appellate restraint, this Court is satisfied that the learned Judge's findings of fact, whether primary or by evaluation of the evidence, should be respected and that this Court should only interfere if it is determined that the learned Judge erred in principle.

Fage UK Ltd. and another v Chobani UK Ltd. and another [2014] EWCA Civ 5 applied; Dolcie Christian (In her capacity as Executor of the Estate of Sydney Christian, QC) v King's Casino Limited ANUHC VAP2018/0030 (delivered 26th March 2020, unreported) followed; Group Seven Ltd. (a company incorporated under the laws of Malta v Notable Services LLP [2019] EWCA Civ 614 applied; Biogen Inc v Medeva Plc [1997] RPC 1 applied.

5. It has generally been accepted that the wholesale adoption of counsel's submissions by a judge is not offensive. The adoption of one party's submissions by a judge is one method of providing adequate reasons. While this may not be the choice of every judge, it is impossible to say that it necessarily falls short of the judicial duty to provide reasons.

English v. Emery Reimbold & Strick Ltd. 2002] EWCA Civ 605 applied; James and others v. Surf Road Nominees Pty. Ltd and others 2004] NSWCA 475 (AustLII) applied.

APPLICATIONS AND APPEALS

Panel 1

Case Name:

Kevin Porter

v

The Commissioner of Police

[SVGMCRAP2012/0014]

(Saint Vincent and the Grenadines)

Date:

Monday, 24th July 2023

Coram:

**The Hon. Dame Janice M. Pereira, DBE Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal**

Appearances:

Applicant/Respondent: Mrs. Tammika Da Silva-McKenzie

Respondent/Appellant: No appearance

Issues: Criminal appeal - Application to dismiss appeal for want of prosecution

Type of Order: Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:
The appeal is dismissed for want of prosecution.

Reason: The Court noted that the appellant had been served with the Notice of Hearing and the respondent's application to dismiss the appeal for want of prosecution. The Court therefore proceeded in the appellant's absence to hear the application to dismiss the appeal for want of prosecution.

The Court, having been satisfied that the application to dismiss the appeal for want of prosecution was duly served and that the appellant had served the sentence imposed upon him since 11th September 2012, was of the view that the appellant had no further interest in prosecuting his appeal. The Court accordingly granted the application to dismiss the appeal for want of prosecution.

Case Name: Randan Matthews
v
The Commissioner of Police
[SVGMCRAP2013/0004]
(Saint Vincent and the Grenadines)

Date: Monday, 24th July 2023

Coram: The Hon. Dame Janice M. Pereira, DBE Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal

Appearances:

Appellant/Respondent:	No appearance
Respondent/Applicant	Ms. Tammika Da Silva-McKenzie

Issues: Criminal Appeal - Application to dismiss the appeal for want of prosecution - Appellant expressed no interest in prosecuting the appeal - Appellant served his sentence and had been released since July 2013

Type of Order: Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:

The application to dismiss the appeal for want of prosecution is granted.

Reason: The Court noted that the application to dismiss the appeal for want of prosecution was filed on 15th July 2022 and the affidavit of service of same was filed on 18th July 2022.

The Court was satisfied that the appellant was served all relevant notices to appear for the hearing and he did not appear thereby indicating his lack of interest in prosecuting the appeal.

The Court also noted that the appellant had served his sentence and had been released since 9th July 2013.

Accordingly, the Court was of the view that the application to dismiss the appeal for want of prosecution should be granted.

Case Name:

Brennon Roberts

v

The King

[SVGHCRA2023/0010]

(Saint Vincent and the Grenadines)

Date:

Monday, 24th July 2023

Coram:

**The Hon. Dame Janice M. Pereira, DBE Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal**

Appearances:

Applicant/Appellant: **In person**

Respondent: **Mr. Richie Maitland**

Issues:

Criminal appeal against conviction and sentence - Application for an extension of time within which to appeal – Application for leave to appeal - Application to have appeal re-heard and re-opened - Applicant indicating that he was not properly represented by his then legal counsel - Previous decision of the Court of Appeal withdrawing and dismissing the appeal against conviction - Previous decision of the Court of Appeal dismissing the appeal against sentence - Applicant indicating that there was new information in the appeal - Applicant's allegation that he was forced to write a letter by his then legal counsel - Legal counsel not present in Court

Type of Order:

Directions

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED THAT:

- 1. A copy of the appellant's letters dated 12**

December 2019 and 6th June 2023 shall be furnished to Ms. Kay Bacchus-Baptiste, together with an audio transcript of today's Court proceedings, with a copy to the respondent.

2. The said Ms. Kay Bacchus-Baptiste shall be at liberty to file with the Court an affidavit responding to the matters raised by the appellant, not only in the letters but also in today's Court proceedings, by 1st September 2023.
3. The respondent also has liberty to file an affidavit with the Court in respect of the said matters raised by the appellant in the said letters and the hearing before the Court of Appeal on 24th February 2020 and to file same on or before 1st September 2023.
4. The transcript of the Court's proceedings of 24th February 2020 shall be furnished by the Registrar of the court below to the Court and to the appellant as well as to Ms. Kay Bacchus-Baptiste and the respondent, by Monday 18th September 2023.
5. The further hearing of this application is adjourned to the next sitting of the Court for the state of Saint Vincent and the Grenadines carded for the week commencing 29th January 2024.

Reason:

The Court had before it an application by which the appellant, Mr. Brennon Roberts sought to rehear his appeal, notwithstanding the hearing of the appeal by a panel of the Court of Appeal on 24th February 2020 in which a letter was produced to the Court from the appellant, and the Court, having recorded on the 24th February 2020 that the appeal against conviction was withdrawn and that the Court proceeded to hear the appeal against sentence only. The Court has now seen that letter of the appellant dated 12th December 2019. That letter recorded that the appellant was abandoning his appeal against conviction and proceeding against sentence only. A portion of the letter was read into the record, and it stated:

"My name is Brennon Roberts currently on appeal at the Eastern Caribbean Court of Appeal and is at

present serving time at the above-mentioned institution (that being Belle Isles Correctional facility). I am hereby requesting to have the appeal against the conviction withdrawn but I will continue to proceed with the appeal against sentencing.”

Ultimately the Court on 24th February 2020, having heard arguments against sentence, and having recorded that the appeal against conviction was withdrawn, dismissed the appeal against sentence. The appellant on 24th April 2023, some three years following the hearing of the appeal, has made this application, in essence, to re-hear his appeal on the basis of new information. A single judge hearing the application on 30th May 2023, after noting that the appeal had been heard by the Court and determined on 24th February 2020, directed that the appellant furnish the court with the relevant documents detailing the new information he wished the Court to consider by 21st June 2023.

This then led to the appellant submitting a letter to the Court dated 6th June 2023. That letter set out a series of questions which the appellant appears to be desirous of asking in respect of his trial. In the letter of 6th June 2023, the appellant also stated that his lawyer misrepresented him before the court. Today the appellant has now asserted that his lawyer, Ms. Kay Bacchus-Baptiste forced him to write a letter expressing how sorry he was about the incident, and he also said he had someone write that letter for him.

He, however, did not say or deny that the letter was signed by him. Having regard to the statements now made by the appellant, the Court considered that information should be furnished by his then counsel, Ms. Kay Bacchus-Baptiste in respect of the matters surrounding the letter dated 12th December 2019 and the further letter of the appellant dated 6th June 2023 and that Ms. Kay Bacchus-Baptiste be given an opportunity to respond to those matters by affidavit. The Court noted that the allegation being made against then counsel Ms. Kay Bacchus-Baptiste is a serious allegation, and she therefore ought to be given an opportunity to respond to it.

Case Name:

**Ian Fraser
v
[1] Bruce Brown
[2] Ernest Brown**

**[SVGMCVAP2019/0003]
(Saint Vincent and the Grenadines)**

Date: Monday, 24th July 2023

Coram: The Hon. Dame Janice M. Pereira, DBE Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal

Appearances:

Appellant: In person

Respondents: No appearance

Issues: Civil appeal - Application for adjournment

Type of Order: Adjournment

Result / Order: [Oral delivery]

IT IS HEREBY ORDERED THAT:

The hearing of the appeal is adjourned at the request of the appellant to the next setting of the Court for the State of Saint Vincent and the Grenadines to commence during the week of 29th January 2024.

Reason: The Court enquired whether the appellant had secured legal representation for the purposes of the appeal. The appellant notified the Court that he spoke to an attorney at the offices of Mr. Duane Daniel the morning of the hearing as well as on two occasions in the previous week.

The Court stood down the matter for 15 minutes so that the Registrar could arrange for the appellant to contact the offices of Mr. Duane Daniel.

When the matter resumed, Ms. Tonya Da Silva from Mr. Daniel's office appeared before the Court. She informed the Court that the office only received notice of the hearing of the appeal around 8:00 a.m. and that the appellant did not properly retain counsel. Ms. Da Silva further informed the Court that the appellant was advised to indicate to the Court that he was in the process of acquiring legal representation.

The Court, having heard the explanations of the appellant and Ms. Da Silva decided to give the appellant one opportunity to properly retain counsel. In the circumstances, the Court granted the appellant one adjournment of the hearing of the appeal to the next sitting of the Court for the State of Saint Vincent and the Grenadines to commence during the week of 29th January 2024.

Case Name:

Francis Robinson

v

Tasca Abbott

[SVGMCVAP2019/0006]

(Saint Vincent and the Grenadines)

Date:

Monday, 24th July 2023

Coram:

**The Hon. Dame Janice M. Pereira, DBE Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal**

Appearances:

Appellant: No appearance

Respondent: No appearance

Issues:

Nonappearance of appellant or respondent -

**Respondent's husband appearing in person -
Appellant served to be present in court today -
Appellant's failure to prosecute appeal**

Type of Order: Oral judgment

Result / Order: IT IS HEREBY ORDERED THAT:

The appeal SVGMCVAP2019/0006 brought by Mr. Francis Robinson is dismissed for want of prosecution by the appellant.

Reason: There was no appearance by either the appellant or the respondent. However, the respondent's husband was present in Court and indicated that the respondent was at work at the hospital. The Court was satisfied that the appellant was served with the order setting the date for the hearing of the appeal as indicated in the affidavit of service. The Court also noted the contents of the affidavit of service, wherein the appellant indicated that he was no longer interested in pursuing the appeal. The appeal was therefore dismissed for want of prosecution.

Panel 2

Case Name: The Federal Republic of Nigeria
v
[1] Tibit Limited
[2] Justin Ickonga
[BVIHCMAP2021/0044]
(Territory of the Virgin Islands)

Date: Monday, 24th July 2023

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

Appearances: Appellant/Respond Mr. Steven Thompson KC with him Mr. Richard

ent: **Brown**

Respondents/Applicant: **Mr. Vernon Flynn KC and Mr. James Henson for the second respondent/applicant**

Issues: **Motion for conditional leave to appeal to His Majesty in Council - Application for adjournment**

Type of Order: **Directions**

Result / Order: **[Oral Delivery]**

IT IS HEREBY ORDERED THAT:

- 1. The applicant is ordered to file and serve written submissions with authorities addressing the issues of:
 - i. Whether there is a proper application for leave to appeal to the Privy Council; and**
 - ii. Whether any irregularity in the application can be rectified by the Court by virtue of rule 26.9 of the Civil Procedure Rules 2000, the common law, or otherwise.****
- 2. The submissions and authorities shall be filed and served by the applicant on or before 8th September 2023.**
- 3. Leave is given to the respondent to file and serve submissions in response on or before 29th September 2023.**
- 4. The hearing of the application shall be set for a date to be fixed by the Chief Registrar.**
- 5. The interim stay granted by Farara JA [Ag.] on 30th May 2023 shall remain in place pending the hearing and determination of this application.**
- 6. Costs to the respondent to be assessed if not agreed within 21 days.**

Reason: **The Court noted that the Amended Notice of Motion filed by the applicant was filed outside of the time for seeking leave to appeal to the Privy Council and that**

the Notice it purports to amend is a Notice of Appeal, and not a Notice of Motion, the validity of which is therefore questionable. The Court considered that the parties should file submissions on the issue of whether there is a proper application before the Court for leave to appeal to the Privy Council, and that this issue should be determined before any application can be heard for leave to appeal to the Privy Council.

Case Name:

[1] Lisa Smith, Lenice Smith and Michelle Smith
(as Representatives of Michael Smith, deceased)
[2] Bryon Smith
[3] Edric Brathwaite
v
[1] Duff's Valley Corporation Ltd.
[2] Ishmael Brathwaite

[BVIHCVAP2023/0004]
(Territory of the Virgin Islands)

Date: Monday, 24th July 2023

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

Appearances:

Applicants:	Mr. Jamal Smith
Respondents:	Mr. Daniel Davies

Issues: Application for leave to appeal – Application for a stay of proceedings - Application for adjournment

Type of Order: Directions

Result / Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:

1. The applicants shall file and serve written submissions with authorities in support of the application for leave to appeal and a stay of proceedings on or before 28th July 2023.
2. Leave is given to the respondents to file and serve submissions in response to the application for a stay of proceedings on or before 14th August 2023.
3. The hearing of the application for leave to appeal and a stay of proceedings is adjourned to a date to be fixed by the Chief Registrar.
4. Costs to the respondents in the sum of \$500.00, to be paid on or before 7th August 2023.

Reason:

The Court noted that counsel for the applicants indicated an intention to file submissions in support of the application at the last case management conference, but he failed to do so. The Court was of the view that legal submissions with authorities were required to properly determine the application and counsel for the appellant requested an adjournment to file said submissions.

Case Name:

**Marshall Phillips
v
The King**

**[SVGHCRA2016/0005]
(Saint Vincent and the Grenadines)**

Date:

Tuesday, 25th July 2023

Coram:

**The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal
[Ag.]**

Appearances:

Appellant: Mr. Stephen Williams
Respondent: Ms. Tameka DaSilva-McKenzie

Issues: Application to abandon grounds of appeal filed by the appellant and to substitute them with the grounds filed by counsel

Type of Order: Oral decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The application to amend the grounds of appeal is granted.
2. Counsel for the appellant is allowed to proceed with the grounds of appeal as filed in the appellant's submissions by counsel for the appellant.
3. The grounds of appeal attached to the notice of appeal are deemed abandoned.
4. The appellant is to file an amended notice of appeal on or before 26th July 2023.

Reason: The original grounds of appeal had been filed by the appellant without the assistance of counsel. There was no objection to the application and the Court allowed the appellant to amend the grounds of appeal by substituting the grounds originally filed by the appellant with the grounds filed by counsel for the appellant.

Case Name: Marshall Phillips
v
The King

[SVGHCRA2016/0005]
(Saint Vincent and the Grenadines)

Date: Tuesday, 25th July 2023

Coram: The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. Stephen Williams

Respondent: Ms. Tameka DaSilva-McKenzie

Issues: Criminal Appeal against conviction - Murder - Self defence - Whether the learned trial judge misdirected the jury on the issue of self defence, in particular on the issue of pre-emptive strike as it relates to the issue of self-defence - Provocation - Whether the trial judge in summing up to the jury on the law relating to provocation was unfair and biased towards the prosecution

Type of Order: N/A

Result / Order: [Oral delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name: Andy Quashie
v
The King

[SVGHCRAP2019/0011]
(Saint Vincent and the Grenadines)

Date: Tuesday, 25th July 2023

Coram: The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. Jomo S. Thomas
Respondent: Ms. Rose-Ann Richardson

Issues:

Application to abandon grounds of appeal filed by the appellant and to substitute them with the grounds filed by counsel

Type of Order:

Oral decision

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The application to amend the grounds of appeal is granted.
2. Counsel for the appellant is allowed to proceed with the grounds of appeal as filed in the appellant's submissions by counsel for the appellant.
3. The grounds of appeal filed in the original notice of appeal are deemed abandoned.
4. The appellant is to file an amended notice of appeal on or before 26th July 2023.

Reason:

The original grounds of appeal had been filed by the appellant without the assistance of counsel. There was no objection to the application and the Court allowed the appellant to amend the grounds of appeal by substituting the grounds originally filed by the appellant with the grounds filed by counsel for the appellant.

Case Name:

**Andy Quashie
v
The King**

**[SVGHCRA2019/0011]
(Saint Vincent and the Grenadines)**

Date:

Tuesday, 25th July 2023

Coram: The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. Jomo S. Thomas
Respondent: Ms. Rose-Ann Richardson

Issues:

Criminal appeal - Appeal against conviction and sentence - Murder – Section 159(1) of the Criminal Code - Possession of a firearm - Section 19(1)(a) of the Firearms Act - Whether the learned judge erred in allowing prejudicial hearsay evidence, thus making the trial manifestly unfair to the appellant - Whether the learned judge erred in law and misdirected himself by initially refusing and then failing to give an adequate Turnbull direction - Whether the learned judge erred in law and misdirected himself when he failed to give an accomplice direction

Type of Order: N/A

Result / Order: [Oral delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name: Granvil Defreitas
v
The Commissioner of Police
[SVGMCRAP2021/0013]
(Saint Vincent and the Grenadines)

Date: Tuesday, 25th July 2023

Coram: The Hon. Mde. Margaret Price-Findlay, Justice of

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

Appearances:

Appellant: Mr. Ronald Marks
Respondent: Ms. Rose-Ann Richardson

Issues:

Magisterial criminal appeal - Theft - Section 308 of the Criminal Code Act - Whether section 308 is unconstitutional - Reversed burden placed on accused - Whether matter ought to be referred to the high court - Whether appeal should be adjourned pending the outcome of the referral to the high court

Type of Order:

Adjournment

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED THAT:

- 1. The appeal is adjourned pending the determination of the constitutional question or issue to be referred by this Court to the high court for its determination.**
- 2. The question as to the constitutionality of section 308 of the Criminal Code of Saint Vincent and the Grenadines is to be referred and is hereby referred for determination by the high court including more specifically, whether section 308 offends against sections 8(2)(a) and 8(7) of the Constitution of Saint Vincent and the Grenadines.**
- 3. A copy of this order shall be served on the Registrar of the high court in Saint Vincent and the Grenadines.**

Reason:

In this matter, the appellant was charged and convicted with a single count under section 308 of the Criminal Code Chap. 171 of the revised laws of Saint Vincent and the Grenadines, 2009. The

appellant has appealed his conviction. The appellant, through his learned counsel has, in the appeal, raised for the first time, a question as to the constitutionality of section 308 of the Criminal Code and whether that provision offends against two sections of the Constitution of Saint Vincent and the Grenadines namely, section 8(2)(a) which states that every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty, and section 8(7) which states that a person who is tried for a criminal offence shall not be compelled to give evidence at the trial. The appellant has relied principally on two authorities. The first being the decision of this Court in *The Attorney General v Peter Hippolyte et al* SLUHCVAP2015/0019 (delivered 4th April 2016, unreported) and *The Commissioner of Police of the Virgin Islands Police Force et al v Rudolph Maduro* BVIHCVAP2009/0016 (delivered 7th February 2011, unreported) where a similar issue arose as to the constitutionality of provisions in those jurisdictions in respect of which certain offences were charged.

The respondent, in their written submissions, had conceded that the conviction of the appellant before the magistrate should be quashed as section 308 in its present state is unconstitutional. The respondent, however, goes on to submit that the issue as to the constitutionality of section 308 is a matter which, had it been raised before the learned magistrate, the magistrate would have been compelled to refer the constitutional question for determination by the high court pursuant to section 97(1) of the Constitution of Saint Vincent and the Grenadines.

Counsel for the respondent has also referred this Court to section 227 of the Criminal Procedure Code Chap. 172 of the revised laws of Saint Vincent and the Grenadines 2009 which read as follows:

“The court may adjourn the hearing of the appeal, and may upon the hearing thereof confirm, reverse, vary or modify the decision of the magistrate’s court or remit the matter with the opinion of the court thereon to the magistrate’s court, or may make such order in the matter as it may think just, and may by

such order exercise any power which the magistrate's court might have exercised, and such order shall have the same effect and may be enforced in the same manner as if it had been made by the magistrate's court."

Having heard submissions on this issue by learned counsel for both sides, the Court was satisfied that the constitutional issue raised by the appellant in the appeal was a matter which ought properly to be referred by this Court for determination by the high court and that in doing so, this Court ought to adjourn the hearing of the appeal to await the outcome of that determination by the high court.

Case Name:

[1] Samuel David Samuel

[2] Osborne Hewitt

v

George Reynold Scotland

[SVGHCVAP2019/0023]

(Saint Vincent and the Grenadines)

Date:

Tuesday, 25th July 2023

Coram:

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

The Hon. Mr. Trevor Ward, Justice of Appeal

The Hon. Mr. Gerard St. C. Farara, Justice of Appeal

[Ag.]

Appearances:

Appellants:

Ms. Tonya Da Silva holding papers for Mr. Duane Daniel

Respondent:

Ms. Patricia Marks-Minors

Issues:

Civil appeal - Notice of appeal filed approximately 7 days out of time - Notice of appeal filed without an extension of time being sought or granted - Notice of appeal filed in 2019 - Notice of opposition filed in 2020 brought to the appellant's attention the fact of the notice of appeal being filed out of time - No

application for an extension of time filed for over 3 years since the filing of the notice of appeal and since notice given by the notice of opposition - Whether the notice of appeal should be struck out as a nullity

Type of Order:

Oral judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

The notice of appeal, having been filed out of time, is deemed a nullity and there is therefore no pending appeal before the Court.

Reason:

The notice of appeal was filed in 2019 some 7 days after the time stipulated within which the appeal ought to have been filed. As the appeal was a final appeal no leave was necessary to appeal but it was incumbent upon the appellants to seek and obtain an extension of time within which to appeal. This was not done. In 2020, the respondent filed a notice of opposition and brought it to the appellants' attention that the notice of appeal had been filed out of time. Despite this, no extension of time was sought or obtained by the appellants.

The appeal was scheduled for hearing on today's date and as a preliminary matter, the respondent raised the issue of the appeal being out of time. The Court noted that there was no application before it to extend the time nor was there affidavit evidence explaining and accounting for the delay in seeking the extension some 3 years after having been put on notice of the situation. In the circumstances, the Court deemed the notice of appeal a nullity, it having been filed out of time without an extension being sought or obtained.

Case Name:

[1] Metrocint General Insurance Company
Limited
[2] Samuel Deroche
v
Mercedes Delplesche

**[SVGHCVAP2019/0019]
(Saint Vincent and the Grenadines)**

Date: Tuesday, 25th July 2023

Coram: The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal
[Ag.]

Appearances:

Appellants: Ms. Tonya Da Silva for the 1st appellant
No appearance for the 2nd appellant

Respondent: Mr. Cecil A Blazer Williams

Issues: Civil Appeal - Motor Vehicle Accident - Assessment of Damages - Section 14(1)(h) of the Motor Vehicle Insurance (Third Party Risks) Act (“the Act”) - Whether the master misdirected himself in holding that section 14 of the Act invalidates the restrictions which the first appellant relied on in the insurance policy - Whether the learned master applied too broad an interpretation to section 14(1)(h) of the Act - Whether the Act creates exceptions to third party statutory rights which the 1st appellant can rely on to avoid liability to indemnify the 2nd appellant under the Act

Type of Order: N/A

Result / Order: [Oral delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name: Magavon Toby
v
Barrow Toby

**[SVGHCVAP2020/0005]
(Saint Vincent and the Grenadines)**

Date: Wednesday, 26th July 2023

Coram: The Hon. Dame Janice M. Pereira, DBE Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal
[Ag.]

Appearances:

Appellant:	Ms. Tonya Da Silva holding for Mr. Duane Daniel
Respondent:	Mr. Michael Wyllie

Issues: Application for adjournment

Type of Order: Adjournment

Result / Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:

1. The hearing of the appeal is adjourned to the next sitting of the Court for the State of Saint Vincent and the Grenadines during the week commencing 29th January 2024.
2. No order as to costs.

Reason: An application for an adjournment was made on behalf of counsel for the appellant, who was absent due to illness. The Court, upon hearing the application and noting that there was no objection to it by counsel for the respondent, granted the application. The matter was therefore adjourned, and the Court made no order as to costs.

Case Name:

**Michael Wyllie
v
[1] Magavon Toby**

[2] Dianetta Patrick

**[SVGHCVAP2019/0005]
(Saint Vincent and the Grenadines)**

Date: **Wednesday, 26th July 2023**

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

Appearances:

Appellant: **In person**

Respondents: **Ms. Tonya DaSilva holding for Mr. Duane Daniel for
the first respondent
Ms. Paula David for the second respondent**

Issues: **Application for an adjournment**

Type of Order: **Adjournment**

Result / Order: **[Oral delivery]**

IT IS HEREBY ORDERED THAT:

- 1. On the application of counsel for the 1st respondent who is ill and there being no objection by the appellant and counsel for the 2nd respondent, the hearing of the appeal is adjourned to the next sitting of the Court for the State of Saint Vincent and the Grenadines during the week commencing 29th January 2024.**
- 2. There shall be no order as to costs.**

Reason: **Counsel for the 1st respondent, Mr. Duane Daniel, was ill, and this was communicated both to the Court and to counsel for the other parties. There was no objection by the appellant, in person, or counsel for the 2nd respondent. The matter was therefore adjourned.**

Case Name:

**Daniel Delpesche
v
The Commissioner of Police**

**[SVGMCRAP2022/0005]
(Saint Vincent and the Grenadines)**

Date:

Wednesday, 26th July 2023

Coram:

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

Appearances:

Appellant: In person

Respondent: Ms. Rose-Ann Richardson

Issues:

Magisterial criminal appeal - Appeal against conviction and sentence - Possession of an unlicensed firearm - Section 4(3) of the Firearms Act - Whether the learned magistrate wrongfully excluded evidence - Whether the sentence of 5 years and 8 months was excessive

Type of Order:

Oral Judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal against conviction is dismissed and the appellant's conviction affirmed.**
- 2. The appeal against sentence is allowed and the sentence of 3 years and 6 months is substituted for the original sentence of 5 years and 8 months, with the 31 days spent on remand being credited to the substituted sentence.**

Reason:

The appellant, Mr. Daniel Delpesche, appealed against his conviction and sentence imposed by the learned magistrate in relation to the offence of possession of component parts of a firearm.

The Court considered his ground of appeal in relation to his conviction, that the magistrate excluded relevant evidence, and found no exclusion of evidence by the learned magistrate. Based on the evidence placed before her and the evidence given by the appellant, it was reasonable for her to reach the conclusion that the offence of possession of a firearm was made out. Accordingly, the Court found no basis to disturb that finding and the appellant's conviction was affirmed.

The learned magistrate sentenced the appellant to 5 years and 8 months' imprisonment in respect of the possession charge. Having heard the appellant's oral submissions as well as the submissions of counsel for the respondent, the Court was of the view that the learned magistrate made an error in the manner in which she constructed and computed the sentence.

The error was made mainly in relation to how she categorized the question of seriousness. The Court was satisfied that the offence merited category 1 in terms of consequence, but in relation to seriousness, none of the factors taken into account by the learned magistrate should have placed the offence in a higher category in terms of seriousness and would have fallen in the level C range. Therefore, the starting point should have been in the region of 3 years and 6 months, applying the sentencing guidelines. The Court concluded that the aggravating factor in relation to the offence considered by the learned magistrate, that the firearm was in the appellant's possession for a sustained period of time, ought not to be taken into account as it was not supported by the evidence.

The Court also concluded that the appellant's prior convictions were spent, the last one being in 2010, and so they ought not to be treated as an aggravating factor in relation to the offence or the offender. Accordingly, the scale from 3 years and 6 months

ought not to be adjusted upwards or downwards as no aggravating or mitigating factors are present. The Court therefore allowed the appeal against sentence and substituted the sentence of 3 years and 6 months for the sentence of 5 years and 8 months originally imposed by the magistrate. The Court also ordered that the 31 days spent on remand were to be credited to the appellant's substituted sentence of 3 years and 6 months.

Case Name:

**Arnol Dasent
v
The Commissioner of Police**

**[SVGMCRAP2020/0006]
(Saint Vincent and the Grenadines)**

Date:

Wednesday, 26th July 2023

Coram:

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

Appearances:

Appellant: In person

Respondent: Mrs. Maria Jackson-Richards

Issues:

Magisterial criminal appeal - Adjournment - Appellant requested an adjournment to obtain legal representation

Type of Order:

Adjournment

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED THAT:

The hearing of the appeal is adjourned at the request of the appellant to the next sitting of the Court for the

State of Saint Vincent and the Grenadines to commence during the week of 29th January 2024 at which time the appellant must be ready to prosecute his appeal.

Reason:

The appellant, appearing pro se, requested an adjournment to obtain counsel to represent him in the appeal. When asked by the Court why he did not take the necessary steps to obtain counsel within the 3 years and 4 months he had been out on bail, the appellant stated that he was unable to secure a permanent job until June 2023. Given the circumstances, the Court was of the view that the appellant should be granted 1 adjournment during which time he must make every effort to obtain counsel so that he has legal representation when the matter comes up for hearing during the week of 29th January 2024.

Case Name:

Cardel Jacobs
v
The Commissioner of Police
[SVGMCRAP2023/0007]
(Saint Vincent and the Grenadines)

Date:

Wednesday, 26th July 2023

Coram:

The Hon. Dame Janice M. Pereira, DBE Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal
[Ag.]

Appearances:

Appellant: **No appearance**
Respondent: **Ms. Renee Simmons**

Issues:

Magisterial Criminal appeal - Non appearance of appellant - Appellant's failure to prosecute appeal

Type of Order:

Oral judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

The appeal is dismissed for want of prosecution.

Reason:

The appellant was sentenced to two years' imprisonment and at the time of hearing the appeal, he had already served his time and he had been released on 15th April 2023. The appellant was served to be present at today's proceedings, but he was not present in Court. The Court was therefore satisfied that the appellant was aware of the proceedings and that he was served with the notice of hearing on 10th February 2023 and other attempts were made to bring the matter to his attention. The Court could thus infer that he was not interested in prosecuting his appeal. The Court therefore proceeded to dismiss the appeal for want of prosecution.

Case Name:

[1] Cauldric Chambers

[2] Alwakey Stapleton

V

The Commissioner of Police

[SVGMCRAP2019/0004]

(Saint Vincent and the Grenadines)

Date:

Wednesday, 26th July 2023

Coram:

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

Appearances:

Appellants:

Mr. Grant Connell

Respondent:

Mrs. Maria Jackson Richards

Issues:

Magisterial criminal appeal - Appeal against conviction - Whether conviction is unsafe and

unsatisfactory - Failure to make a no case submission - Whether the failure to make a no case submission amounted to a miscarriage of justice

Type of Order:

N/A

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name:

Linford George Robinson
V
The Commissioner of Police
[SVGMCRAP2023/0008]
(Saint Vincent and the Grenadines)

Date:

Wednesday, 26th July 2023

Coram:

The Hon. Dame Janice M. Pereira, DBE Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal
[Ag.]

Appearances:

Appellant: In person

Respondent: Mrs. Maria Jackson-Richards

Issues:

Magisterial criminal appeal - Appeal against sentence
- Section 14 (4) (a) of the Firearm Act of St. Vincent
and the Grenadines - Possession of a prohibited
weapon without the authorization of Minister

Type of Order:

Oral Judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The appeal against sentence is dismissed.
2. The sentence of 5 years imprisonment imposed by the magistrate for the offence of possession of a prohibited weapon and 2 years for possession of ammunition, both sentences to run concurrently is affirmed.

Reason:

This was an appeal according to the notice of appeal filed by the appellant dated 24th June 2021 against both conviction and sentence although the appellant had in fact pleaded guilty to the offence for which he was charged. At the oral hearing of the appeal, however, the appellant indicated to the Court that he intended to proceed only with his appeal against sentence. Despite this, in his submissions made in person, the appellant dealt principally with issues concerning his conviction. He placed significant emphasis on the fact that the gun did not belong to him and submitted that even though he was found in possession of the gun, it had just been thrust upon him by other persons.

The Court considered that the appellant pleaded guilty to the offence for which he was charged and was of the view that none of his submissions could in any event cause the Court to disturb the determination by the learned magistrate.

The appellant was sentenced to a term of imprisonment of 5 years with respect to the possession of a prohibited firearm and a sentence of 2 years in respect of ammunition for the said firearm; the sentences to run concurrently. Principally, the Court had to consider whether the sentence of 5 years imposed by the magistrate was an appropriate sentence. The Court considered the fact that the appellant pleaded guilty to the offence which entitled him to a one-third discount, his plea of guilty having been entered on the first opportunity. The Court also considered that the appellant has no previous convictions and that the maximum sentence of the offence is 10 years. The magistrate in looking at the starting point/notional sentence decided on a notional sentence of 7 ½ years. The Court was of the view that there was no basis to disturb the finding by

the Magistrate that the appropriate sentence was 5 years. It was well in keeping with the category of the offence which would provide for a range between 60-90% and the learned Magistrate having taken a percentage of 75% in arriving at the notional sentence, the Court found no fault with the determination. Having arrived at the notional sentence of 7½ years, the magistrate then discounted that sentence by a total of 1 ½ years. The Court noted that counsel for the prosecution found that that discount was generous and again found no basis to disturb the sentence imposed by the magistrate, whether by upward or downward movement.

In the circumstances, the Court was minded to dismiss the appeal and affirmed the sentence of 5 years imprisonment imposed by the magistrate for the offence of possession of a prohibited weapon and 2 years for possession of ammunition, the two sentences to run concurrently.

Case Name:

**Dexter Pope
v
The Commissioner of Police**

**[SVGMCRAP2022/0004]
(Saint Vincent and the Grenadines)**

Date:

Wednesday, 26th July 2023

Coram:

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

Appearances:

Appellant: In person

Respondent: Mr. Richie Maitland

Issues:

Magisterial criminal appeal - Appeal against conviction and sentence - Possession of firearm and ammunition - Whether the appellant was wrongfully

convicted - Whether there was a misdirection by the trial magistrate - Whether the police prosecutor mislead the court - Whether the sentence is excessive in all the circumstances

Type of Order:

Oral Judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal against conviction is dismissed and the conviction affirmed.**
- 2. The appeal against sentence is dismissed and the sentence affirmed.**

Reason:

This was an appeal by the appellant, Mr. Dexter Pope, in relation to his conviction and sentence imposed on him by the learned magistrate where he was found guilty on 27th September 2021, of the offences of possession of a firearm without a license for which he was sentenced to 3 years and 8 months, and possession of two rounds of nine-millimeter ammunition without a license. On the ammunition count the appellant was sentenced to 6 months and that sentence was set to run concurrently.

The appellant, being dissatisfied with his conviction and sentence, appealed. His grounds of appeal raised the question of whether or not the magistrate made an error in finding him guilty. He also raised the ground that his sentence was excessive and that it ought to be reduced.

His main argument in the challenge to his conviction was that he did not own the firearm, that he was not in possession of the bag in which the firearm was found and that he had no knowledge of the contents of the bag.

The Court reviewed the evidence that was before the magistrate and noted that it is not open to the Court of Appeal to simply substitute its view for the facts as found by the magistrate unless it can be said that there were no facts warranting her finding or that her

finding cannot be supported on the facts led and accepted by her during the conduct of the trial.

The Court was of the view that it was open to the learned magistrate to accept the version of events as set out by the prosecution and reject the evidence set out by the appellant, and to find him guilty of the offences. There was no basis to disturb that finding and accordingly the appeal against conviction was dismissed and the conviction affirmed.

In respect of the sentence, the appellant requested a reduction in sentence as he considered it excessive compared to other similar cases, which were not put before the Court. The Court reviewed the sentencing exercise carried out by the learned magistrate and was of the view that in arriving at the appropriate sentence in all of the circumstances, she did not commit an error in arriving at the sentence of 3 years and 8 months. She took into account the fact that the appellant had a prior conviction in relation to aggravating factors of the appellant, and she had regard to mitigating factors including his young age. There was no fault in the way that she approached the sentencing exercise and therefore the appeal against sentence was dismissed and the sentence affirmed.

Case Name:

**Ozem Olliver
v
The Commissioner of Police**

**[SVGMCRAP2022/0007]
(Saint Vincent and the Grenadines)**

Date:

Wednesday, 26th July 2023

Coram:

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

Appearances:

Appellant:

In person

Respondent: Mr. Cornelius Tittle

Issues: Magisterial criminal appeal - Appeal against sentence
- Unlawful possession of a firearm and ammunition -
Appellant's indication to not prosecute the appeal -
Appellant's withdrawal of the appeal

Type of Order: Oral judgment

Result / Order: IT IS HEREBY ORDERED THAT:

1. The appeal against sentence is withdrawn.
2. The sentence in respect of this appeal runs concurrent with the sentence imposed by the learned judge on 7th June 2022, that being the sentence of 9 years 10 months and 11 days.

Reason: On the withdrawal of the appeal, the Court was satisfied that the sentence imposed by the learned magistrate runs concurrent with the sentence imposed by the learned judge in his sentence made on 7th June 2022. The effect was that the two earlier sentences, that is, the suspended sentence that was activated and the earlier sentence of 3 years 7 months which was the sentence the subject of this appeal, those two run consecutive to each other but both those earlier sentences run concurrent to the sentence imposed by the learned judge of 9 years 10 months 11 days so that the total term of imprisonment in respect of the appellant would be 9 years 10 months and 11 days.

Case Name: [1] Canadian Bank Note Company Limited
[2] CBN St Lucia Inc.
v
[1] Cage St. Lucia Ltd.
[2] The National Lotteries Authority
[SLUHCVAP2023/0002]

(Saint Lucia)

Date: Thursday, 27th July 2023

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

Appearances:

Applicants: Ms. Renee St. Rose with Ms. Shari-Ann Walker and Ms. Marie-Ange Symmonds

Respondents: Mr. Garth Patterson KC and Mr. Dexter Theodore KC for the 1st respondent
Mr. Fidel Michel for the 2nd respondent

Issues: Application to adduce fresh evidence in an interlocutory appeal - Test in Ladd v Marshall - Whether the evidence to be adduced could not have been obtained with reasonable diligence for use at the trial - Whether evidence to be adduced would probably have an important influence on the result of the case - Whether evidence to be adduced is credible - Relaxation of Ladd v Marshall principles in interlocutory appeals - Whether in all circumstances it would further the overriding objective if the evidence were to be adduced

Type of Order: Oral decision

Result / Order: IT IS HEREBY ORDERED THAT:

The fresh evidence is admitted *de benne esse*.

Reason: The Court heard the oral submissions and read the written submissions of either party. Having considered these, the Court was of the opinion that the fresh evidence ought to be admitted *de benne esse*.

Case Name: [1] Canadian Bank Note Company Limited

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

[SLUHCVAP2023/0002]
(Saint Lucia)

Date: Thursday, 27th July 2023

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

Appearances:

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

Respondents: Mr. Garth Patterson, KC and Mr. Dexter Theodore, KC
for the 1st respondent
Mr. Fidel Michel for the 2nd respondent

Issues: Interlocutory appeal - Breach of contract - Trial judge's grant of interim injunction - Whether the learned judge erred when he failed to give any or sufficient consideration as to whether there was a serious issue to be tried as to whether the NLA breached any valid contract with CAGE and whether CBN had induced such breach of contract - Whether the learned judge failed to consider the 2004 CBN agreement and the 2010 CAGE Contract - Whether the judge erred when he failed to give consideration to the fact that the original 2004 CBN agreement authorized and permitted CBN to import and operate VLTs in Saint Lucia - Whether the learned judge failed to consider whether damages was an adequate remedy and erred in inferring irreparable harm - Whether the trial judge failed to consider whether CAGE and/or its counsel made material misrepresentations and failed to make full and frank disclosure of all material facts known to one or both of them when CAGE obtained the interim injunction ex parte - Whether the judge erred when he gave consideration to the CBN Proposal exhibited by

counsel for CAGE, Mr. Mark Maragh in an affidavit filed on the morning of the injunction - Whether the learned judge erred by continuing the interim injunction notwithstanding misrepresentations and non-disclosure of material facts - Whether the judge erred when he awarded costs against CBN even though it is well established that costs are to be reserved in an interim injunction - Whether the learned judge erred when he ordered that CBN be restrained from inducing or procuring an inducement of breach of contract and failed to give any or sufficient consideration to the issue - Whether the judge erred in the exercise of his discretion by continuing the injunction

Type of Order:

N/A

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED THAT:

1. The injunction granted by the learned judge remains in place until further order of the Court.
2. Judgment is reserved.

Case Name:

**Unicomer (Saint Vincent) Ltd
v
[1] Appeal Commissioners
[2] The Comptroller of Inland Revenue**

**[SVGHCVAP2021/0010]
(Saint Vincent and the Grenadines)**

Date:

Friday, 28th 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. Barrie Attzs and Mr. Mikhail Charles

Respondents: Mr. Geoffrey Grahame Bollers for 1st respondent
Ms. Tonya Da Silva holding papers for Mr. Duane Daniel for the second respondent

Issues: Civil appeal - Application for adjournment - Directions for the progress of the appeal

Type of Order: Directions

Result / Order: [Oral delivery]

IT IS HEREBY ORDERED THAT:

1. The application for the adjournment is granted.
2. The second respondent shall file and serve written submissions and authorities addressing the issues on appeal on or before 16th October 2023.
3. The first respondent shall file and serve written submissions and authorities (if necessary) on or before 31st October 2023.
4. The appellant shall file submissions in reply on or before 21st November 2023.
5. The hearing of the appeal is adjourned to the next sitting of the Court for the state of Saint Vincent and the Grenadines scheduled for the week commencing 29th January 2024.

Reason: Counsel for the 2nd respondent, Mr. Duane Daniel was ill, and Ms. Da Silva (holding on his behalf) thus requested an adjournment of the matter as per the application filed by the 2nd respondent on 27th July 2023. The application was not opposed by counsel for the appellant or counsel for the 1st respondent. However, counsel for the 1st respondent requested that the matter be listed earlier than the next sitting of the Court for the state of Saint Vincent in January 2024. The Court indicated that it would not be possible to determine whether or not the matter could be listed for an earlier sitting at this point. Consequently, counsel for the 1st respondent conceded that the matter be listed for the Saint Vincent sitting in January 2024.

The Court further noted the earlier indication by counsel Mr. Duane Daniel that he would not be filing submissions in the appeal despite his opposition to the appeal. The Court, however, was of the opinion that submissions ought to be filed in the matter. The adjournment was therefore granted and directions were given for the filing of submissions.