

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

TERRITORY OF THE VIRGIN ISLANDS
VIDEOCONFERENCE
MONDAY, 22nd – 26th MAY 2023

JUDGMENTS

Case Name:

Guy Eardley Joseph

V

**McDowall Broadcasting Corporation (MBC)
Limited**

**[SLUHCVAP2022/0008]
(Saint Lucia)**

Date:

Monday, 22nd May 2023

Coram:

**The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Prof. Eddy Ventose, Justice of Appeal [Ag.]**

Appearances:

Appellant: Ms. Candace Fletcher and Mr. Mark Maragh

Respondent: Mr. Kenroy Denver Justin

Issues:

Interlocutory appeal – Service – Rule 5.7 of the Civil Procedure Rules – Service of originating documents on a company – Whether service of the claim form on the receptionist of the respondent at its usual place of business constituted proper service – Rule 26.9 of the Civil Procedure Rules – Whether the court has the jurisdiction under CPR 26.9 to cure procedural irregularities in service - Whether the learned master erred in finding that the decision of Barton v Wright Hassall LLP was applicable to the instant case - Prescription – Whether the appellant's purported service on the respondent was sufficient to interrupt prescription – Interpretation Act – Whether the learned master erred in considering section 23 of the

Interpretation Act on the matter of who may be served since the provision is only of relevance where an Act is silent on the manner of service

Result/Order:

IT IS HEREBY ORDERED THAT:

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

Reason:

1. In ascertaining whether service of process has been validly effected, the court must examine CPR 5.7 and the Companies Act carefully with regard to service of documents, and not nit-pick in order to find technicalities which put litigants out of the doors of court. It is clear that for true justice to be done, the substantive matter must be allowed to come to the court. Courts are interested in hearing substantive matters and unless procedural breaches prove fatal to a claim, the court will use its powers to have matters heard. In this case, the appellant conducted a search at the Corporate Registry and found the respondent's registered address to be 'John Compton Highway, Castries, St. Lucia'. This address was ambiguous and without a more specific address, service of the claim on the registered office of the respondent proved difficult, if not impossible. The appellant therefore served the receptionist of the respondent at its place of business. Even though the service in this matter might have been considered procedurally irregular, it satisfied the purposes of service as it engaged the attention of the respondent who actively participated in the proceedings thereafter.

Hoddinott v Persimmon Homes (Wessex) Ltd [2007] EWCA Civ 1203 applied; Section 521 of the Companies Act Cap. 13:01, Revised Laws of Saint Lucia 2013 considered; Rule 5.7 of the Civil Procedure Rules 2000 considered.

2. Service of documents in civil proceedings is a procedural matter and as such if an error of procedure occurs, the court has the authority under CPR 26.9 to address and correct what may be considered

procedural errors. The court has the jurisdiction and the discretion to cure defects and irregularities depending on the circumstances of the particular case, and procedural irregularities are within the discretionary powers of the court to rectify, if the justice of the case requires that it be done to give effect to the overriding objective of the CPR. Service on the receptionist, and not an officer of the respondent, as contemplated by CPR 5.7(c) and section 521 of the Companies Act, did not render service of the claim a nullity. The words of both section 521 and CPR 5.7 are not mandatory. The court is entitled to treat the service as an irregularity especially when bearing in mind the purpose of service, which is to bring the documents to the attention of the respondent. The learned master therefore erred in finding that the provisions of the Companies Act did not allow him to invoke the inherent powers of CPR 26.9 to correct what was in effect an irregularity. Accordingly, he erred in finding that the claim had not been properly served and that the matter was prescribed.

Barbara Angela Reid v Melroc Investments Ltd T/A Access Cambio [2019] JMSC Civ 244 applied; Bupa Insurance Limited (Trading as Bupa Global) v Roger Hunter [2017] JMCA Civ 3 applied; Singh (Santosh Kumari) v Atombrook Ltd. (trading as Sterling Travel) [1989] 1 All ER 385 applied; Rule 26.9 of the Civil Procedure Rules 2000 applied; Section 521 of the Companies Act Cap. 13.01, Revised Laws of Saint Lucia 2013 considered; Rule 5.7 of the Civil Procedure Rules 2000 considered.

3. In *Barton v Wright Hassall LLP*, the court was being asked whether it ought to exercise its discretion to retrospectively validate service of a claim on the defendants, the appellant having served the claim by an alternate method, via email, without prior confirmation that the respondent's solicitors were willing to accept service by that method. In the instant case, there was a failure to adhere to the procedures set out in CPR 5.7 by the appellant. The appellant took all reasonable steps to locate the registered office of the respondent but was forced to utilize alternative methods of service when this proved impossible. Being unable to locate the registered office of the respondent, the appellant used the next best option, a place with a close connection, i.e, the respondent's place of business. Accordingly, the principles

pronounced in Barton have little or no applicability to the issues in the instant case and the learned master erred in relying on them.

Barton v Wright Hassall LLP [2018] 3 All ER 487 distinguished.

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

Section 23 of the Interpretation Act Cap. 1.06, Laws of Saint Lucia applied; Section 521 of the Companies Act Cap. 13.01, Revised Laws of Saint Lucia 2013 considered; Rule 5.7 of the Civil Procedure Rules 2000 considered.

Case Name:

[1] Cheryl Bertrand
[2] Shakira Francis
(by her next friend, Kara Maria Francois)

v

The Attorney General

[SLUHCVAP2021/0014]
(Saint Lucia)

Date:

Monday, 22nd May 2023

Coram for
delivery:

The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]
The Hon. Mr. Robert Levy, Justice of Appeal [Ag.]

Appearances:

Appellants:

Mr. Horace Fraser

Respondent:

Ms. Karen Bernard

Issues:

Civil appeal – Intestacy – Succession – Entitlement of children born out of wedlock to inherit from their deceased father’s estates on intestacy – Constitutional law – Fundamental rights and freedoms – Whether Article 579 of the Civil Code of Saint Lucia infringed sections 6, 10 and 13 of the Constitution of Saint Lucia – Standing to bring a constitutional claim for breach of fundamental rights and freedoms – Whether appellants had standing to bring a claim for breach of their fathers’ rights to freedom of expression and to protection from discrimination – Chose in action – Whether Article 579 deprived the appellants of the right of succession to property or interest in property to which their deceased fathers were entitled – Application to amend a statement of case after the first case management conference – Rule 20.1 of the Civil Procedure Rules 2000 – Whether the learned judge erred by refusing leave to the appellants to amend their statements of case

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal against the learned judge’s decision is dismissed and the judgment is wholly affirmed.**
- 2. The parties shall each bear their own costs of the appeal.**

Reasons:

- 1. After the first case management conference, a party may change its statement of case only with leave of the court. The guiding principle is that amendments ought to be made if essential to the resolution of the real question in controversy and where the justice of the case so requires. When considering an application to amend a statement of case, the court should have regard to all relevant factors including how promptly the application was made, the stage of the proceedings, the prejudice or advantage to parties if the application is granted or refused,**

whether the opposing party may be compensated in costs, the effect on the trial date and the administration of justice. Ultimately, the court should aim to achieve fairness to the parties and further the overriding objective.

Rule 20.1 of the Civil Procedure Rules 2000 applied; *George Allert (Administrator of the Estate of George Gordon Matheson, deceased) et al v Joshua Matheson* GDAHCVAP2014/0007 (delivered 24th November 2014, unreported) followed.

2. An examination of the trial judge's ruling reveals that she had regard to CPR 20 when considering the application to amend the statements of case. She considered the stage of the proceedings and the likely prejudice to the respondent. However, the judge's decision appeared to be predicated primarily on the fact that the application was not in writing. She therefore failed to have proper regard to other material considerations including the interest of justice, whether the respondent could have been compensated in costs, the impact granting the order would have had on the progress of the proceedings, the loss of judicial time and how it would impact the administration of justice. The judge further failed to consider that the application qua submission was made on the trial date or the procedure regarding how an amendment is formally effected. In so doing, the judge erred by failing to consider all the relative substantive and procedural factors and the application to amend the statements of case fell to be considered afresh by the Court of Appeal.

Rule 20.1 of the Civil Procedure Rules 2000 applied; *George Allert (Administrator of the Estate of George Gordon Matheson, deceased) et al v Joshua Matheson* GDAHCVAP2014/0007 (delivered 24th November 2014, unreported) followed; Paragraphs 2 and 3 of Practice Direction No. 5 of 2011 applied.

3. On the facts, no application was made to dispense with the need for a written application and no order was made dispensing with that requirement. Moreover, the appellants failed to present to the court or the opposing party a draft with the wording of the proposed changes to the statements of case. The fact is that the application was made at an advanced stage of the proceedings and the respondent would have been taken by surprise. Further, any order granting leave would have had to include consequential orders for the statements of case to be re-verified and re-filed and the corresponding changes to the evidence would have been necessary. This would have likely led to a deferral of the trial date. Whilst it was arguable that the respondent could have been compensated in costs, a preliminary assessment of the appellants' prospects of success if the amendments were permitted suggests that their intended allegation was likely to fail. Thus, the relevant procedural and substantive factors weighed heavily against the appellants and the Court found that it was in the interest of justice to deny the oral application for leave to amend the statements of case.
4. Section 16 of the Constitution confers a cause of action for breach of section 10 exclusively on the person who claims that his right to freedom of expression has been, is being or is likely to be infringed. Only such a person may maintain an action for breach of such rights in relation to himself. On the facts, neither appellant had the requisite legal standing to maintain a claim for breach of her father's constitutional right to freedom of expression by virtue of Article 579. Consequently, their contention that they were directly affected by reason of their inability to inherit from their fathers' estates on intestacy did not forge a connection between their fathers' enjoyment of their rights and any purported constitutional or other right of either appellant to inherit such property or interest in

the same. The judge therefore did not err in holding that the appellants had no legal standing to pursue a claim for infringement of their fathers' rights to freedom of expression and that those as well as the incidental claims therefore failed.

Section 16 of the Constitution of Saint Lucia Cap. 1.01 of the Revised Laws of Saint Lucia, 2020 applied.

5. The learned judge however, did not go on to consider the other aspects of the appellants' freedom of expression case, i.e. that the breach of those rights of their fathers directly affected their 'right of succession to property', to 'an interest in property' of their fathers, or their 'ability to inherit property forming part of their fathers' estates. With the appellants' freedom of expression claims having failed, so too would the claim for declaratory relief in relation to them. Thus, there being no breach of the fathers' rights to freedom of expression under section 10 of the Constitution, there was no corresponding breach of the appellants' right under section 6 not to be subjected to compulsory deprivation of property without adequate compensation. Moreover, even if the learned judge had considered the decision in *Vermeire v Belgium*, or granted leave to amend the appellants' statements of case as requested, this would not have changed the outcome, that Article 579 of the Constitution did not deprive the appellants of their right to succession to property or an interest in property to which their deceased fathers were entitled.

Vermeire v Belgium [1991] ECHR 12849/87 distinguished.

6. A chose in action is a term used to describe all rights of property which can only be claimed or enforced by action and not by taking physical possession. The appellants' use of the terminology 'right of succession to property or

interest in property to which [the] deceased father is so entitled' and 'right to succession of property or interest in property of [the] father' signified that the declaratory relief sought was not limited to 'an interest in property' but also extended to a 'right to succession of property' which qualified as a chose in action. In her ruling, the judge did not address her mind to the issue of whether the appellants made out their claim to choses in action and in so doing, she erred, and it fell to the Court of Appeal to make a determination on the issue.

Flat Point Development Limited v Mary Dooley ANUHCVP2015/0029 (delivered 13th March 2019, unreported) followed.

7. Section 6 of the Constitution prohibits the compulsory acquisition not only of physical tangible things such as land, but also trust, contractual and beneficial contingent rights, provided that they are capable of being owned or held in possession. A chose in action would fit into this description if it is capable of being owned. On the facts, the appellants had not identified any chose in action owned by them. Moreover, neither appellant alleged that the Crown had transferred the avowed chose in action to another person or that Article 579 had that effect. Consequently, neither appellant established that they had the requisite standing to pursue a claim for a breach of section 6 and they failed to prove that Article 579 had the effect of compulsory acquisition of any right of theirs to pursue a claim for an interest in their fathers' estates, being the choses in action to which they claimed ownership.
8. Constitutional provisions such as section 1 of the Constitution are introductory and prefatory in nature, are unenforceable and not justiciable. Notwithstanding, to the extent that they are declaratory of rights, regard is to be had to them in construing justiciable provisions in the

Constitution. On the facts, the learned judge examined section 1 and its import in relation to the appellants' contention that it was justiciable. Although a judge is not expected to expressly analyze every possible legal point that is a spin-off from the main issues in a case, the appellants' contention that the learned judge failed to have regard to the declarations in section 1 in construing section 13 was not borne out by the contents of the judgment.

Olivier and another v Buttigieg [1966] 2 ALL ER 459 considered; Matadeen v Pointu [1998] UKPC 9 considered; Jay Chandler v The State (No 2) [2022] UKPC 19 considered.

9. Section 13(4)(c) of the Constitution makes an exception for the enactment of laws which afford different treatment to individuals in matters pertaining to devolution of property on death. An examination of section 13(4) of the Constitution demonstrates that the clause 'reasonably justifiable in a democratic society' qualifies only paragraph (d). It has no applicability to paragraph (c). Construing paragraphs (c) and (d) as disjunctive, better accords with the practice within courts of Commonwealth common law jurisdictions, including this Court. The learned judge was therefore correct to conclude that it was not necessary for her to examine whether Article 579 was 'reasonably justifiable in a democratic society.' Consequently, she did not err when she held that section 13(4)(c) and (d) do not have to be read conjunctively but disjunctively, and that section 13(4)(c) permits the enactment of a discriminatory law in certain exceptional instances, including in relation to devolution of property on death, as happened with Article 579 of the Civil Code.

Magaya v Magaya [1999] 3 LRC 35 considered.

Case Name:

Peter Winston

v

Dianne Telemaque

**[DOMHCVAP2012/0017]
(COMMONWEALTH OF DOMINICA)**

Date: Thursday, 25th May 2023

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

Appearances:

Appellant: Ms. Zena Moore-Dyer

Respondent: In person

Issues: Civil Appeal – Personal Injury – Assessment of Damages – Special Damages – Whether the judge ought to have found the items which had been claimed as special damages to have been proved – Pain and Suffering and Loss of Amenities – Whether the judge erred in assessing damages for loss of amenities – Future Loss of Earnings – Whether the judge erred in assessing damages for future loss of earnings by failing to properly consider the medical report – Interest – Pre-Judgment Interest – Whether the judge erred in not awarding pre-judgment interest

Result/Order: IT IS HEREBY ORDERED THAT:

1. The appeal is allowed in part.
2. Interest at the rate of 2.5% per annum is awarded on the sums made payable as special damages and pre-trial loss of earnings from the date of the accident to the date of trial.
3. The award of \$40,000.00 made by the learned judge for general damages for pain, suffering and loss of amenities is set aside, and the amount awarded under that head of damages is increased to the sum of \$100,000.00. Interest at the rate of 5% per annum is awarded on that sum for the period from the date of service of the claim form to the date of trial.

4. Save as aforesaid the appeal stands dismissed.
5. The respondent shall pay to the appellant: (a) prescribed costs in the court below calculated on the award as varied on appeal and (b) costs on the appeal in a sum calculated as one-half of the prescribed costs in the court below.

Reason:

1. When resolving a claim for loss of amenities, the court examines the evidence with a view to determining the extent to which the claimant's quality of life has been diminished by the injuries sustained because of the relevant incident. The judge, having heard and evaluated the evidence, is well placed to assess the credibility of the evidence proffered. The appeal court will only reverse a trial judge's findings of fact, if it is satisfied that the trial judge was plainly wrong. A judgment should be looked at in the round, particularly where the outcome depends on the judge's assessment of the credibility of the respective witnesses. A judge should not be criticised for not mentioning every item of evidence.

Elliston v Glencore Services (UK) Ltd [2016] EWCA Civ 407 applied.

2. It is trite that an appellate court would not interfere with an award of general damages unless the award is based on some wrong principle of law, or where the amount awarded is so high or so low as to make it an entirely erroneous estimate of the damage suffered by the claimant. Upon review of decisions in which similar injuries to that sustained by the appellant had been compensated by awards ranging between \$95,000 to \$100,000 it is evident that the global sum of \$40,000 for pain, suffering and loss of amenities experienced by the appellant is so low as to justify interference by this Court.

Miriam Myers vs Dickenson Bay Hotel Management Ltd Dba Sandals Antigua ANUHCV2013/0231 (delivered 6th October 2016, unreported) applied; David Robin and another v Ulysses Auguste and others DOMHCV2003/0141 (delivered 25th November 2010, unreported) distinguished.

3. The fact that evidence was only disputed by way of cross examination does not necessarily mean that it

must be accepted as truthful, regardless of the judge's assessment of the credibility of the evidence before him. An appellate court should only upset findings of fact by a trial judge if it is satisfied that, on evidence the reliability of which it was for him to assess, he had plainly erred in reaching his conclusions of fact.

Industrial Chemical Co (Jamaica) Ltd v Ellis [1986] 35 WIR 303 applied.

4. The jurisdiction to award pre-judgment interest arises from the original jurisdiction of the Supreme Court as stated in section 7 of the various Supreme Court Acts. In the case of Dominica, the relevant provision is section 7 (1) of the Eastern Caribbean Supreme Court (Dominica) Act. Consequently, the High Court in Dominica has the power to award pre-judgment interest notwithstanding the absence of specific statutory provision empowering it to do so.

Section 7 (1) of the Eastern Caribbean Supreme Court (Dominica) Act Chapter 4:02 of the Revised Laws of Dominica applied; Martin Alphonso and others v Deodat Ramnath [1997] 56 WIR 183 considered; Steadroy Matthews v Garna O'Neal BVIHCVAP2015/0019 (delivered 16th January 2018, unreported) followed; Andrey Adamovsky et al v Andriy Malitskiy et al BVIHCMAP2014/0022 (delivered on 3rd February 2017, unreported) applied; The Attorney General of The Federation of St. Christopher And Nevis v SKN Choice Times Limited SKBHCVAP2019/0045 (delivered 27th May 2022, unreported) followed.

ORAL JUDGMENT

Case Name:

**[1] Avagay Hervelyn Cummings
(Acting on behalf of and by virtue of a
Power of Attorney duly given by
Christine Evans and suing in her capacity
as personal representative of the Estate
of the late Lashauna Sheleta Bridgen also
called Lashauna Sheleta Blidgen also
called Lashauna Shelet Bridgen)**

[2] Chafray Chafral Bridgen (Suing in his capacity as personal representative of the estate of the late Lashauna Sheleta Bridgen also called Lashauna Sheleta Blidgen also called Lashauna Shelet Bridgen)

V

Diondre Samuel

**[ANUHCVP2023/0004]
(ANTIGUA AND BARBUDA)**

Date:	Friday, 26th May 2023
Coram for delivery judgment:	The Hon. Mde. Vicki Ann Ellis, Justice of Appeal The Hon. Mr. Paul Webster, Justice of Appeal [Ag.] The Hon. Prof. Eddy Ventose, Justice of Appeal [Ag.]
Appearances:	
Appellants:	Ms. Ruth-Ann Richards-Simpson and Ms. Christelle Wilson
Respondent:	Mr. Wendel Alexander and Ms. Merrise McDougal
Issues:	Interlocutory appeal - Interim Payment - Delay in filing Challenge to findings of fact - Whether the learned judge erred in assessing the means and resources available to the respondent - Whether the learned Judge misdirected herself as to the criteria to be satisfied in establishing the liquidity of the respondent in relation to any prospective order to make payment - Whether the learned judge erred in point of law and fact by misdirecting herself in relation to the applicability of interim proceeding protocols as established by relevant case law to the instant facts before her - Whether learned judge misapplied the decision of Joseph Pinder v Trishell Wetherill - Whether learned judge failed to conduct a fair hearing
Result/Order:	IT IS HEREBY ORDERED THAT: i. The appeal is dismissed. ii. The judge's order refusing the application for interim payment is affirmed.

iii. There is no order as to costs.

Reason:

Before the Court is an interlocutory appeal filed on 21st March 2023 in which the appellants appeal against the judge's decision to dismiss their application for an urgent interim payment. That application was advanced in the context where the appellants have commenced legal proceedings against the respondent in negligence under the *Fatal Accidents Act Cap 166, Laws of Antigua and Barbuda* claiming, inter alia, that while driving his vehicle on 20th January 2022 he struck Lashauna Bridgen (the deceased) throwing her 100 feet from the point of impact and as a result of which she sustained serious injuries to the spine and pelvis and later died.

The application was considered over the course of several hearings and ultimately the judge determined that the application should be dismissed with no order as to costs.

Dissatisfied with this result, the appellants have appealed the judge's decision. Although the notice of appeal identified 7 grounds of appeal, they essentially target three aspects of the judge's reasoning and can be categorised into three main headings:

1. Grounds 1 and 6 – address the respondent's means and resources to make the interim payment. The appellants contend that the judge erred in point of fact when she ruled that the respondent did not have the means to make an interim payment. The appellants contend that the judge had the benefit of the respondent's affidavit of means (the "Affidavit of Means") and associated material which demonstrated that he was not impecunious at the time of the application; that he enjoyed disposable income well in excess of 2,000.00XCD per month and possessed assets valued at 17,000.00XCD.

2. Ground 2, 3, 4, and 5 – address the learned judge's findings as to whether the respondent was insured at the time of the accident. The appellants submit that the judge erred in point of fact when she found that the appellants' evidence was unclear as to the insurance status of the respondent and that the respondent had not provided his insurance status in his submissions or otherwise. Again, the appellants contended that the judge had the benefit of closing submissions filed on behalf of the respondent in which it was categorically

stated that the respondent's motor vehicle was insured at the time of the accident; the respondent's amended defence in which at paragraph 2 of the amended defence, the respondent admitted that his motor vehicle was insured; the respondent's sworn evidence in his Affidavit of Means which records car insurance as an expense; the appellants' uncontested averments that the respondent was insured as contained in paragraph 26 of the affidavit supporting the application; the appellants' uncontested averment (as contained in paragraph 21 of the affidavit supporting the application) that the respondent's insurance policy was with General Insurance Company, who had declined to settle the matter on the basis that they had received no instructions from the respondent to do so [but not an indication that the defendant was not an insured person with their company or an indication that they would not settle the matter if the relevant instructions were received]; and the Royal Police Force of Antigua and Barbuda Police Report in which it was stated that the respondent's vehicle was insured.

The appellants further contend that there was ample material from both parties which underscored the fact that the respondent was insured for the purposes of the claim. Indeed, it is reiterated that this point was not merely uncontested but served as one of the points of unanimity between the parties.

3. Ground 7 addresses the learned judge's finding on the salient issue of whether the appellants would obtain judgment against the respondent for a substantial sum if the matter went to trial. The appellant contends that the judge had within her purview sufficient material with which to arrive at a reasoned conclusion as to the respondent's liability. The appellant submitted that the judge had the benefit of the affidavit of Avagay Cummings (as sworn in support of the Urgent Interim Payment Application), the amended claim form, amended statement of claim, amended certificates of exhibits, the amended defence and counterclaim and the defence to the counterclaim. Noting the judge's reliance on *Joseph Pinder v Trishel Wetherill HCVAP 2011/041 (delivered on June 5, 2012, unreported)*, the appellants nevertheless contend that it was misapplied in this case in that the factual issues in this matter are not complicated and do not require cross-examination at this stage to facilitate an

assessment. In arriving at its judgment, the Court has considered:

- i. The appellants' notice and grounds of appeal.
- ii. The record of appeal.
- iii. The written submissions as well as the oral submissions with the authorities advanced by counsel on behalf of the appellants.

The Court did not have regard to the legal submissions filed on behalf of the respondent on 5th May 2023 and outside the time prescribed in the Civil Procedure Rules 2000 ("the CPR") and without the leave/permission of this Court. The Court also had regard to the conditions which must be satisfied before an interim payment can be ordered. CPR Part 17.6 provides as follows:

"Interim payments – conditions to be satisfied and matters to be taken into account

17.6(1) The court may make an order for an interim payment only if –

(a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;

(b) the claimant has obtained an order for an account to be taken as between the claimant and the defendant and for judgment for any amount certified due on taking the account;

(c) the claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money (including costs) to be assessed;

(d) (except where paragraph (3) applies), it is satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial amount of money or for costs; or

(e) the following conditions are satisfied –

(i) the claimant is seeking an order for possession of land (whether or not any other order is also being sought); and

(ii) the court is satisfied that, if the case went to trial, the defendant would be held liable (even if the claim for possession fails) to pay the claimant a sum of money for rent or for the defendant's use and occupation of the land while the claim for possession was pending.

(2) In addition, in a claim for personal injuries the court may make an order for the interim payment of damages only if the defendant is –

- (a) a person whose means and resources are such as to enable that person to make the interim payment;**
- (b) insured in respect of the claim; or**
- (c) a public authority.**

(3) In a claim for damages for personal injuries where there are two or more defendants, the court may make an order for the interim payment of damages against any defendant if–

- (a) it is satisfied that, if the claim went to trial, the claimant would obtain judgment for substantial damages against at least one of the defendants (even if the court has not yet determined which of them is liable); and**
- (b) paragraph (2) is satisfied in relation to each defendant.**

(4) The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.

5) The court must take into account –

- (a) contributory negligence (where applicable); and**
- (b) any relevant set-off or counterclaim.”**

In the application in the court below, the appellant sought an interim payment on the basis that if the claim went to trial, the appellants would obtain judgment against the respondent for a substantial amount of money. The appellant further contended that respondent is a person whose means and resources are such as to enable that person to make the interim payment and that he is insured in respect of the claim.

Having considered the evidence which was before the learned judge and having considered the submissions made by counsel for the appellant the court is satisfied that grounds 1 – 6 have been satisfactorily proved. Given the clear evidence before the judge, it is clear that she could not have concluded:

- 1. That the name of the insurance company was unidentified; or**
- 2. That the Defendant had not provided his insurance status.**

What is apparent is that the learned judge was concerned about the appellants’ evidence that the insurance company had informally advised that it has received no instructions from the respondent that

would enable them to honour any settlement requests. On that basis she concluded that the status of the respondent being insured in respect of the claim is unclear. This is not the correct approach. In *Buttar Construction Ltd v Arshdeep* [2021] EWCA Civ 1408 the English Court of appeal considering CPR Part 25.7 (1)(e)(ii)(a), (the equivalent of CPR Part 17.6) determined that that this provision requires that a defendant “is insured in respect of the claim”. It does not mean “indemnified” or “has the right to be indemnified”. Although the insurers in that case were said to be reserving their rights, the Court determined that by definition, during a period of reservation of rights, the policy remains extant. Since cover had not been declined and there was no evidence that the policies had been avoided or repudiated, the defendants remained insured until their insurance has been brought to an end.

This Court adopts this reasoning. In light of the overwhelming evidence before the judge she was therefore obliged to conclude that the respondent was in fact insured in respect of the matters arising in the claim.

Similarly, it is clear that, in arriving at the conclusion that the evidence does not demonstrate that the respondent has the means to make the interim payment (if necessary in installment payments under Part 17.5 (6)), the judge would have ignored the clear indication that the respondent has assets valued at \$17, 000.00 and disposable income in the sum of \$2000.00 per month.

In considering ground 7 however, a useful starting point is the dicta in *GKN Group v Revenue and Customs Commissioners* [2012] EWCA Civ 57 where at paragraphs [32]-[39] Aikens LJ (with whom Ward and Lewison LJJ agreed) gave guidance on the proper approach to be adopted by a court considering an application for interim payment:

“[33] [I]t is obvious that the claimant seeking the Interim Payment has the burden of satisfying the court that the necessary conditions have been fulfilled for it to consider exercising the power to grant an Interim Payment order. An Interim Payment order is one that is obtained in civil proceedings. Whatever conditions have to be satisfied must be to the usual standard of proof in civil proceedings unless there is an express indication in a statute or rule of court to the

contrary. Here there is none. Therefore the claimant has to satisfy the court that the requisite conditions have been fulfilled to the civil standard, which is upon the balance of probabilities. In the case of an application for an Interim Payment order under CPR Pt 25.7(1)(c), of course, the claimant has to satisfy the court on a balance of probabilities about an event that has not, in fact, occurred; that is, that if the claim went to trial, he would obtain judgment (and for a substantial amount of money).

...

[36] That leads on to the next and more important question: of what does the claimant have to satisfy the court? To which the answer is: that if the claim went to trial, the claimant would obtain judgment for a substantial amount of money from this defendant. Considering the wording without reference to any authority, it seems to me that the first thing the judge considering the Interim Payment application under paragraph (c) has to do is to put himself in the hypothetical position of being the trial judge and then pose the question: would I be satisfied (to the civil standard) on the material before me that this claimant would obtain judgment for a substantial amount of money from this defendant?

...

[38] The second point is what precisely is meant by the court being satisfied that, if the claim went to trial, the claimant “would obtain judgment for a substantial amount of money” ? ...The court has to be so satisfied on a balance of probabilities. The only difference between the exercise on the application for an Interim Payment and the actual trial is that the judge considering the application is looking at what would happen if there were to be a trial on the material he has before him, whereas a trial judge will have heard all the evidence that has been led at the trial, then will have decided what facts have been proved and so whether the claimant has, in fact, succeeded. ... The court must be satisfied (to the standard of a balance of probabilities) that the claimant would in fact succeed on his claim and that he would in fact obtain a substantial amount of money. It is not enough if the court were to be satisfied (to the standard of a balance of probabilities) that it was “likely” that the claimant would obtain judgment or that it was “likely” that he would obtain a substantial amount of money.

[39] Next there is the question of what is meant by “a substantial amount of money”. In my view that phrase means a substantial, as opposed to a negligible, amount of money. However, that judgment has to be made in the context of the total claim made. What is a substantial amount of money in a case where there is a comparatively small claim may not be a substantial amount when the claim is for a much larger claim. It may be that in very small claims an Applicant could never satisfy the court that, even if it obtained judgment, the amount of money it would obtain would be “substantial”. But that is not this case and each must be decided on its facts.”

Closer to home, in the case of *Joseph Pinder v Trishell Wetherill*, Pereira JA (as she then was) held:

“5. Taking into account the tenor of CPR 17.6 and the case of *Schott Kem Ltd. v Bentley and Others*, the principles guiding the exercise of the court’s discretion in such circumstances are clear. The court must be satisfied that the applicant would obtain judgment based on more than the making out of a *prima facie* case. Although evidence meeting the criminal standard of proof (beyond reasonable doubt) is not required, the burden, (on a balance of probabilities) is high.

6. Further, the *Schott Kem* case is also authority for the principle that the interim payment procedure is not suited to cases of serious disputes on issues of fact or of law. The version of events here are very much in conflict and gives rise to a situation which cannot be resolved in the absence of cross examination at a trial as to liability and then further, as to the degree of liability.”

What is clear is that the judge had to put herself in the hypothetical position of being the trial judge and then ask whether she was satisfied on the balance of probabilities that on the material before her, the appellants would obtain judgment for a substantial amount of money from the respondent.

In doing so, the judge is not expected to conduct a mini trial but the judge putting herself in that hypothetical position had to be conscious that not all the evidence that might be adduced at trial was available (e.g. in this case accident reconstruction evidence) and that such evidence as was available had not been fully tested through the trial process.

Although the judge in this appeal determined that there it was not disputed that the respondent collided with the deceased, she determined that the respondent "...advanced a notably difference version of how the accident occurred together with allegation of contributory negligence such that the factual state of affairs in the pleadings is at considerable variance which significantly affects the ability of the court to examine the Defendant's liability and what may ultimately be awarded as a quantum of damages."

Counsel for the claim has submitted that this conclusion was a fallacy because the judge had "within her purview sufficient material with which to arrive at a reasoned conclusion as to the liability of the Respondent and the likelihood of the Applicants obtaining judgment against him in the substantive matter (for a substantial sum)...".

It is clear from its wording that CPR Part 17.6 requires that a judge has to be satisfied that the claimant "would" in fact succeed and not merely that "it was likely" that he would succeed.

The judge was astute to follow the guidance in *Joseph Pinder v Trishell Wetherill*. It established sound principle in cases where the pleadings reveal serious disputes of fact or law. In the case before the judge, while it is clear that the respondent did strike the deceased with his vehicle ultimately resulting in her death, there is an irreconcilable divergence as to how the collision occurred, with each side pointing to the other's negligence. No expert evidence (accident reconstruction) has been advanced and no criminal liability established and determined. The judge would have been left with the conflicting recounts as to how the accident occurred and the allegations of contributory negligence set out in the respondent's defence and counterclaim.

In such a case, it is essential that the facts are analysed carefully, on the basis of the evidence that is before the Court at the interim stage. The respondent in this case contends that although he consumed a quantity of marijuana, he was not impaired. He further contends that he was not speeding and drove with due care and attention on the morning of the collision; that he took sufficient defensive measures to avoid a collision with the deceased, who was dressed in all dark clothing and who walked across the road from

east to west in the path of the oncoming vehicle driven by the defendant in a dangerous manner on the unlit highway.

Given all the circumstances of the case, while it could be said that it was likely that the respondent would find it difficult to resist primary liability and that the appellants would be successful, that is not the test for entitlement to interim payment relief. The judge must be satisfied on a balance of probabilities that the appellants would obtain judgment and that such judgment would be for a substantial sum of money. The learned judge was clearly not satisfied that the respondent's pleadings/ arguments were sufficiently weak to conclude that judgment was inevitable.

The judge is not alone in such analysis. In *Joseph Pinder v Trishell Wetherill* the master made an order for interim payment pursuant to CPR 17.6 (1) (d) in circumstances where there was no admission of liability and the versions of how the accident occurred were at considerable variance. The parties' affidavits conflicted on many matters ranging from how the accident occurred and the cause thereof to the conversations allegedly between the parties or witnesses for the parties. The issue of contributory negligence was also raised. On appeal, this Court held that the case was not one suitable for the application of the interim payment procedure and the learned master erred in principle in ordering interim payment in the circumstances and set aside the order of the master.

This decision has since been followed in *Adrien Mitchell v C.O. Williams Construction Ltd.* DOMHCV2012/0203 (delivered 11th March 2013, unreported) and *Ternion St Kitts Ltd v DDM Properties Limited* SKBHCV2020/0022 (delivered 27th October 2021, unreported).

In a recent case, *Stephen v Stephen* [2021] 10 WLUK 273 which was eerily similar to the facts in this appeal, Cotter J. in the English High Court considered whether the claimant was able to satisfy the requirements for an interim payment under rule 25.7(1)(c) of the English Civil Procedure Rules and ultimately determined that the defences raised prevented the claimant from being able to say not only that he was likely to win the case but, on the balance of probability, he would win it. The

application for interim payment was accordingly refused.

In that case the claim arose from a road traffic accident, and it is necessary in considering rule 25.7(1)(c) to address the circumstances of the accident, which are summarised as follows. At twilight, at around 9 pm on 13th August 2019, the defendant had been driving a tractor along a lane. Attached to the rear of the tractor was a seeding machine, which was wider than the tractor. The claimant and his wife were walking on the lane when they became aware of the approaching tractor. They attempted to get out of the way by stepping onto a verge adjacent to a hedge. The tractor passed, but the seeding machine struck them, causing injury. The claimant alleged that the defendant had driven too fast, failed to heed the position of him and his wife on the verge and failed to stop or slow down. Liability was denied. The defendant's defence was that he had kept a proper lookout for pedestrians on the lane, it was twilight, the lights on the tractor were on, he had not seen them prior to the accident, that the probable reason was that they had moved on to the verge and were obscured by vegetation and the hedge, they were not illuminated by the light on the tractor and/or they were wearing dark clothing. He maintained that he was driving at a reasonable speed and was correctly positioned in the middle of the lane. He conceded that he had driven past them and that the seeding machine with its greater width had collided with the claimant.

Ultimately, in any application for interim payment where liability is denied, there is often scope for different judges to take different views especially at an interim stage where the evidence has not been tested. However, an appellate court applying appropriate judicial restraint is not at liberty to interfere with a judge's ruling solely on the basis that it would have arrived at a different conclusion. The appellants have not shown that the judge's balancing of factors that weighed in favour or against the exercising of his discretion was either wrong in principle, included immaterial features, excluded material features, or reached a conclusion that was outside the generous ambit available to him. Instead, the complaint is about the conclusion that the learned judge reached. This is not sufficient to warrant the Court's interference.

It did not assist the appellant's case that contrary to CPR rule 17.5 (4) (c) the sworn evidence filed in support of the application did not state the appellant's assessment of the amount of damages or other monetary judgment that are likely to be awarded. This is particularly critical in a fatal accident claim in which contributory negligence is alleged, as that is likely to impact the amount of the final judgment. In these premises it is not surprising that the judge would conclude that she was unable to determine "what may ultimately be awarded as a quantum of damages." The judge therefore could not in any event be satisfied on the balance of probabilities that on the material before her that the appellants would obtain judgment for a substantial amount of money from the respondent.

The appellants were obliged to plead a proper case which they did not do and that should not be given a chance to fill the gaps. Further, the evidence as to how the accident happened and the issue of liability (including contributory negligence is heavily disputed and can only be resolved at trial. I would therefore dismiss the appeal on Ground 7.

In light of the appellant's failure to cross the threshold hurdle prescribed by CPR rule 17.6 (1) (d), the judge's findings in respect of the insurance and the means of the appellant would fall away and so notwithstanding the errors, the judge's ultimate disposal of the application was correct.

APPLICATION & APPEALS

Case Name:

Arman Oyekenov

V

[1] Tensigma Limited

[2] Julian Svirsky

[3] Denis Donin

[BVIHCMAP2021/0039]

(TERRITORY OF THE VIRGIN ISLANDS)

Date:

Monday, 22nd May 2023

Coram: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Prof. Eddy Ventose, Justice of Appeal [Ag.]

Appearances:

Applicant: Mr. Stephen Ryan

Respondents: Ms. Dancia Penn, KC with her Ms. Astra Penn for the second and third respondents
Mr. Andre McKenzie appearing on a watching brief for the receiver of Tensigma Limited

Issues: Application to withdraw appeal

Type of Order Oral decision

Result / Order: IT IS HEREBY ORDERED THAT:
1. The appeal is dismissed, having been withdrawn.
2. Costs to the second and third respondents to be assessed if not agreed within 21 days of the date of this order.

Reason: The Court considered that the appellant filed a notice of discontinuance of the appeal. There being no objection from the respondents, the matter was dismissed having been withdrawn.

Case Name: [1] Julian Svirsky
[2] Denis Donin

V

[1] Arman Oyekenov
[2] Tensigma Limited

[BVIHCMAP2021/0040]
(TERRITORY OF THE VIRGIN ISLANDS)

Date: Monday, 22nd May 2023

Coram:	The Hon. Mr. Mario Michel, Justice of Appeal The Hon. Mr. Paul Webster, Justice of Appeal [Ag.] The Hon. Prof. Eddy Ventose, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Ms. Dancia Penn, KC with her Ms. Astra Penn
Respondent:	Mr. Stephen Ryan for the first respondent Mr. Andre McKenzie appearing on a watching brief for the receiver of Tensigma Limited
Issues:	Commercial appeal - Company dissolved - Injunction granted against Company - Jurisdiction - Whether the learned judge had jurisdiction to make the November order continuing the injunction - Whether a good arguable case had been established - Whether injunction should have been granted when company had been dissolved and therefore did not own any property subject to the injunction - Risk of dissipation - Whether judge erred in finding that there was a risk of dissipation - Whether judge erred in finding that it was just and convenient to continue the injunction - Undertaking as to damages - Whether the judge erred in accepting the undertaking as to damages - Whether the judge erred in failing to have regard to relevant factors - Whether judge's decision to continue injunction plainly wrong
Type of Order	N/A
Result / Order:	IT IS HEREBY ORDERED THAT: Judgment is reserved.
Case Name:	[1] Julian Svirsky [2] Denis Donin V [1] Arman Oyekenov [2] Tensigma Limited [BVIHCMAP2021/0046] (TERRITORY OF THE VIRGIN ISLANDS)

Date:	Monday, 22nd May 2023
Coram:	The Hon. Mr. Mario Michel, Justice of Appeal The Hon. Mr. Paul Webster, Justice of Appeal [Ag.] The Hon. Prof. Eddy Ventose, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Ms. Dancia Penn, KC with her Ms. Astra Penn
Respondent:	Mr. Stephen Ryan for the first respondent Mr. Andre McKenzie appearing on a watching brief for the receiver of Tensigma Limited
Issues:	Commercial appeal - Injunction - Jurisdiction - Whether the decision of the learned judge was wrong in law and made without jurisdiction - Whether a good arguable case had been established - Whether injunction ought to have been granted when company had been dissolved and therefore did not own any property subject to the injunction - Whether the learned judge erred in considering the authority of Yuzu Hair v Selvathiravilm as authority to conclude that the jurisdiction existed to continue the injunction - Whether judge applied to correct test in deciding whether or not to grant the injunctive relief - Risk of dissipation - Whether judge erred in finding that there was a risk of dissipation - Whether judge erred in finding that it was just and convenient to continue the injunction - Undertaking as to damages - Whether the judge erred in accepting the undertaking as to damages - Whether the learned judge failed to take into account the interest of third parties - Whether the judge erred in failing to have regard to relevant factors - Whether the learned judge's decision was against the weight of the evidence - Whether the learned judge made and continued an order which is itself unclear and ambiguous - Whether judge's decision to continue injunction plainly wrong - Whether the learned judge failed to have any regard to the failure of the claimant to comply with his duty of full and frank disclosure
Type of Order	N/A
Result / Order:	IT IS HEREBY ORDERED THAT: Judgment is reserved.

Case Name:

**[1] Julian Svirsky
[2] Denis Donin**

V

**[1] Arman Oyekenov
[2] Tensigma Limited**

**[BVIHCMAP2022/0005]
(TERRITORY OF THE VIRGIN ISLANDS)**

Date:

Monday, 22nd May 2023

Coram:

**The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Prof. Eddy Ventose, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Ms. Dancia Penn, KC with her Ms. Astra Penn

Respondent:

**Mr. Stephen Ryan for the first respondent
Mr. Andre McKenzie appearing on a watching brief for
the receiver of Tensigma Limited**

Issues:

Commercial appeal - Recusal - Whether the learned judge erred and failed in law when he did not recuse himself - Whether the judge failed to distinguish between a case of actual bias and one of apparent bias and wrongly sought to justify his decision not to recuse himself by stating that he was not biased - Whether the judge failed to apply the correct test or, having applied the correct test, failed to reach the correct conclusion based on such application - Whether it is wrong in principle that, in circumstances where a judge wrongly failed to recuse himself, an order made by him thereafter should be allowed to stand

Type of Order

N/A

**Result /
Order:**

**IT IS HEREBY ORDERED THAT:
Judgment is reserved.**

Case Name:

BEC Limited

v

[1] A2

[2] A1

**[BVIHCMAP2022/0044]
(Territory of the Virgin Islands)**

Date:

Monday, 22nd May 2023

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]
The Hon. Mr. Robert Levy, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. Stewart Buckingham KC with him Ms. Olga Osadchaya and Mr. Peter Ferrer

Respondents:

Mr. Timothy de Swardt

Issues:

Commercial appeal - Appeal against refusal to set aside statutory demand - Whether the learned judge erred in finding that there was no bona fide substantial dispute as to whether the alleged debt was due or owing - Whether the learned judge erred by applying the wrong test to the question of whether the alleged debt asserted in the demand amounts to vindication of foreign revenue law - Whether the learned judge wrongly concluded that because the alleged debt arose out of a dispute between three private companies regarding the liability to reimburse each other for a Chinese tax liability that had been settled with the relevant authorities years prior, this did not amount to vindication of foreign tax liability - Whether the learned judge erred by failing to make any determination on the respondents' fourth ground for seeking to oppose the set aside application, namely that recognition of foreign revenue law is permitted as long as there is no question of enforcement - Whether the learned judge erred by failing to properly consider the appellant's argument that if the principal is unenforceable on public policy grounds, awards, like costs, which are parasitic to the principal claim should also be unenforceable - Whether the learned judge

erred by failing to properly consider the jurisdiction issue identified by the appellant arising out of the fact that BECB was not a party to the arbitration agreement, but agreed to join the arbitration proceedings for the limited purposes of bringing a claim but not for the purposes of defending the separate claim made against it – New argument raised on appeal – Whether A2/A1 coerced or otherwise became agent or nominee of Tax Authority – Not argued below – Whether allowable on appeal- Oral application for permission at end of presenting arguments

Type of
Order:

N/A

Result /
Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name:

**Goldin Investments Intermediary Limited
v
China Citic Bank International Limited**

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

Date:

Tuesday, 23rd May 2023

Coram:

The Hon. Mde. Vicki Ann Ellis, 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. Paul McGrath KC with him Ms. Sara Latham

Respondent:

Mr. John McCarroll, Mr. Romane Duncan and Ms. Tamika Calme

Issues:

Interlocutory Appeal - Statutory Demand – Judge’s refusal to set aside statutory demand –Whether judge

erred in applying test for ‘substantial dispute’ – Sparkasse Bergenz Bank AG v In the Matter of Associated Capital Corporation BVIHCVAP2002/0010 (delivered 18th June 2003, unreported) - Construction of Deed of Assignment - Whether judge erred in finding that GILL’s defence, based on the proper construction of the deed of assignment in the context of the other relevant agreements, did not give rise to a ‘substantial’ defence - Whether defence rises above threshold of not being frivolous so as to amount to a substantial dispute under section 157(1)(a) of the Insolvency Act, 2003 - Contractual interpretation of Deed of Assignment - Whether Hong Kong law should be used to construe clause 2 of the Deed of Assignment

Type of
Order:

N/A

Result /
Order:

IT IS HEREBY ORDERED THAT:
Judgment is reserved.

Case Name:

**Villa Cornucopia Ltd
v
Esther Developments Limited**
[BVIHCVAP2023/0001]
(Territory of the Virgin Islands)

Date:

Tuesday, 23rd May 2023

Coram:

The Hon. Mde. Vicki Ann Ellis, 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. Tom Roscoe and Mr. Simon Hall

Respondent:

Mr. John Carrington KC with him Ms. Reisa Singh

Issues:

Interlocutory appeal – Interlocutory injunction –
Enforcement of negative/restrictive covenant –
Applicable legal principles – Whether there is a

presumption in favour of the grant of injunction to enforce negative of restrictive covenants on interim basis – Whether American Cyanamid Co v Ethicon Limited [1975] AC 396 applies — Whether judge erred in finding that damages would not be an adequate remedy because of a potential change in the character of the neighbourhood – Whether the judge applied the correct approach in determining balance of convenience – Adequacy of the claimant's undertaking in damages

Type of Order

N/A

Result /
Order:

IT IS HEREBY ORDERED THAT:
Judgment is reserved.

Case Name:

Xin Gang Power Investments Limited

v

Kenworth Industrial Limited

**[BVIHCMAP2022/0067]
(TERRITORY OF THE VIRGIN ISLANDS)**

Date:

Tuesday, 23rd May 2023

Coram:

The Hon. Dame Janice M. Pereira DBE, Chief Justice
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]
The Hon. Mr. Robert Levy, Justice of Appeal [Ag.]

Appearances:

Appellant:

Mr. Stephen Houseman, KC

Respondent:

Mr. Alex Hall Taylor, KC

Issues:

Interlocutory appeal - Appeal against dismissal of application for a stay of a liquidation application - Jurisdiction - Section 168 of Insolvency Act 2003 - Whether the Court of Appeal has the jurisdiction to hear the appeal where section 168 of the Insolvency

Act has had the prior effect of dismissing the liquidation application

Type of
Order:

Oral judgment

Result /
Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.
2. No order as to costs on the appeal.

Reason:

The Court was of the view that the appeal ought to be dismissed as the substratum of the appeal came to an end by operation of law to wit: section 168 of the *Insolvency Act 2003 Laws of the Virgin Islands*, before those very issues, being the subject of the appeal, were heard and determined. The Court considered that it was not appropriate in the circumstances of this case for the Court to proceed with the hearing of an appeal which has been rendered academic. Accordingly, the appeal was dismissed.

As it related to costs, the Court considered the arguments placed before it by counsel on both sides. Having heard those arguments, the Court was of the view that the proper order was that there be no order as to costs of the appeal.

Case Name:

Emmerson International Corporation

V

Renova Holding Limited

[BVIHCMAP2019/0001]
(TERRITORY OF THE VIRGIN ISLANDS)

Date:

Wednesday, 24th May 2023

Coram:	The Hon. Mde. Vicki Ann Ellis, Justice of Appeal The Hon. Mr. Paul Webster, Justice of Appeal [Ag.] The Hon. Prof. Eddy Ventose, Justice of Appeal [Ag.]
Appearances:	
Applicant:	Mr. Robert Weekes KC with him Mr. Iain Tucker and Mr. Daniel Burgess
Respondent:	Ms. Arabella di Iorio and Ms. Jodi-Ann Stephenson
Issues:	Application for leave to appeal to His Majesty in Council - Whether Court of Appeal ("CA") erred in holding that the decision whether to impose a confidentiality club is a 'discretionary case management decision' - Whether CA erred in its approach to confidentiality clubs in respect of asset disclosure provided pursuant to freezing injunctions - Section 3(2)(a) of the Virgin Islands (Appeal to Privy Council) Order 1967 - Whether appeal involves a question of great general or public importance or otherwise
Type of Order	N/A
Result / Order:	IT IS HEREBY ORDERED THAT: Judgment is reserved.
Case Name:	Emmerson International Corporation V [1] Viktor Vekselberg [2] Renova Holding Limited [3] Berdwick Holding Limited [4] Tiwel Holding AG [BVIHCMAP2019/0020]

(TERRITORY OF THE VIRGIN ISLANDS)

Date: Wednesday, 24th May 2023

Coram: The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Prof. Eddy Ventose, Justice of Appeal [Ag.]

Appearances:

Applicant: Mr. Robert Weekes KC with him Mr. Iain Tucker and Mr. Daniel Burgess

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

Issues: Application for leave to appeal to the Privy Council - Section 3(2)(a) of the Virgin Islands (Appeals to the Privy Council) Order 1967 - Whether the intended appeal involves a question, which by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council - Application for a continuation of a stay on the discharge of freezing orders - Whether the applicant's appeal to the Privy Council would be rendered nugatory if the stay is not continued

Type of Order N/A

Result / Order: IT IS HEREBY ORDERED THAT:

1. Judgment with respect to the Leave to Appeal Application and the Further Stay Application and consequential costs is reserved.
2. The Stay shall be extended until the handing down of the judgment on the Leave to Appeal Application and the Further Stay Application.
3. The Freezing Orders shall therefore continue in full force and effect until the handing down of the said judgment by the Court of Appeal.

Case Name: [1] Avagay Hervelyn Cummings

(Acting on behalf of and by virtue of a Power of Attorney duly given by Christine Evans and suing in her capacity as personal representative of the Estate of the late Lashauna Sheleta Bridgen also called Lashauna Sheleta Blidgen also called Lashauna Shelet Bridgen)

[2] Chafray Chafral Bridgen (Suing in his capacity as personal representative of the estate of the late Lashauna Sheleta Bridgen also called Lashauna Sheleta Blidgen also called Lashauna Shelet Bridgen)

V

Diondre Samuel

**[ANUHCVP2023/0004]
(ANTIGUA AND BARBUDA)**

Date: Wednesday, 24th May 2023

Coram: The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Prof. Eddy Ventose, Justice of Appeal [Ag.]

Appearances:

Appellants: Ms. Ruth-Ann Richards Simpson and Ms. Christelle Wilson

Respondent: Ms. Merrise Mc Dougal holding for Mr. Wendell Alexander

Issues: Interlocutory appeal - Interim Payment - Delay in filing
Challenge to findings of fact - Whether the learned judge erred in assessing the means and resources available to the respondent - Whether the learned Judge misdirected herself as to the criteria to be satisfied in establishing the liquidity of the respondent in relation to any prospective order to make payment - Whether the learned judge erred in point of law and fact by misdirecting herself in relation to the applicability of interim proceeding protocols as established by relevant case law to the instant facts

before her - Whether learned judge misapplied the decision of Joseph Pinder v Trishell Wetherill - Whether learned judge failed to conduct a fair hearing

Type of Order

N/A

Result /
Order:

IT IS HEREBY ORDERED THAT:

1. The respondent's legal submissions filed on 5th May 2023 outside the time prescribed and without the leave of the court are struck.
2. Judgment is reserved.
3. Judgment will be delivered on 26th May 2023.

Case Name:

Andrey Titarenko

v

[1] Messrs. Forbes Hare (a partnership)
[2] Robert Nader
[3] Emmerson International Corp.

[BVIHCMAP2022/0035]
(Territory of the Virgin Islands)

Date:

Thursday, 25th May 2023

Coram:

The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mr. Eddy Ventose, Justice of Appeal [Ag.]

Appearances:

Appellant:

In person

Respondents:

Mr. Robert Nader and Mr. Ben Giblin for the 3rd respondent

Issues:

Application to hear proceedings in camera -
Application for recusal

Type of
Order:

Oral decision with written reasons to follow

**Result /
Order:**

IT IS HEREBY ORDERED THAT:

- 1. The application for the proceedings to be heard in camera is granted.**
- 2. The application for the recusal of Ward JA is refused.**

Case Name:

Andrey Titarenko

v

**[1] Messrs. Forbes Hare (a partnership)
[2] Robert Nader
[3] Emmerson International Corp.**

**[BVIHCMAP2022/0035]
(Territory of the Virgin Islands)**

Date:

Thursday, 25th May 2023

Coram:

**The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mr. Eddy Ventose, Justice of Appeal [Ag.]**

Appearances:

Appellant: In person

Respondents: Mr. Robert Nader and Mr. Ben Giblin for the 3rd respondent

Issues:

Application for joinder - Whether the notice of joinder is in fact an application to join the persons named in it as parties to the appeal - Whether the notice of joinder should be struck out - Application to revoke or vary order of a single judge - Whether the single judge erred in striking out the appeal against Forbes Hare - Whether the Court should vary the date and method of payment of security for costs - Whether the single judge made an accidental slip in ordering that the appeal be struck out if security for costs was not provided

Type of Order:	N/A
Result/Order:	IT IS HEREBY ORDERED THAT: Decision is reserved.
Case Name:	Malcolm Maduro [dba Sunshine Power Boat Rental] v Department of Customs [BVIHCVAP2022/0001] (Territory of the Virgin Islands)
Date:	Thursday, 25 th May 2023
Coram:	The Hon. Mr. Trevor Ward, Justice of Appeal The Hon. Mr. Paul Webster, Justice of Appeal [Ag.] The Hon. Mr. Eddy Ventose, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Ms. Mandy Harnarinesingh
Respondent:	Ms. Nicosie Dummett and Ms. Abayna Devonish
Issues:	Application to amend counter-notice of appeal - Court's jurisdiction to amend a counter notice of appeal- Whether there are exceptional circumstances why the Court should set aside the default judgment - Application to strike out notice of opposition - Rule 62.10 of the Civil Procedure Rules 2000 - Failure to file notice of opposition within stipulated time
Type of Order:	Oral Decision
Result / Order:	IT IS HEREBY ORDERED THAT:

1. The application to amend the counter-notice of appeal is dismissed.
2. Costs to the appellant, to be assessed if not agreed within 28 days.

Reason:

The underlying proceedings in this matter concern an appeal by the appellant Mr. Malcolm Maduro against an order of the learned master setting aside the default judgment which he had previously obtained. The appellant filed his notice of appeal and the respondent filed a counter notice of appeal. Some four months after the filing of the counter notice of appeal, the respondent applied to amend it.

The Court firstly noted that it is seised of jurisdiction to amend a counter notice of appeal filed in the context of an interlocutory appeal. The Court also noted that the proposed amendments did not raise any new points. All the issues raised in the proposed amendments were raised in the proceedings before the master. The Court highlighted that the new points must go to show whether there are exceptional circumstances why the Court should set aside the default judgment or whether there were procedural irregularities in the entering of the default judgment.

The Court heard the oral submissions of counsel, reviewed the material before the Court and was constrained to dismiss the application to amend the counter notice of appeal. In doing so, the Court noted the delay of four months after the filing of the counter notice, in the filing of the application to amend. The Court also viewed the delay against the fact that interlocutory appeals which are meant to be dealt with speedily.

The Court also looked at the proposed new grounds in the counter notice of appeal and was not satisfied that any of them rise to the level of what has been described by the courts as a “knockout” point. To reach the level of showing exceptional circumstances, the point must not be merely arguable, but it must be a knockout point. The Court was not satisfied that the points raised by the respondent reached the required threshold. In the circumstances of the length of the delay, and the absence of a good reason for the delay, the Court was constrained to dismiss the application for an amendment of the counter notice of appeal.

Case Name:

**Malcolm Maduro
[dba Sunshine Power Boat Rental]**

v

Department of Customs

**[BVIHCVAP2022/0001]
(Territory of the Virgin Islands)**

Date:

Thursday, 25th May 2023

Coram:

**The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mr. Eddy Ventose, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Ms. Mandy Harnarinesingh

Respondent:

Mr. Renard Penn, SC with him Ms. Nicosie Dummett

Issues:

**Application to strike out the notice of opposition to the
interlocutory appeal - Application to rely on the written
submissions**

**Type of
Order:**

Oral decision

**Result /
Order:**

IT IS HEREBY ORDERED THAT:

- 1. The application to strike out the notice of opposition to the interlocutory appeal is dismissed.**
- 2. The application to rely on the written submissions filed in support of the amendment application is granted and the respondents are allowed to rely on the submissions only to the extent that it supports the unamended counter-notice of appeal.**
- 3. The parties shall bear their own costs.**

Reason:

The notice of interlocutory appeal was filed on 2nd May 2022 and on 12th May 2022, the respondent filed a counter-notice of appeal. The Civil Procedure Rules, 2000 require the respondent support the counter-notice of appeal with submissions within 14 days of service of notice of interlocutory appeal.

Five months after service the respondent applied to amend the counter notice of appeal and in support of that application, filed written submissions. The respondent prayed to the Court, by way of another application, to rely on those submissions in support of the counter-notice and in effect in opposition to the notice of appeal.

While the Court took serious note of the delays in the matter, it appreciated that it has the discretion to not hear from counsel for the respondent. In the interest of justice, it would allow the respondent's notice of opposition to the interlocutory appeal to stand as at the date filed notwithstanding the delay in filing. In respect of the submissions, the Court granted the respondent's application to rely on written submissions filed in support of the amendment application only to the extent that it supported the unamended counter-notice of appeal. The Court was also of the view that the parties should bear their own costs.

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Coram:

**The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mr. Eddy Ventose, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Ms. Mandy Harnarinesingh

Respondent:	Mr. Renard Penn, SC with him Ms. Nicosie Dummett
Issues:	Interlocutory appeal – Default judgment – Whether the learned master erred in law and acted in excess of his jurisdiction in setting aside the default judgment - Whether the relief granted on the default judgment was impermissible or irregular
Type of Order:	N/A
Result / Order:	IT IS HEREBY ORDERED THAT: Judgment is reserved.
Case Name:	[1] Fang Angkong [2] HWH Holdings Limited V Green Elite Limited (in liquidation) [BVIHCMAP2022/0013] (TERRITORY OF THE VIRGIN ISLANDS)
Date:	Thursday, 25th May 2023
Coram:	The Hon. Dame Janice M. Pereira, DBE Chief Justice The Hon. Mde. Esco Henry, Justice of Appeal [Ag.] The Hon. Mr. Robert Levy, Justice of Appeal [Ag.]
Appearances:	
Applicants:	Mr. John Carrington KC with him Ms. Reisa Singh
Respondent:	Mr. John Machell and Mr. Peter Ferrer and Mr. Christopher Pease
Issues:	Application for a stay of the motion for leave to appeal to the Privy Council - Whether the proposed appeal is devoid of merit and has no real prospect of succeeding - Whether the applicants' motion for leave to appeal to the Privy Council ought to be stayed as being an abuse

of process - Whether the Court of Appeal's inherent power to grant a stay would be inconsistent with Article 3(1)(a) of The Virgin Islands (Appeals to Privy Council) Order 1967 - Motion for conditional leave to appeal to the Privy Council - Article 3(1)(a) of The Virgin Islands (Appeals to Privy Council) Order 1967 - Whether the proposed appeal lies as of right to the Privy Council - Application for a stay of execution

Type of Order

Oral decision

Result /
Order:

IT IS HEREBY ORDERED THAT:

1. The amended conditions application is dismissed.
2. The respondent/applicant shall bear the costs to the appellants/respondents on the amended conditions application, to be assessed if not agreed within 21 days.
3. Conditional leave to His Majesty in Council is granted and costs will be costs in the appeal to His Majesty in Council. The parties are to present a draft order in those terms.
4. The application for a stay of execution is dismissed with costs to the respondent to be assessed unless agreed within 21 days.

Reason:

The Court was not persuaded that the conduct complained of in this case merited the Court exercising any inherent jurisdiction which it has to stay the motion for conditional leave, which is an appeal as of right pursuant to Article 3(1)(a) of The Virgin Islands (Appeals to Privy Council) Order 1967, Laws of the Virgin Islands. Accordingly, the Court dismissed the amended conditions application.

The Court was of the view that the applicants had satisfied the requirements under section 3(1)(a) of The Virgin Islands (Appeals to Privy Council) Order 1967, Laws of the Virgin Islands for a grant of conditional leave to appeal to His Majesty in Council as of right. Accordingly, leave to appeal to His Majesty in Council was so granted.

The Court, however, was not of the view that the applicants' had satisfied the requirements for a grant of a stay of execution of the judgment below.

Case Name:

Bernadette McKelly

v

Registrar of Lands

[BVIHCVAP2020/0007]

(TERRITORY OF THE VIRGIN ISLANDS)

Date:

Thursday, 25th May 2023

Coram:

**The Hon. Dame Janice M. Pereira, DBE Chief Justice
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]
The Hon. Mr. Robert Levy, Justice of Appeal [Ag.]**

Appearances:

Appellant:

In person

Respondent:

Mr. Renard Penn

Issues:

Civil appeal - Judicial review - Application to partition lands - Appellant's objection to partition application - Oral order made by Chief Registrar at hearing of application on 20th November 2013 - Oral order not reduced to writing, formalized or given to parties - Whether learned judge erred in holding that the Chief Registrar's order dated 20th November 2013 was legal - Final order made on 2nd December 2015 - Whether the learned judge erred by failing to grant a writ of certiorari quashing the final order - Whether the learned judge erred in finding the appellant's position to be equivocal - Compulsory partition - Whether the judge erred by considering the issue of compulsory partition when neither party gave evidence on the issue - Whether the learned judge failed to give proper consideration to the principles of judicial review - Whether relief sought on appeal concerned parties who were present in the lower court - Absence of parties present in the lower court

**Type of
Order:**

Adjournment

**Result /
Order:**

IT IS HEREBY ORDERED THAT:

1. The Court hereby directs that pursuant to Part 62.7 of the Civil Procedure Rules 2000 the appellant serves the following persons within 30 days: (1) Lorna Fraser, (2) Beverly Christopher-Fraser, (3) Ashdale Prince, (4) Althea Davis Prince, (5) First Caribbean International Bank, (6) Albato King with copies of the notice of appeal and all documents comprising the record of appeal and file an affidavit(s) in proof of service of the notice of appeal and the record of appeal on each of the persons listed in this order.
2. The hearing of the appeal is accordingly adjourned pending receipt of proof of service of the notice of appeal and record of appeal on the parties the Court has named.

Reason:

The Court was concerned that the relief sought by the appellant on the appeal would overturn the partition effected in the lower court and that those persons who had been parties to the proceedings in the lower court had not been joined on the appeal seemingly had no notice of the appeal. The Court therefore determined that in the interest of justice, the notice of appeal and record of appeal ought to be served on those parties and made directions accordingly.

Case Name:

**Terrance Abdulah Charles
v
The King
[BVIHCRA2022/0004]
(Territory of the Virgin Islands)**

Date:

Friday 26th May 2023

Coram:

**The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]
The Hon. Mr. Robert Levy, Justice of Appeal [Ag.]**

Appearances:

Applicant: In person

Respondent: Ms. Tiffany R. Scatliffe, The Director of Public Prosecutions

Issues: Application for a McKenzie friend - Application to revoke or vary order of single judge - Whether the Court of Appeal could hear an appeal against its own order - Whether learned judge failed to consider constitutional points raised by applicant

Type of Order: Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:
1. The application for a Mckenzie friend is granted.
2. The application to revoke the order of the single judge is dismissed.

Reason: The applicant was convicted of the offence of murder on 12th December 2011 and was sentenced on that same day to life imprisonment with the possibility of parole after 20 years. In 2013, the applicant appealed against his sentence and on the hearing of his appeal, in November 2014, he appeared in person with Mr. Warren Cassell as his Mckenzie friend. On 25th December 2014, the Court of Appeal dismissed his appeal and affirmed the sentence. On 8th September 2022, the applicant filed a notice of application with an affidavit and submissions in support for an extension of time to file a notice of appeal and that it be deemed properly filed, and for him to be granted bail pending appeal.

The application was heard by a single judge of the Court of Appeal on 14th December 2022, who dismissed the appeal. On 22nd December 2022, the applicant filed what he described as ‘a notice of appeal from the refusal of a single judge of his application, for leave to appeal, extension of time to give notice of appeal and bail pending appeal.’ In the notice, the applicant gave notice that he desired that the application for extension of time for the notice of

appeal to be deemed properly filed, and that bail pending appeal be considered and determined by the Full Court. On 18th May 2023, the applicant filed an application for Mr Warren Cassell to be appointed as his Mckenzie friend to assist him at the hearing of the matter. The Court heard and granted, the Mckenzie friend application and on the recall of the matter, the applicant appeared with his Mckenzie friend, Mr. Warren Cassell who assisted him in the presentation of his appeal.

Although the application to be heard was titled 'notice of appeal', the Court held that there could not in fact, be an appeal to this Court against an order of this Court. The notice of application which was filed on 8th September 2022, sought an extension of time to appeal, the deeming of a notice of appeal filed on the same 8th September 2022 properly filed and for bail pending appeal, was heard by a single judge of the Court on 14th December 2022 and was dismissed. The order of Webster JA [Ag.], who heard the application as a single judge of the Court of Appeal was an order of the Court of Appeal. Therefore, the Court ruled on that application and it could not hear an appeal against its own order. Since, however, the order was an order made by a single judge of the Court and not by the Full Court of three judges, the Court espoused that the Full Court may vary, discharge or revoke the order. The applicant upon inquiry informed the Court initially that he was seeking the discharge of the order of the single judge. He later informed the Court that he was seeking that the order be varied.

The applicant made submissions on why the Court should review and re-hear his application for an extension of time to file an appeal against his December 2011 conviction. The applicant argued essentially that, at the time that he had filed and pursued his appeal in November of 2014, he had not been advised of the constitutional arguments that were available to him. Upon being so advised, the applicant sought to make an application for an extension of time in order to pursue these new grounds, in particular that Section 150 of the Criminal Code 1997, provided for a mandatory life sentence which was unlawful and unconstitutional. The applicant therefore asked the Court to make a declaration in that regard. On that basis, the applicant also asked that his application be considered, given the alleged breach of his constitutional rights. The

applicant asked the Court to allow that consideration to override the significant delay in the making of his application. The Director of Public Prosecutions, (DPP) Ms. Scatliffe indicated that the prosecution would oppose the application and that Webster JA [Ag.], who considered the application, had reviewed all of the necessary factors that had been taken into consideration and all that needed properly to be considered on an application for extension of time and that the Court ought not to interfere with his order. In terms of the approach of this Court to applications to vary or discharge, or revoke orders of a single judge of the Court, the Chief Justice in Inna Gudavadze and others v Ivane Chkhartishvili [2017] ECSCJ No. 7 stated:

“The power of this Court on consideration of an application to revoke or vary the order of the single judge is a power of review in determining whether the single judge of the Court of Appeal may have erred in his conclusion. The Court will therefore look to the material and the nature of the application before the single judge and not any new material placed before the Court thereafter.”

In that case, the Court of Appeal held that “based on the application to the single judge and the material before him, it was quite within the exercise of his discretion to arrive at the conclusion that he did. There is no reason why this Court should upset this conclusion.”

In the instant matter, Webster JA [Ag.] specifically recited in his order, all of the facts and documents, which he considered in making his decision to refuse the application for extension of time, including very importantly, the fact that the applicant was seeking an extension of time to file an appeal in 2022 against a sentencing order made in 2011, and that moreover the applicant had already appealed against that very order, and the appeal was dismissed by the Court since November 2014. While the considerations raised by the applicant of an issue of constitutionality were open to the Court, the Court had regard to the fact that this was a sentence pronounced over 12 years ago and the fact that there had previously been an appeal against this sentence, which was determined 9 years ago.

The Court held that based on the application before the single judge and the material which was before him, the single judge did not err in his conclusion and that there was no reason to upset that conclusion. The Court unanimously concluded that there was no basis whatsoever for this Court to vary, discharge or revoke the order of Webster JA [Ag.]. The application was accordingly dismissed.

Case Name:

Werner Fuhrken Batista

v

Dietrich Fuhrken Batista

**[BVIHCVAP2022/0015]
(Territory of the Virgin Islands)**

Date:

Friday, 26th May 2023

Coram:

**The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]
The Hon. Mr. Robert Levy, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. Peter Ferrer

Respondent:

Mr. Jerry Samuel and Ms. Allana-J Joseph

Issues:

Interlocutory appeal - Appeal against refusal to grant probate on procedural grounds - Rule 67(1) of the Eastern Caribbean Supreme Court (Non-Contentious Probate and Administration of Estates) Rules 2017 - Whether the learned judge erred in finding that an application under rule 67(1) is required to be made to the Registrar - Whether the learned judge erred in finding that a high court judge does not have jurisdiction to determine an application made pursuant to rule 67(1) - Whether the learned judge erred in finding that it was improper and/or an abuse of process and/or otherwise inappropriate to continue with a rule 67(1) application - Whether the learned judge erred in refusing to consider the issue of who should be granted probate - Whether the learned judge erred in finding that the court's case management powers could not or should not be used to correct any procedural irregularities or perceived defects - Whether the learned judge erred in holding that the

appellant should pay the respondent's costs on an assessed basis, if not agreed

**Type of
Order:**

N/A

**Result /
Order:**

IT IS HEREBY ORDERED THAT:

- 1. Judgment is reserved.**
- 2. The parties are to file brief further written submissions with authorities within 14 days of the date of this order on the issue of the finding by the learned judge that it was improper and/or an abuse of process and or otherwise inappropriate for the appellant to have continued with the rule 67(1) application.**

Case Name:

Vladimir Niyazov

v

- 1. Messrs. Agon Litigation (a partnership)**
- 2. Arabella Di Iorio**
- 3. Michael J. Fay KC**

By way of this Application/Motion:

Vladimir Niyazov

v

- 1. Arabella Di Iorio**
- 2. Michael J. Fay KC**
- 3. [Agon Litigation (A Law Firm in the Virgin Islands)]**
- 4. [Shane Manus Quinn]**

**[BVIHCMAP2021/0038]
(TERRITORY OF THE VIRGIN ISLANDS)**

Date: Friday, 26th May 2023

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

Appearances:

Applicant: In person

Respondents: Mr. Paul Griffiths and Ms. Jodi-Ann Stephenson for Agon Litigation and Arabella Di Iorio
Mr. Michael Fay KC in person

Issues: Application to vary an order of the Court of Appeal - Application to vary the order of a single judge - Rules 26.9 and 42.7(4) of the Civil Procedure Rules 2000 - Whether the Court of Appeal made procedural errors in the recital of its order dated 4th October 2022 - Whether the Court of Appeal erred in law in having disregarded the applicant's submissions made on 11 May 2022 in writing and on 13 May 2022 orally that the single judge's order is a nullity as made outside the jurisdiction of a single judge - Functus Officio - Whether Court of Appeal can revisit its own order - Application for conditional leave to appeal to the Privy Council - Whether the Court of Appeal infringed or impaired the right of the applicant for a fair hearing under section 16(9) of the Constitution of the Virgin Islands by making a costs order on the papers - Whether the applicant has a right to know the identities of the members of a firm which is a party to proceedings - Whether the appeal involves a question which by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council - Parties joined without leave of court and without formal application - Whether 1st, 2nd and 4th respondents were improperly joined to application - Costs

Type of Order: Oral decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The parties Arabella Di Iorio, Michael J. Fay KC and Shane Manus Quinn, listed in the application filed on 25th October 2022 are struck

out as parties being improperly joined to the application filed 25th October 2022.

2. The respondent, Mr. Michael J. Fay KC, shall have his costs in the sum of \$5,000.00.
3. Consequent upon the orders of the Court, the application made by Mr. Michael J. Fay, KC on 20th February 2023 seeking security of costs falls away.
4. The application filed 25th October 2022 is dismissed.
5. Costs of the application to be assessed by a judge of the Commercial Court if not agreed within 21 days of the date of this order.

Reason:

The Court having heard Mr. Niyazov and being unpersuaded with his oral submissions and those submissions advanced on 16th May 2023, was of the view that it was proper to make an order that the 1st, 2nd and 4th respondents be removed as parties to the application, having been improperly joined by Mr. Niyazov without a formal application or leave of the Court. Consequently, the Court considered an application for costs made by Mr. Michael J Fay KC. Upon hearing the submissions of Mr. Fay KC and the limited submissions advanced by Mr. Niyazov, the Court determined that the general rule as to costs should apply, there being no basis for departure from the general rule under the rules governing costs and that Mr. Fay KC should have his costs consequent upon his improper joinder. Costs were assessed in the sum of \$5,000.00.

The Court considered the application filed on 25th October 2022 and the written and oral submissions of the applicant, Mr. Niyazov, and Mr. Griffith on behalf of Agon Litigation, the respondent to the application. The Court determined that the application should be dismissed in its entirety.

In relation to the first part of the application in which the applicant sought to have the Court revisit its decision, an order of the Court of 4th October 2022, relying on rule 26.9 of the Civil Procedure Rules 2000 and the inherent jurisdiction of the Court. This application is misconceived. The Court was satisfied that the common law doctrine of *functus officio* applied to the first part of the application. Accordingly,

the Court having reached a final decision in the matter, that decision cannot be revisited by the Court.

In relation to the second part of the application, i.e., for leave to appeal to the Judicial Committee of the Privy Council, the applicant contended that the issues raised in the intended appeal raised matters of general or public importance. Applying the relevant rule in the Virgin Islands (Appeals to the Privy Council) Order 1967, Laws of the Virgin Islands, considering the applicable principles in the well-known decisions of this Court, including *Renaissance Ventures Ltd et al v Comodo Holdings* BVIHCMAP2018/0005 & BVIHCMAP2018/0008 (delivered 8th October 2018, unreported) and *Pacific Wire v Texan Management* BVIHCVAP2006/0019 (delivered 15th October 2007, unreported) and those of the Privy Council, considering that none of the various grounds of appeal relied upon by the applicant met the test of great general or public importance requiring consideration by the Privy Council, that the grounds of appeal are in any event without any merit and, therefore, do not provide any basis upon which this Court ought otherwise to refer to refer the matter to the Privy Council, the application is for leave to appeal was dismissed.