

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

SAINT LUCIA
20th – 24th March 2023

JUDGMENTS

Case Name:

Harvey Zabusky

v

[1] Viscaya Armadora S.A.

[2] P.M.P. Anguilla Ltd

[3] Virgtel Limited

[BVIHCVAP2011/0070]

(Territory of the Virgin Islands)

Date:

Tuesday, 21st March 2023

**Coram for
Delivery:**

**The Hon. Dame Janice M. Pereira, DBE, Chief
Justice**

The Hon. Mde. Vicki Ann Ellis, Justice of Appeal

The Hon. Mr. Trevor Ward, Justice of Appeal

Appearances:

Appellant:

In person

Respondent:

**Mr. Paul Dennis KC with him Mrs. Nadine Whyte
Laing for the 1st and 2nd respondents**

Issues:

**Civil appeal – Appellate interference with finds of
fact made by trial judge – Whether learned judge
erred in finding that Virgtel Limited was the 85%
shareholder in Virgin Technologies Limited –
Whether learned judge erred in finding that Mr. van
Leeuwen was appointed as director of Virgtel and
Mr. Zabusky was not – Whether learned judge erred
in finding that Viscaya Armadora S.A. (Panama)
was the legal owner of 318,001 shares in Virgtel -**

Court's power to make declarations – Declarations by learned judge as to directors of Virgtel - Whether first and second respondents had a legal interest in the issue pertaining to the directors of Virgtel - Costs – Rule 64.6 of the Civil Procedure Rules 2000 – General rule that successful party entitled to costs – CPR 64.6(1) - Departure from general rule – CPR 64.6(2) - Whether learned judge erred by departing from the general rule as to costs by awarding 50% costs to first respondent

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal is dismissed.**
- 2. The orders of the judge below are affirmed.**
- 3. VA is awarded no more than two thirds of the 50% costs awarded below.**
- 4. The judgment shall not take effect until 28th March 2023.**

Reasons:

- 1. An appellate court would not interfere with the findings of fact by a trial judge unless compelled to do so, in that, the judge must have been plainly wrong. This applies not only to findings of primary facts, but also to the evaluation of those facts and inferences to be drawn from them. Where the judge reaches a conclusion on the primary facts, it is only in rare cases such as where that conclusion was: (i) unsupported by the evidence; (ii) based on a misunderstanding of the evidence; or (iii) a conclusion which no reasonable judge could have reached, that an appellate tribunal will interfere with it. The judge's finding that Virgtel was and remained the 85% shareholder in VTL was a finding of fact which would only be interfered with had the judge been plainly wrong. Despite Mr. Zabusky's contention that the finding was not essential to the judge's determination of the issues before him, it was open to the judge to make this finding since the issue of**

the composition of VTL's shareholding was a live issue during the proceedings as it arose on the pleadings and evidence was given on it at trial. The judge considered the oral and documentary evidence before him and properly reasoned how he arrived at that fact. It therefore cannot be said that he was plainly wrong to find that Virgtel was and remained the 85% shareholder in VTL.

Watt (or Thomas) v Thomas 1947 SC HL 45 applied; Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5 applied; McGraddie v McGraddie and another [2013] 1 WLR 2477 applied; Henderson v Foxworth Investments Limited [2014] UKSC 41 applied.

2. A declaration is a discretionary remedy and the court has power to make a declaration even where the party to which the declaration is being made in favour of has no cause of action. Provided the court is satisfied that the party before it has a legal interest within the law, the court can take cognizance of that interest. The judge had to deal with the issue pertaining to the directors of Virgtel. Whether Mr. Zabusky or Mr. van Leeuwen were directors was an issue. Based on the evidence before the judge, it was clear that VA and PMP Anguilla had an interest in that issue since VA was supposed to be registered as a member in Virgtel and PMP Anguilla was claiming to be the sole director of Virgtel. In the circumstances, it was open to the judge to make these declarations as both parties had sufficient interest in the issue of who were Virgtel's directors. The judge therefore did not err in this regard.
3. The learned judge's decision that Mr. van Leeuwen was appointed as a director of Virgtel and that Mr. Zabusky was not, were findings of fact which would only warrant appellate interference if the judge had been plainly wrong. Mr. Zabusky contended that the learned judge erred by failing to consider

his evidence but in his judgment, the judge clearly explained that Mr. Zabusky's evidence was not favoured and was instead rejected. On the facts, there was no evidence to support Mr. Zabusky's claim that he was ever appointed a director of Virgtel whereas Mr. van Leeuwen's appointment was supported by the evidence. In those circumstances, it cannot be said that the learned judge, having arrived at his findings based on the evidence before him, was plainly wrong.

Re Duomatic Limited [1969] 2 Ch 365 distinguished.

4. As to VP's legal title to the 318,001 shares in Virgtel, this was a finding of fact made by the trial judge, which would not be interfered with unless he was plainly wrong. The evidence before the judge was that WOL transferred its 300,001 shares to VP and BZ transferred 18,000 of its shares to VP so that by 25th January 2001, VP was the registered owner of 318,001 shares. Even though VP purported to transfer its shares to VA, the judge found that VA was never registered as the holder of Virgtel's shares. Having regard to the totality of the evidence before him, it was open to the learned judge to find that VP was the legal owner of the 318,001 shares and that it held these shares as nominee for VA even though VP was not a party to the proceedings, since the issue was raised by the parties on the pleadings. Despite Mr. Zabusky's arguments to the contrary, the judge found that his evidence was inconsistent with the pleadings and uncorroborated by documentary evidence. The learned judge therefore did not err in finding that VP was the legal owner of the 318,001 shares in Virgtel.
5. As per rule 64.6(1) of the Civil Procedure Rules 2000 ("CPR"), the general rule about costs is that the unsuccessful party pays the

costs of the successful party. However, the CPR affords the court a very wide discretion and the court may depart from the general rule. The court may order a successful party to pay all or part of the costs of an unsuccessful party or make no order as to costs under rule 64.6(2). Mr. Zabusky contended that as he was successful in the lower court, the judge erred in awarding 50% of the costs to VA. On the facts, the learned judge had regard to all the circumstances of the case including the conduct of the parties, the manner in which the parties pursued the matter and the amount of success the parties enjoyed on the issues in the case. Having regard to the totality of the evidence before him, it cannot be said that the judge erred in the exercise of his discretion in awarding 50% of the costs to VA or that he was plainly wrong to so do.

Rule 64.6 of the Civil Procedure Rules 2000 applied; *Rochamel Construction Limited v National Insurance Corporation* SLUHCVAP2003/0010 (delivered 24th November 2003, unreported) followed.

Case Name:

Palmavon J. Webster

v

**[1] Sea Island Realities Limited
[2] John O. Dyrud
(as a shareholder and director of Sea
Island Realities Limited)**

**[AXAHCVAP2021/0003]
(Anguilla)**

Date:

Wednesday 22nd March 2023

**Coram for
Delivery:**

The Hon. Mr. Mario Michel, Justice of Appeal

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

Appearances:

Appellant: Mrs. Tana'ania Small Davis

Respondent: No appearance of the first respondent
Ms. Jean Dyer for the second respondent

Issues:

Civil Appeal – Winding up proceedings – Application by shareholder to wind up company on just and equitable ground – Section 217 (1) (a) (ii) of the Companies Act of Anguilla– Arbitration Award – Whether the learned judge misunderstood and misinterpreted the Arbitration Award between the parties – Breakdown of trust and confidence – Quasi Partnership – Deadlock in management of company – Whether the learned judge erred in fact and/or law in finding that there is a functional deadlock of the parties – Whether the learned judge erred in finding that the substratum of SIRL was gone – Alternative remedies to a winding up order – Exercise of Judicial discretion – Whether learned judge erred in the exercise of his discretion – Approach of appellate court to evaluations of fact

Result/Order:

IT IS HEREBY ORDERED THAT:

The appeal is dismissed with costs of the appeal to be paid by the appellant to the second respondent. Such costs are to be assessed by a Judge or Master of the High Court if not agreed within 28 days of the date of this judgment.

Reasons:

- 1. The fact that the company is not presently carrying out the main activity for which it was originally incorporated is not determinative of whether it has lost its substratum. However, where the common intention and understanding of the parties, upon which they both agreed, to carry on the business is no longer possible and it can no longer serve the principal purpose for**

which it was agreed, the substratum will be frustrated.

Eric Duneau v Klimt Invest SA and others [2022] EWHC 596 (Ch) considered.

- 2. An examination of the Arbitral Award shows that the issue which the arbitrator had been called upon to resolve was whether and to what extent Mr. Dyrud had any liability for indebtedness incurred by the WDM partnership and secured by charges placed on the property of related entities such as WDM Limited or SIRL following his retirement. The arbitrator found that any liability that Mr. Dyrud might have had for any indebtedness of the partnership was proscribed by virtue of Clause 1.3 of the Partnership Withdrawal Agreement. Therefore, the submission made on behalf of the appellant that in arriving at his decision, the learned Judge had misinterpreted or had failed to properly consider the Arbitration Award is rejected.**
- 3. When determining whether or not a company could be characterised as a quasi-partnership company or whether a petitioner was or had become a quasi-partner, the court looks through the various legal entities used by the parties to structure their dealings, to the core elements of the underlying business relationship. One of the elements required is that there be an association formed or continued on the basis of a personal relationship, involving mutual confidence. It is the existence of a personal relationship with the necessary character of confidence that is the foundation for equitable obligations. In evaluating the evidence relied upon to demonstrate a personal relationship of mutual confidence, the court should focus on the substance, not the form, of the parties' relationship. SIRL was clearly a quasi-partnership company because it was an association continued on the basis of a personal relationship, involving mutual confidence or understanding. The learned judge did not err and was right in his determination that SIRL was**

and had been operated by the parties as a quasi-partnership company.

Lau v Chu [2020] 1 W.L.R. 4656 applied; Re Edwardian Group Limited [2018] EWHC 1715 applied; Croly v Good and others [2011] BCC 105 applied.

4. Functional deadlock occurs when because of the inability of members to cooperate, the company is unable to function at board or shareholder level. In assessing whether a quasi-partnership is deadlocked it is however permissible to consider not only matters concerning aspects of the business operations or assets of the company upon which the parties were already deadlocked, but specific disputes which were likely to arise between the parties relating to important aspects of the company's business or assets and which would likely result in deadlock. A deadlock however is not established merely because the relationship between quasi-partners has deteriorated to such an extent that they may well be unable to agree generally on matters which had not yet arisen and could not be specifically identified. In this case there was no claim that Mr. Dyrud has been excluded from participation in the management of SIRL or that Mr. Dyrud's quasi-partner has otherwise failed to observe equitable obligations owed to him. The learned judge therefore erred when he held that there was a state of functional deadlock in the management and affairs of SIRL.

Ng Eng Hiam v Ng Kee Wei and others¹⁹⁶⁴] UKPC 53 applied; Lau v Chu [2020] 1 W.L.R. 4656 applied.

5. A well-recognised basis for seeking a winding up on the just and equitable ground is the breakdown of trust and confidence between participating members within a quasi-partnership. The court has power to order the winding up of a quasi-partnership company where there has been an irretrievable

breakdown in trust and confidence between the participating members whether or not such a breakdown in trust and confidence has resulted in a complete functional deadlock. The learned judge had an abundance of evidence upon which he could find that the relationship between Mr. Dyrud and Ms. Webster has broken down to the point that they can no longer coexist within a business relationship.

Re Yenidje Tobacco Company Limited 1916] 2 Ch. 426 applied.

6. An appellate court may interfere with the exercise of discretion by a trial judge only in circumstances in which the appellate court is satisfied (1) that in exercising his judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. In this case the learned judge considered the relevant issues and did not err in principle in coming to his decision to order the winding up of SIRL. The challenge to the learned judge's exercise of his discretion to order the winding up of SIRL cannot be sustained.

Michel Dufour and others v. Helenair Corporation Ltd. and Others (1996) 52 WIR 188 followed; Mark Byers and others v Chen Ningning (also known as Diana Chen) BVIHCVAP 2015/0011 (delivered 12th June 2018, unreported) considered.

Case Name:

Palmavon J. Webster

v

**[1] WDM Limited
[2] John O. Dyrud
(as a shareholder and director of WDM
Limited)**

**[AXAHCVAP2021/0002]
(Anguilla)**

Date: Wednesday 22nd March 2023

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

Appearances:

Appellant: Mrs. Tana'ania Small Davis

Respondents: No appearance of the first respondent
Ms. Jean Dyer for the second respondent

Issues: Civil appeal – Exercise of judge's discretion to grant a petition for the winding up of a company - Winding up of company on just and equitable grounds – Quasi-partnership company – Whether company was a quasi-partnership company - Liability for indebtedness — Whether there has been a breakdown in trust and confidence between shareholders of company that justifies the winding up of company – Deadlock in relation to application of proceeds of the policy of insurance - Whether substratum of company no longer existed – Alternative remedy – Burden of proof in showing the existence of an alternative remedy

Result/Order: IT IS HEREBY ORDERED THAT:

The appeal is dismissed with costs of the appeal to be paid by the appellant to the second respondent. Such costs are to be assessed if not agreed within 28 days of the date of this judgment.

Reasons:

- 1. The most important consideration in determining whether a company is a quasi-partnership is the requirement that there be an association formed or continued on the basis of a personal relationship, involving mutual confidence. The requirement that there exists a relation of mutual confidence has been described as being the necessary ‘substratum’ of the equitable considerations present in a quasi-partnership. In evaluating the evidence relied upon to demonstrate a personal relationship of mutual confidence, courts should focus on the substance, not the form, of the parties’ relationship. In this case, the common intention and understanding of Mr. Dyrud and Ms. Webster was to carry on the business of operating a law practice in partnership with each other using corporate vehicles, to facilitate the operation of the partnership and of any businesses which they operated in connection therewith. WDM Limited was one such corporate vehicle; its purpose was to hold the Property at which premises the offices of the law firm and other ancillary operations of the partnership were located. It was therefore clearly a quasi-partnership company because it was an association continued on the basis of a personal relationship, involving mutual confidence or understanding. In the circumstances, the learned judge was correct in finding that WDM Limited was and had been operated by the parties as a quasi-partnership company.**

Lau v Chu [2020] 1 W.L.R. 4656 applied; Re Edwardian Group [2018] EWHC 1715 considered; Croly v Good [2011] B.C.C. 105 considered.

- 2. A just and equitable winding up may be ordered where the company's members have fallen out in two related but distinct situations, which may or may not overlap. Firstly, a winding up may be ordered to resolve a functional deadlock which**

is the inability of members to co-operate in the management of the company's affairs. This leads to the inability of the company to function at board or shareholder level. Secondly, where a company is a corporate quasi-partnership, what matters is the relationship between the quasi-partners, and the extent to which the necessary basis of trust and confidence has evaporated. For this purpose, no aspect of their business relationship is likely to be irrelevant. Accordingly, the Court rejected the argument that the evidence before the court below concerning the breakdown in the relationship of trust and confidence between Ms. Webster and Mr. Dyrud could not be sufficient to justify the court granting an order for the winding up of the company on the just and equitable ground.

3. In circumstances where shareholders in a quasi-partnership company are unable or unwilling to agree upon important or consequential aspects of the company's business or affairs, whether by reason of the breakdown of trust or confidence or some other reason, the court may take that reason into account in deciding whether to wind up the company on the just and equitable ground. In the present case the inability of the two shareholders of WDM Limited to come to a decision upon an important and consequential matter such as whether damage to the sole property of the company should be repaired using the proceeds from insurance to cover such damage, or whether the funds should be used for another purpose, is indicative of a deadlock in the management of the company in that, the shareholders are unable to agree on important aspects of the company's business, assets and affairs. This circumstance could well justify a decision to wind up a corporate quasi-partnership on the just and equitable ground.

Lau v Chu [2020] 1 W.L.R. 4656 applied.

4. In arriving at his conclusion that the substratum of WDM Limited had gone, the judge found that

that company had been incorporated with the intention and on the understanding that it would be used as a vehicle to acquire and hold the Property for the benefit of the WDM Partnership which involved the understanding that the Property would be available to secure needed financing for the WDM Partnership. It was no longer possible for the company to fulfill this purpose because the WDM Partnership had been dissolved. After the dissolution, WDM Limited had been repurposed to provide that facility to Webster LP the successor to the WDM Partnership. To that extent its substratum had gone, because WDM Limited could no longer serve the principal purpose for which the quasi-partners had agreed to use it.

5. The legal burden of proof is on the petitioner to establish his or her entitlement to relief and, if so, that a winding up would be just and equitable if there were no other remedies available. If the petitioner can so establish, then the legal burden of proof shifts to the respondent to prove that the petitioner has unreasonably failed to pursue some other available remedy rather than seeking a winding up. In this case, Mr. Dyrud has shown satisfactorily that the WDM Limited is a corporate quasi-partnership and that an irretrievable breakdown in trust and confidence has occurred between its members. He has also shown that the parties are irreconcilably deadlocked on an issue of vital concern of the company and that the substratum of the company has gone. In all the circumstances, Mr. Dyrud has shown an entitlement to some form of relief. The only alternative remedy suggested by Ms. Webster's counsel is that it was open to Mr. Dyrud to realize his investment by selling his shares on the open market. In considering this issue, the court expressed the view that the sale of his shares on the open market is not a viable option open to Mr. Dyrud since the only asset owned by WDM Limited is heavily encumbered particularly with respect to debts that Ms. Webster is personally liable for. Given the evidence placed

before him this is a conclusion which the learned judge was well entitled to arrive at, and this Court will not interfere.

Case Name:

**[1] Siong Beng Seng
[2] Ching Hui Huat
[3] Springfield Investments & Nominees
PTE Ltd**

v

Caldicott Worldwide Ltd

**[BVIHCMAP2021/0007]
(Territory of the Virgin Islands)**

Date:

Wednesday 22nd March 2023

**Coram for
Delivery:**

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

Appearances:

Appellants:

Mr. Iain Tucker

Respondent:

Mr. Simon Hall and Mr. Dhanshuklal Vekaria

Issues:

Commercial Appeal - Arbitration agreement - Stay of claim against Company in favour of arbitration - Preliminary issue - Whether appeal an abuse of process - Test for determining whether particular claims against appellants touch upon differences caught in the arbitration agreement warranting a stay - Ennio Zanotti v Interlog Finance Corp et al – Whether judge erred in holding that where a single matrix of facts giving rise to differences between the respondent and the Company might support parallel claims against the Company they may proceed simultaneously - Whether judge erred in failing to stay aspects of the respondent's claim which gave rise to differences between the

company and respondent – Whether there needs to be a genuine dispute between the parties for matter to be referred to arbitration - Whether Judge erred in holding that certain claims could proceed pro tem subject to later review – Reasonably foreseeable defence test

Result/Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is allowed.
2. The order by the learned judge permitting the seeking of a declaration that the resolution passed on 30th November 2019 is unlawful, void and of no effect or alternatively voidable is set aside and this head of relief shall be stayed for the duration of the stay or until further order.
3. The order by the learned judge permitting the seeking of a declaration that the dividends are properly due and owing is set aside and this head of relief shall be stayed for the duration of the stay or until further order.
4. Costs to be assessed by a judge of the Commercial Court, if not agreed within 21 days of the date of this judgment.

Reasons:

1. If a point that could have been taken in earlier proceedings is not taken then the point cannot be raised in subsequent proceedings unless there has, in the interim, been a significant and material change of circumstances or the party has become aware of facts of which he was unaware at the first hearing. However, the mere fact that a point could have been raised but was not, is not conclusive of the issue. The present appeal challenges the grant of the stay of the claim against the Company as did the First Appeal albeit on different grounds. The First

Appeal questioned the exercise of the Judge's discretion to dismiss the appellants' application for a case management stay of the proceedings in favour of arbitration whereas this appeal questions the test applied by the Judge in determining which of the heads of relief would proceed to trial and which of those were caught by the arbitration clause. These matters were dealt with at the Consequential Hearing and could not have arisen in the First Appeal as the notice of appeal was filed before the Order settling the Judgment in the Consequential Hearing. Therefore, this appeal cannot be said to be an abuse of process.

Koza Ltd and another v Koza Altin Isletmeleri AS [2021] 1 WLR 170 applied; Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1 applied.

2. The test for determining whether particular claims against the appellants were caught within the scope of the arbitration agreement and ought to be stayed is two staged. Firstly, the court must identify the matter which is the subject of the arbitration agreement. In identifying the 'matter', the court looks to substance and not form, adopting a practical common-sense approach. Secondly, the court must determine whether that matter is one that the parties have agreed can only be arbitrated. As to this second limb, the court must properly construe the arbitration agreement in question. The learned judge fell into error when he sought to adopt a test of determining whether the claims between the respondent and the appellants required an issue of fact or law arising between the respondent and the Company to be first resolved, in order for the claim against the appellants to be stayed.

Virgin Islands Arbitration Act, 2013 No. 13 of 2013 of the Laws of the Virgin Islands considered; Republic of Mozambique (acting

through its Attorney General) v Credit Suisse International and others [2021] EWCA Civ 329 applied; Tomolugen Holdings Ltd and another v Silica Investors Ltd [2016] 1 LRC 147 considered.

3. Notwithstanding the Judge's error in adopting an incorrect test, it was perfectly permissible in principle for the Judge to have decided to allow the court proceedings to continue while staying the matters which were the subject of the arbitration agreement between the respondent and the Company.

Lombard North Central plc and another v GATX Corporation [2012] 2 All ER (Comm) 1119 applied.

4. Under the BVI Arbitration Act, 2013 the court is not required to consider whether or not there was a genuine dispute on a matter before deciding whether the matter should be stayed in favour of arbitration. The court only need be satisfied that there is a dispute on a matter within the subject of the arbitration clause. On a proper construction of the arbitration clause in question, it is clear that differences had arisen between the respondent and the Company regarding the November Resolution and as to whether the Company had improperly withheld dividends from the respondent. Therefore, the Judge erred in his approach when he applied the 'was there in fact any dispute' test in determining whether these matters should be stayed and in finding that they should not.

Virgin Islands Arbitration Act, 2013 No. 13 of 2013 of the Laws of the Virgin Islands applied; Halki Shipping Corporation v Sopex Oils Ltd [1998] 1 WLR 726 considered.

5. When identifying which issues may fall within the scope of the arbitration agreement, once an actual or a reasonably foreseeable defence is identified, the second

stage is to determine whether such defence is sufficiently connected to the arbitration agreement. The learned judge admitted that it was not clear on what grounds the Company and the appellants disputed the claim and allowed certain of the respondent's claims against the appellants to proceed pro tem subject to later review. However, the Judge abdicated his function and erred in law when he adopted this 'wait and see' approach rather than firstly applying the reasonably foreseeable defence test and then determining whether there was an identified or reasonably foreseeable defence that was sufficiently connected to the arbitration agreement.

Republic of Mozambique (acting through its Attorney General) v Credit Suisse International and others [2021] EWCA Civ 329 applied.

Case Name:

Inderjit Kaur Chhina

v

**[1] Muhammad Nazir Muhammad Ismail
[2] Mohammed Nazim**

**[BVIHCMAP2020/0024]
(Territory of the Virgin Islands)**

Date:

Thursday, 23rd March 2023

**Coram for
Delivery:**

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

Appearances:

Appellant:

Mr. Adrian Davies

Respondent:

No appearance

Issues:

Application for leave to appeal to His Majesty in Council – Sections 3(1) and 3(2) of Virgin Islands (Appeals to the Privy Council) Order 1967 – Application test – Whether the decision being appealed is a final or interlocutory order – Whether the question involved in the proposed appeal is a matter of great general or public importance, or otherwise, that should be submitted to His Majesty in Council

Result/Order:

IT IS HEREBY ORDERED THAT:

The application for conditional leave to appeal to the Privy Council is dismissed.

Reasons:

- 1. To succeed under section 3(1) of the 1967 Order the applicant must prove that the intended appeal to His Majesty in Council is an appeal from a final decision of the Court of Appeal. It is settled law in the Eastern Caribbean that the test to be applied in determining whether an order is final or interlocutory is a procedural matter to be decided by the local courts, and the application test is to be used in making that determination. Under the application test, an order is interlocutory if the claim, or the subject matter of the application, will come to an end if the application is determined one way, but will continue if it is determined the other way. Applying the same test, an order is final if it was made on an application that would have determined the matter in litigation for whichever side the decision is made.**

Rule 62.1(3) of the Civil Procedure Rules 2000 applied; Othniel Sylvester v Satrohan Singh Saint Vincent & the Grenadines Civil Appeal No. 10 of 1992 (delivered 18th September 1995, unreported) followed; Nam Tai Electronics, Inc v David Hague et al Territory of the Virgin Islands Civil Appeal No

12 of 2003 (delivered 21st September 2004, unreported) followed; *Thamboo Ratnam v Thamboo Kumarasamy and another* [1965] 1 WLR 8 distinguished; *R. S. Lopes v N.K.V Valliappa Chettiar* [1968] AC 887 distinguished; *Haron bin Mohd Zaid v Central Securities (Holdings) Bhd* [1982] 2 All ER 481 considered; *Durity v The Judicial and Legal Services Commission and another* [1996] 2 LRC 451 considered; *Pentium (BVI) Limited et al v The Bank of Bermuda Territory of the Virgin Islands Civil Appeal No. 14 of 2003* (delivered 12th January 2005, unreported) followed; *Lux Locations Limited v Yida Zhang (Antigua and Barbuda)* [2023] UKPC 3 considered.

2. The decision whether to apply the application test or the order test is a procedural issue and the courts of the Eastern Caribbean are not bound to follow the decisions of the Privy Council that apply the order test. The order of the Court of Appeal striking out the notice of appeal was an interlocutory order and leave to appeal to the Privy Council is required.

Section 3(1) of the Virgin Islands (Appeals to the Privy Council) Order 1967 S.I. No. 234 of 1967 applied.

3. The reasons advanced by the Applicant for saying that her intended appeal to the Privy Council under section 3(2) of the Privy Council Order involves matters of great general and public importance do not qualify as matters of great general and public importance. Neither are there any points of law that could benefit from guidance by the Board. The Applicant's complaints are issues in a private dispute between the parties, the resolution of which has no impact on other persons. They are not matters of public importance. The application for leave to appeal under section 3(2) also fails.

Section 3(2)(a) of the Virgin Islands (Appeals to the Privy Council) Order 1967 S.I. No. 234 of 1967 applied; Martinus Francois v The Attorney General Saint Lucia Civil Appeal No. 37 of 2003 (delivered 7th June 2004, unreported) followed.

Case Name:

**Tibit Limited
v
Federal Republic of Nigeria**

**[BVIHCMAP2021/0042]
(Territory of the Virgin Islands)**

Date:

Friday, 24th March 2023

**Coram for
Delivery:**

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

Appearances:

Appellant:

Mr. Neil McLarnon and Ms. Monique Peters

Respondent:

Mr. Richard Brown

Issues:

Commercial appeal – Forum non conveniens – Stay on ground of forum non conveniens – Appellate restraint on forum applications – Appropriate forum - Whether the learned judge’s decision to find that the BVI is the appropriate forum to try claims was plainly wrong – Governing law – Connecting factors – Whether the judge was wrong to find that BVI law is the governing law of the claims – Res judicata – Issue Estoppel – Whether the judge was wrong to find that the Italian proceedings are irrelevant to the claims against appellant – Delay – Part 9.7A of the Civil Procedure Rules 2000

Result/Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.
2. Costs to The Federal Republic of Nigeria to be assessed if not agreed within 21 days.

Reasons:

1. The appellate court will not interfere with the judge's exercise of discretion unless the applicant can show that the judge erred in principle and that as a result of his error his decision exceeded the generous ambit of reasonable disagreement and was clearly or blatantly wrong. This need for appellate restraint is even greater in forum applications where the judge is carrying out a balancing exercise to determine the most appropriate forum for trying the action.

Dufour v Helenair Corporation and others (1996) 52 WIR 188 applied; Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460 applied; Livingston Properties Equities Inc and others v JSC MCC Eurochem and another [2020] UKPC 31 applied.

2. The principle of forum non conveniens gives the court a discretionary power to stay an action when it is satisfied that there is another court that is more appropriate to try the case. To determine the most appropriate forum for trying a case, the court must conduct a three-stage inquiry. The first is whether there is another available forum, second, whether that forum is more appropriate than the local court. If there is an available forum that is more appropriate, the third stage is whether there is a risk of injustice if the claim were to be prosecuted in the foreign forum. In this case the real dispute is in relation to the second stage – which of the BVI or Nigeria is the more appropriate forum for the trial of the action. To determine this stage the court must examine the pleadings and evidence to determine what are the connecting factors to

the two competing jurisdictions, to see which of the two is clearly and distinctly the more appropriate forum for the trial of the action. The connecting factors in this case are the governing law of the claims, the location of witnesses and documents, and the incorporation in the BVI of Tibit and other companies used in the acquisition of the Jet.

Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460 applied.

3. The governing law of a claim is an important factor because it is generally preferable that a case should be tried in the country whose law applies. The starting point for determining the governing law of the claims is the pleadings. The claims in this case for unjust enrichment, knowing receipt and dishonest assistance were pleaded in the statement of claim and there was no suggestion in the defence, nor in any evidence filed by Tibit, that these claims are governed by the laws of Nigeria, or by the laws of any other country. The only factor pointing to Nigeria is that the underlying fraud that led to the filing of the claims occurred in Nigeria. This is outweighed by the facts that the claims in the action are governed by BVI law and relevant documents and witnesses relating to the central issue of the ownership and control of Tibit are in the BVI; other witnesses are located in diverse countries and not Nigeria; the activities leading to the purchase of the Jet occurred outside Nigeria and were done by persons resident and working outside Nigeria. As a result, the BVI is the most appropriate forum for the trial of the action because Tibit is sued as of right in the jurisdiction, and there are connecting factors pointing to the BVI. The learned judge in making these findings did not err in principle and his decision did not exceed the generous ambit of reasonable disagreement. His decision was not clearly or blatantly wrong.

Livingston Properties Equities Inc and others v JSC MCC Eurochem and another [2020] UKPC 31 applied. VTB Capital plc v Nutritek International Corp and others [2013] 2 AC 337 applied; Sibir Energy PLC v Gregory Trading SA and others BVI Civil Appeal No. 26 of 2005 (delivered 18th September 2016, unreported) applied; Rules 25 and 230(1)(c) of Dicey, Morris and Collins (15th edn) applied.

- 4. The Federal Republic of Nigeria v JP Morgan Chase Bank NA case is a different case on different facts and the findings and observations of Cockerill J do not impel this Court to set aside the exercise of discretion by the judge and come to a different conclusion on the issue of the appropriate forum for the trial of the claims.**

The Federal Republic of Nigeria v JP Morgan Chase Bank NA [2022] EWHC 1447 (Comm) considered.

- 5. A foreign judgment creates an estoppel when (1) the judgment relied on as creating the estoppel is (a) by a court of competent jurisdiction; (b) final and conclusive; and (c) on the merits; (2) the parties (or their privies) must be the same in both sets of proceedings; (3) there must be a clear determination of the issue by the foreign judgment—it must not be merely collateral or an obiter comment; and (4) the issue in the later action must be the same as the issue decided by the judgment in the earlier proceedings. In this case, the allegation of res judicata/issue estoppel was not made out by Tibit and there is no abuse of process in starting and continuing the BVI action. For the same reasons, the BVI action is not a collateral attack on the Italian judgment. The BVI action should not be stayed or struck out on any of these grounds.**

Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2) [1967] 1AC 853 applied; Michael Wilson & Partners Ltd v Sinclair [2017] 1 WLR 2646 considered.

- 6. Delay in filing an application under Part 9.7A of the Civil Procedure Rules 2000 or under the inherent jurisdiction of the court will not result in an automatic barring or dismissal of the application. However, an unreasonable delay in filing the application can have adverse consequences for the applicant, the most obvious being that if the late application is successful and the claim is stayed, the court may order the applicant, though successful, to pay the costs of the proceedings up to the date of the filing of the application, or may make such other order as the court sees fit.**

Part 9.7A of the Civil Procedure Rules 2000 applied.

Case Name:

Federal Republic of Nigeria

v

[1] Tibit Limited

[2] Justin Ickonga

[BVIHCMAP2021/0044]

(Territory of the Virgin Islands)

Date:

Friday, 24th March 2023

**Coram for
Delivery:**

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

Appearances:

Appellant:

Mr. Richard Brown

Respondents:

Mr. Neil McLarnon and Ms. Monique Peters

Issues:

Civil appeal – Default judgment – Rule 12.9(2) of Civil Procedure Rules 2000 - Whether a claim against one defendant can be determined separately from the claim against other defendants – Whether there was some practical reason, connected with the efficiency or expediency of the further conduct of the litigation to explain the deferral of the entry of default judgment

Result/Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is allowed.
2. The order of the learned judge made on 2nd December 2021, ordering that judgment in default of acknowledgment of service and/or defence be entered up against Mr. Justin Ickonga pursuant to rule 12.9(2)(a)(i) of the Civil Procedure Rules 2000 is set aside.
3. The respondent, Mr. Ickonga, shall pay the costs of the appellant, FRN, such costs to be assessed by a judge of the Commercial Court if not agreed within 21 days.

Reasons:

1. CPR Rule 12.9 (2) (a) provides that if a claimant applies for a default judgment against one of two or more defendants, and the claim can be dealt with separately from the claim against the other defendants, the court may enter judgment against that defendant. The word “may” in the context of CPR 12.9(2)(a) is permissive and indicates that on an application for default judgment under CPR 12.9 the court is vested with a discretion to refuse to enter judgment in default even if case can be dealt with separately. While the court may exercise this discretion to refuse to enter judgment in default, there must be some practical reason, connected with the efficiency or expediency of the further conduct of the litigation, which

will explain the deferral of the entry of such judgment.

Rule 12.9(2)(a)(i) of the Civil Procedure Rules 2000 applied; John Page v Champion Financial Management Limited et al [2014] EWHC 1778 (QB) applied; Otkritie International Investment Management Ltd v Urumov [2012] EWHC 890 (Comm) applied; Crown Aluminium Limited v. Northern & Western Insurance Company Limited, Cambridge Risk Advisors Limited [2011] EWHC 277 applied

2. In the instant case the learned judge correctly determined that the claim against Mr. Ickongo was one which fell into the category of claims controlled by CPR 12.9 (2) (a) and could accordingly be dealt with separately from the claim against Tibit. The judge correctly appreciated that notwithstanding the reasons given in his decision, the claims could be tried together. Nonetheless he had exercised his discretion not to enter judgment against Mr. Ickonga for the reasons appealed against. The learned judge did so on the premise (a) that the claims made against Mr. Ickonga and Tibit were based on, or involved their joint liability for dishonest assistance; (b) that the entry of judgment in default against Mr. Ickonga would necessarily disadvantage Tibit by giving rise to the inference or assumption that both defendants have been involved in a corrupt transaction and that in that event the Court would have to undertake the difficult task of compartmentalising that assumption and inference in trying the claim against Tibit; and (c) that the entry of default judgment involved an undesirable risk of inconsistent judgments. However, these premises involved an erroneous analysis of the legal position, as dishonest assistance is a form of civil secondary liability whereby the assistant is held jointly and severally liable along with the trustee whose misconduct he

assisted. The instant case is not one in which a finding of liability on the part of one defendant is contingent on the liability of the other. Mr. Ickonga's liability is claimed to have arisen from his personal actions in having facilitated the purchase of the jet by Mr. Etete and having procured the concealment of the purchase by the arrangement with Tibit, knowing or having reason to suspect that Mr. Etete's scheme to acquire the jet involved a fraudulent breach of trust. The learned judge's concern about the apparent claim of joint liability against the defendants and the importance of that factor in dealing with the respective claims against them is misplaced. No reason has been shown which could explain the learned judge's departure from the usual practice of entering judgment against a defaulting defendant where the claim against him could be dealt with separately from the claim against the other defendant. The learned judge therefore erred in this regard.

Byers & Ors v Samba Financial Group [2021] EWHC 60 (Ch) applied; Twinsectra Limited v Yardley [2002] 2 AC 164 applied; Martin Didier et al v Royal Caribbean Cruises Ltd SLUHC VAP2017/0051 (delivered 6th June 2016, unreported applied; Lewison LJ in Broughton v Kop Football (Cayman) Ltd [2012] EWCA Civ 1743 applied.

Case Name:

**[1] National Contractors Limited
[2] Dave Boriel (As Administrator of
the Estate of the late Thomas Boriel)
[3] Dave Boriel
v
Raymond Boriel
[SLUHC VAP2021/0010]
(Saint Lucia)**

Date: Friday, 24th March 2023

Coram for Delivery: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant: Mrs. Kimberly Roheman

Respondent: Mr. Gerard Williams

Issues: Civil appeal – Appeal against dismissal of application for summary judgment – Summary judgment – Whether master erred in failing to grant the appellants’ application for summary judgment – Whether summary judgment available on the basis of prescription – Prescription – Whether the respondent’s cause/causes of action is/are prescribed – Equitable remedies – Specific performance – Declaratory relief – Whether equitable remedies are prescriptible – Difference between limitation of actions and prescription under the Civil Code of Saint Lucia

Result/Order: IT IS HEREBY ORDERED THAT:

1. The appeal is allowed.
2. The order of the master dated 26th July 2021 dismissing the defendants’ application for summary judgment and making no order as to costs is set aside.
3. Summary judgment is entered for the defendants in Claim No. SLUHCV2010/0100.
4. The case management orders made by the master in his judgment of 26th July 2021 are set aside.
5. The respondent is ordered to pay the appellants’ costs in the court below, to be assessed unless agreed by the parties within 21 days, and costs on the appeal of two

thirds of the amount assessed for costs in the court below.

Reasons:

1. The court may grant summary judgment on a claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or the issue. This does not mean that summary judgment will only be granted if a claimant's claim or defendant's defence is bound to fail at trial, but the claimant or defendant must have a case or defence that is more than merely arguable. From the learned master's own findings, reliefs 3, 4 and 5 of the claim arose from a breach of contract and any claim for these reliefs would be caught by prescription. The master admits that these were compelling arguments for 'striking out' that portion of the claim, but he declined to do so on the basis that a court in equity may consider granting some of these reliefs after a declaration is made. The master ought to have exercised his powers under rule 15.2 of the Civil Procedure Rules 2000 and accordingly, he erred in failing to grant summary judgment in relation to these reliefs.

Swain v Hillman [2001] 1 ALL ER 91 applied; Rule 15.2 of the Civil Procedure Rules 2000 applied.

2. Specific performance is an equitable remedy that is available to a party to a contract to compel the defaulting party to perform his or her contractual obligations. The Court of Appeal of England and Wales has opined that there are instances where an equitable remedy can be available in circumstances where no cause of action exists at law, because there is no statutory limitation period barring claims for equitable relief. However, the Eastern Caribbean Supreme Court, certainly when sitting on cases from Saint Lucia, has not adopted and applied the

English position on this issue and has instead taken the position that if a cause of action is prescribed then all remedies are extinguished. When both a right and remedy are prescribed under the Civil Code, it matters not whether the relief being sought is equitable relief.

P & O Nedlloyd BV v Arab Metals Co and others [2007] 2 All ER (Comm) 401 distinguished; Norman Walcott v Moses Serieux Saint Lucia Civil Appeal No.2 of 1975 applied; Michele Stephenson et al v Lambert James-Soomer SLUHCV2003/0138 and SLUHCV2003/0453 (delivered 19th April 2004, unreported) considered.

3. A claim by a party having entered into a contract with a company engaged in business for the purchase of shares in that company, payment for which would be made partly in cash and partly by the provision of heavy equipment for use in the business of the company, is a claim of a commercial nature. The alleged contract for the sale of shares in this case took place between the company, which is, or was at the material time, carrying on a business; and the respondent, who was at the material time an individual seeking to invest in a company. The contract for the sale of shares in the company to the respondent therefore constituted a sale of movables between a trader and a non-trader and falls within the definition of commercial matters. Actions on such sales would therefore be prescribed by 6 years, in accordance with article 2121(5) of the Civil Code.

Articles 2121(4), 2121(5) and 2129 of the Civil Code of Saint Lucia Chapter 4:01 of the Laws of Saint Lucia applied.

4. An equitable remedy, such as declaratory relief or specific performance, may not be granted by a court in Saint Lucia arising from

a contract, action on which contract is prescribed by article 2121 of the Code and extinguished by article 2129. Moreover, the effect of article 2103 is to close all doors after 30 years have elapsed since the cause of action arose. Even if any right or remedy might have survived article 2121, and might have escaped article 2129, it would be caught by article 2103 and cease to exist altogether, leaving the court with no jurisdiction to adjudicate on it once the lapse of 30 years is established. Accordingly, it is unequivocal that the respondent's claim, being grounded in contract, and having been brought some 31 years after the cause of action arose, was prescribed. It can hardly be contemplated that a claim can be sustained, and moreover have a real prospect of success, if the cause of action upon which it is based is prescribed and the remedies extinguished. Accordingly, the master erred in determining that the rest of the respondent's claim was not prescribed because the respondent sought equitable relief only and that there is no time bar to the grant of equitable relief. It follows therefore, that he also erred in failing to enter summary judgment for the appellants.

Norman Walcott v Moses Serieux Saint Lucia Civil Appeal No. 2 of 1975 applied; Michele Stephenson et al v Lambert James-Soomer SLUHCV2003/0138 and SLUHCV2003/0453 (delivered 19th April 2004, unreported) considered; Swain v Hillman [2001] 1 ALL ER 91 applied; Articles 2103, 2121 and 2129 of the Civil Code of Saint Lucia Chapter 4:01 of the Laws of Saint Lucia applied.

Case Name:

**Marilyn Jeffers nee Weste
v
[1] The Personal Representative of
Wyndham Weste, deceased**

[2] Rupert Alexander Joseph aka Benjamin Joseph

[3] Maudlyn Joseph (also known as Modlyn B. Joseph) (Now deceased and replaced by Rupert Alexander Joseph as personal representative of the estate of Maudlyn Joseph for the purposes of these proceedings only)

**[ANUHCVP2022/0013]
(Antigua and Barbuda)**

Date: Friday, 24th March 2023

Coram for Delivery: The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mr. Gerard St. C Farara, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Jeannot Michel-Walters holding papers for Dr. David Dorsett

Respondent: Mrs. Stacy Richards-Roach

Issues: Civil Appeal - Status of Children Act – Paternity order - Applications to set aside an order of a court of concurrent or coordinate jurisdiction - Whether the learned judge exceeded her jurisdiction by dealing with the application to set aside the paternity order in the manner that she did – Standard of proof - Whether the learned judge applied the correct standard of proof in assessing the evidence upon which the paternity order was made

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal is allowed.**
- 2. The orders of the third judge made on 25th May 2022 are set aside.**

3. The Paternity Order made by the first judge on 2nd December 2005 is reinstated.
4. Costs are awarded to the appellant in the sum of \$1000.00, being two-thirds of the amount awarded in the lower court.

Reasons:

1. When the High Court is dealing with applications to set aside an order of a court of concurrent or coordinate jurisdiction it is not sitting in an appellate jurisdiction. The function of the Court is limited in these circumstances. A court exercising a setting aside jurisdiction is different from a court exercising an appellate jurisdiction. In this case, the third judge was required to determine whether the evidence before the first judge in 2005 was false or mis-stated, or whether there was a material change of circumstance, to determine whether the Paternity Order should be set aside. The third judge was not sitting in an appellate jurisdiction, and it was not open to her to make determinations on findings of fact and the sufficiency of evidence before the first judge who made the Paternity Order. The third judge conducted a complete re-evaluation of the evidence and substituted her ruling for that of the first judge who granted the Paternity Order. In doing so she exceeded her jurisdiction, and her decision must be set aside.

Harding v Forrester and others (2014) 84 WIR 389 applied.

2. It is trite that the civil standard of proof is always on a balance of probabilities. However, there are circumstances that require a flexible application of that standard. The more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before the court will find the allegation proved on the balance of probabilities. The

flexibility of the standard lies in the strength or quality of the evidence that will, in practice, be required for an allegation to be proved on the balance of probabilities, not in any modification to the degree of probability required for an allegation to be proved.

R (on the application of AN) v The Mental Health Review Tribunal (Northern Region)
[2006] 4 All ER 194 applied.

APPLICATIONS AND APPEALS

Case Name:

**[1] The Roserie Company Limited
[2] Thomas Roserie
[3] Sonia Roserie
[4] Chemical Manufacturing and Investment
Company Limited**

v

First Caribbean International Bank

**[SLUHCVAP2021/0012]
(Saint Lucia)**

Date:

Monday, 20th March 2023

Coram:

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

Appearances:

Appellant:

Mr. Dexter Theodore KC

Respondent:

Mr. Bota McNamara

Issues:

**Application for an extension of time to file
submissions - Application to strike out notice of**

appeal - Application for an extension of time to serve notice of appeal - Adjournment - Application for costs

Type of Order:

Directions

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

1. The appellants shall file further submissions with authorities and a supplemental bundle on or before 11th April 2023.
2. The respondent shall file and serve submissions in response together with authorities on or before 10th May 2023.
3. The hearing of the applications made by the parties is adjourned to the next sitting of the Court for Saint Lucia during the week commencing 19th June 2023.
4. Costs to the respondent in the sum of \$1,500.00 to be paid on or before 20th April 2023.

Reason:

The Court noted that certain preliminary matters needed to be addressed before the Court could deal with the three applications filed by the parties. Such matters included the fact that only the odd numbered pages for the lower court judgment had been filed with the Court and that there were filings as late as the morning of the hearing of the applications. The Court noted that a good prospect of success could only be determined by reading the new submissions and authorities filed on the morning of the hearing. After having heard counsel for both sides, the Court determined that the matter could not proceed in its current state. The Court therefore gave directions for both sides to file submissions on the issue of real prospects of success on the appeal and adjourned the matter to the next sitting of the Court for Saint Lucia.

As a result of the adjournment, counsel for the respondent made an oral application for costs for

the day. After hearing counsel for both parties on the issue of costs, the Court determined that costs would be awarded to the respondent in the sum of \$1,500.00.

Case Name:

Werner Fuhrken Batista

v

Dietrich Fuhrken Batista

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

Date:

Monday, 20th March 2023

Coram:

**The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**

Appearances:

Applicant:

Mr. Peter Ferrer and Mr. Christopher Pease and Mrs. Kimberly Crabbe- Adams

Respondent:

Ms. Allana-J Joseph

Issues:

Application for permission to adduce fresh evidence - Ladd v Marshall - Whether the new evidence could not have been obtained with reasonable diligence for use at the trial in the lower court - Whether the evidence is such that if admitted it would probably have an important influence on the result of the appeal, though it need not be decisive - Whether the evidence is apparently credible though it need not be incontrovertible

Type of Order:

Oral Decision

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The application to adduce fresh evidence is dismissed.**
- 2. Costs to the respondent, to be assessed if not agreed within 21 days.**

Reason:

The Court considered the judgment of the learned judge, in particular the issues which were before her, those issues which she determined and those issues which she specifically said she did not determine which were the merits of the application.

The Court further considered the grounds of appeal and noted that it was agreed between the parties that based on the principles in Ladd v Marshall 1 WLR 1489 which govern the admissibility of fresh evidence, that what was in issue was whether the evidence sought to be admitted was relevant to the determination of the appeal.

The Court considered the grounds of appeal and was of the view that they are not relevant in this instance. For those reasons, the Court determined that the application to adduce fresh evidence should be dismissed. The Court also ordered costs to the respondent to be assessed if not agreed within 21 days.

Case Name:

Oscar Vargas

v

[1] Barbara Vargas (nee Pierre)
[2] CIBC First Caribbean International Bank
(Barbados) Limited
[3] Caribbean Union Bank

[ANUHCVP2020/0034]
(Antigua and Barbuda)

Date:

Monday, 20th March 2023

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

Appearances:

Appellant/Respondent : Mr. Hugh Marshall

Respondents/Applicant: The applicant/first respondent in person
Ms. Mandi A. Thomas for the second respondent

Issues: Application to strike out notice of appeal - Whether court has jurisdiction over subject matter of appeal
- Whether notice of appeal is a nullity because leave to appeal was required but not sought - Whether orders of single judge are as of consequence nullities

Type of Order: N/A

Result / Order: IT IS HEREBY ORDERED THAT:

The decision is reserved.

Case Name: Gearing Up Limited

v

FDL Consult Inc

[SLUHCMAP2022/0006]
(Saint Lucia)

Date: Monday, 20th March 2023

Coram: The Hon. Mde. Gertel Thom, Justice of Appeal

The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Leslie Haynes KC with him Mrs. Melissa Modeste-Singh

Respondent: Ms. Candace Fletcher and Mr. Mark Maragh

Issues:

Commercial appeal - Appeal against dismissal of claim seeking orders for an account, inquiries or directions, for the purpose of determining sums alleged to be due as profits to the appellant - Whether a consortium agreement existed among the appellant, the respondent and High Peaks Solar LLC ("HPS") and whether such agreement was abandoned and/or jettisoned such that the appellant became a subcontractor to the respondent ("the fact in issue") - Whether the learned judge failed to appreciate that the onus was on the respondent to establish the fact in issue - Whether the appellant was entitled to receive 25% of the net profits upon completion of the projects - Whether the learned judge erred in preferring the evidence of the respondent's witnesses to that of the appellant's witnesses in relation to the fact in issue - Whether the consortium agreement was replaced by a joint venture agreement between the respondent and HPS - Whether it was open to the learned judge to pronounce on what monies are due from the respondent to the appellant

Type of Order:

N/A

Result / Order:

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name:

The Landings Proprietors Unit Plan No. 2 of 2007

**(also known as the Landings Body
Corporate or the Landings BC)**

v

The Development Control Authority

**The Landings Proprietors Unit Plan No. 2 of
2007**

**(also known as the Landings Body
Corporate or the Landings BC)**

v

Two Seas Holdings Limited

**[SLUHCVAP2019/0019]
(Saint Lucia)**

Date: **Tuesday, 21st March 2023**

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

Appearances:

Appellant/Respondent **Mr. Richard Harwood KC with him Ms. Renee St**
: **Rose and Ms. Marie-Ange Symmonds**

Respondent/Applicant **Mr. Dexter Theodore KC**
:

Interested **Ms. Vanessa Pinnock holding papers for Mr. Garth**
Party/Applicant: **Patterson KC for Two Seas Holdings Limited**

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

Type of Order: **Adjournment**

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

IT IS HEREBY ORDERED BY CONSENT THAT:

The motions for conditional leave to appeal to His Majesty in Council are adjourned to a date to be fixed by the Chief Registrar, and if convenient to the schedule of the Court, the matter may be fixed for hearing during the sitting of the Court in another member state or territory, scheduled with a time estimate of 2 hours in total.

Reason:

The parties indicated to the Court that it was agreed amongst them to have the matter adjourned to a later date due to the unavailability of counsel for the interested party, Two Seas Holdings Limited, whose application for conditional leave to appeal to His Majesty in Council was scheduled to be heard together with the application by The Development Control Authority for conditional leave to appeal His Majesty in Council.

Case Name:

[1] Clint James
[2] Natalia Knight
v
Sagicor General Insurance Inc.
[SLUHCVP2022/0006]
(Saint Lucia)

Date:

Tuesday, 21st March 2023

Coram:

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

Appearances:

Appellants:

Mrs. Maureen John-Xavier

Respondent:

Mr. Anwar Brice holding papers for Mr. Deale Lee

Issues:

Interlocutory appeal – Application for an adjournment

Type of Order: **Adjournment**

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

IT IS HEREBY ORDERED BY CONSENT THAT:

The hearing of this appeal is adjourned to the next sitting of the Court in Saint Lucia scheduled for the week commencing 19th June 2023 with a total time estimate of 1 hour.

Reason: **Counsel for the respondent sought an adjournment of the hearing of the appeal due to the unavailability of lead counsel on the matter. Counsel for the appellant did not object and the matter was adjourned to the next sitting of the Court of Appeal in the State of Saint Lucia.**

Case Name: **Terrance Amedee**

v

Marcus Modeste

**[SLUHCVAP2022/0001]
(Saint Lucia)**

Date: **Wednesday, 22nd March 2023**

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

Appearances:

Appellant: **Ms. Sherene Francis**

Respondent: **Mrs. Maureen John-Xavier**

Issues:

Civil appeal - Vehicular accident - Personal injury - Assessment of damages - Whether learned master erred in the assessment and award of damages - General damages - Award of damages for pain and suffering and loss of amenities - Whether the learned master erred in awarding the sum of EC \$85,000.00 for pain and suffering loss of amenities - Loss of future earnings - Whether the learned master erred in making an award for loss of future earnings/loss of future earning capacity - Whether the award of EC \$432,000.00 for loss of future earnings/loss of future earning capacity was excessive and not supported by the evidence - Special damages - Whether the master erred in finding that the sum of EC \$24,401.95 for special damages was actually pleaded and proved - Interest on damages - Pre-judgment interest - Whether the learned master erred by failing to differentiate between pre-judgment and post-judgment interest on special damages - Whether the learned master ought to have awarded pre-judgment interest on special damages at half the statutory rate (3%) from the date of the accident to the date of trial

Type of Order:

N/A

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name:

**[1] Bethelia Francis
[2] Janice Snaggs**

v

Omega Caribe Limited

(trading as Oasis Marigot St. Lucia)

**[SLUHCVAP2022/0010]
(Saint Lucia)**

Date: **Wednesday, 22nd March 2023**

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

Appearances:

Appellants: **Mr. Horace Fraser and Mr. Lorenzo Francis**

Respondent: **Mrs. Maureen John-Xavier**

Issues: **Interlocutory appeal - Whether the learned master erred in striking out the claims - Rules 19.4 and 20.2 of the Civil Procedure Rules 2000 - Whether the learned master erred in determining that the crux of the respondent's application was that time was prescribed for bringing the claims - Whether the learned master erred in finding that the purported amendment of the appellants' claim amounted to adding a new party after the claim was prescribed - Whether the claims filed against "Oasis Marigot St. Lucia" were valid, such entity being non-existent - Whether the learned master erred in law and in the exercise of his discretion when he determined and calculated costs only on special damages pleaded and not on the total value of the claim quantified and stated on the claim form and pleaded by the appellants in their statement of claim**

Type of Order: **N/A**

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

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name:

Alison Wilson

v

Helen Television Systems Limited

**[SLUHCVAP2021/0011]
(Saint Lucia)**

Date:

Thursday, 23rd March 2023

Coram:

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

Appearances:

Appellant:

Mr. David Francis

Respondent:

Mr. Thaddeus Antoine and Mr. Kenroy Justin

Issues:

Interlocutory appeal - Application for adjournment

Type of Order:

Adjournment

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

- 1. On the application of counsel for the appellant, counsel submitting that he was recently retained and was not in a position to make submissions in relation to the appeal, and there being no objection by the respondent, the hearing of the appeal is adjourned to the next sitting of the Court of the Appeal in the State of Saint Lucia during the week commencing 19th June 2023.**

2. The appellant has leave to file further submissions with authorities, if necessary, on or before 21st April 2023.
3. The respondent has leave to file submissions in response to submissions filed by the appellant pursuant to paragraph 2 of this order on or before 15th May 2023.

Reason:

The Court, upon hearing the submissions of counsel for the appellant that he was recently retained and was not in a position to make submissions in relation to the appeal, and upon noting that there was no objection by the respondent, granted the appellant's application for adjournment.

Case Name:

**[1] Chemical Manufacturing and Investment
Company Limited
[2] The Roserie Company Limited**

v

**First Caribbean International Bank
(Barbados) Limited**

**[SLUHCMAP2021/0003]
(Saint Lucia)**

Date:

Thursday, 23rd March 2023

Coram:

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

Appearances:

Appellants:

Mrs. Cynthia Hinkson-Ouhla

Respondent:

Mr. Bota McNamara

Issues:

Commercial appeal - Debt - Whether the learned judge failed to appreciate that the payment of a debt discharges the hypothec which secures the debt

and releases the guarantors of any obligations - Whether the learned judge erred in relying on the English Encyclopaedia of Banking Law instead of the ECCB Guidelines in determining the circumstances in which an overdraft should be granted - Whether the learned judge failed to appreciate that the respondent did not produce any evidence that the amounts claimed were due and owing - Whether the learned judge erred in allowing the respondent to file further evidence after the conclusion of trial - Whether the learned judge erred in finding that the default interest rate was 25% and was applicable to the debt being claimed - Whether the learned judge failed to appreciate that in cases of doubt, a contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation - Whether the learned judge failed to appreciate that the overdraft was granted as a result of unlawful payment to a third party and not to honour a cheque or cheques submitted by the appellant - Whether the learned judge failed to consider the authority of Houle v Canadian National Bank (1990) 114 N.R. 161 (SCC)

Type of Order:

N/A

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name:

**Alban James
(Trading as Bigguy Construction)**

v

**[1] JASDIP Limited
[2] David Jackson**

**[SLUHCVAP2022/0021]
(Saint Lucia)**

Date: Friday, 24th March 2023

Coram: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Applicant: Mrs. Brenda Portland Reynolds holding papers for
Mr. Horace Fraser

Respondents: No appearance

Issues: Application for leave to appeal - Whether there is a
reasonable prospect of success

Type of Order: Oral Decision

Result / Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:

The application made by the applicant on 16th
December 2022 seeking leave to appeal against the
order of the learned judge is denied.

Reason: The Court was not satisfied, on the material before
it, that there was a reasonable prospect of success
of the proposed appeal against the reasoned order
of the learned judge made on 1st December 2022.

Case Name: Ezra Phillip
v
The King

**[SLUHCRAP2022/0001]
(Saint Lucia)**

Date: Friday, 24th March 2023

Coram: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Alberton Richelieu

Respondent: Mrs. Tanya Alexis-Francis

Issues: Criminal appeal - Appeal against conviction - Intention to cause dangerous harm - Section 99(1) of the Criminal Code Cap. 3.01 - Trial judge's direction as to jury - Whether learned trial judge failed to adequately direct the jury on the issue of intention - Whether learned judge failed to give directions on intent as it related to joint enterprise, causing dangerous harm and intent to be a peacemaker - Whether learned trial judge should have directed the jury along the lines of section 56 of the Criminal Code - Section 56 of the Criminal Code - Whether learned trial judge failed therefore to put the appellant's defence to the jury - Trial judge's summation - Whether trial judge's summation was inadequate in all the circumstances and favored the prosecution - Appeal against sentence - Whether the sentence of \$5,000 compensation to the virtual complainant after the serving of a 5 year term of imprisonment imposed by the trial judge was excessive - Whether trial judge ought to have carried out a means test of the appellant

Type of Order: N/A

Result / Order: [Oral delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name:

Marius Wilson

v

The King

**[SLUHCRAP2021/0003]
(Saint Lucia)**

Date:

Friday, 24th March 2023

Coram:

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

Appearances:

Appellant:

**Mr. Alberton Richelieu and Mr. Jeannot Michel
Walters**

Respondent:

Mrs Tanya Alexis-Francis

Issues:

Criminal appeal - Appeal against conviction and sentence - Sections 99(1) and 101(1)(b) of the Criminal Code of Saint Lucia 2004 - Dangerous harm - Using firearm with intent to cause harm - Whether the learned judge erred in failing to uphold the appellant's no case submission - Whether the learned judge failed to give appropriate directions as to how the jury ought to treat with the evidence of hostile witnesses - Whether the learned judge's direction on the appellant's good character was adequate - Whether the learned judge failed to put the appellant case adequately to the jury - Whether the appellant's sentence was excessive

Type of Order:

N/A

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved.