

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING
VIDEOCONFERENCE

GRENADA
20TH- 24TH FEBRUARY 2023

JUDGMENTS

Case Name: **Multibank FX International Corporation**
v
Von der Heydt Invest S.A.
[BVIHCMAP2022/0001]
(TERRITORY OF THE VIRGIN ISLANDS)

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

Coram: **The Hon. Mr. Mario Michel, 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. Hodge Malek with him, Mr. Heffin Rees KC, Mr. Caley Wright and Mr. Oliver Clifton**

Respondent: **Mr Alex Hall Taylor KC with him, Mr. Alexander Cook Mr. Simon Hall, Mr. Guy Oliff-Cooper and Ms. Sarah Malik**

Issues: **Commercial appeal – Appeal against refusal of applications for recusal – Apparent bias – Whether fair-minded informed observer would conclude that there was real possibility of bias – Adverse comments - Whether the Judge came to factual conclusions on matters which were not the subject of evidence - Whether judge erred in making conclusionary findings - Whether the judge exceeded the scope of judicial functions**

**Result and
Reason:**

HELD: Affirming the orders made at (a), (b) and (c) of paragraph 6 hereof, and ordering VDHI to pay MBFX's costs on both the application and the appeal, which costs are to be assessed if not agreed by the parties within 21 days, that:

- 1. It is settled law that the test of apparent bias is essentially whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. Apparent bias arises when there is something in the judge's conduct of the hearing or behaviour that gives rise to a suspicion that he or she will not be able to decide the case in an impartial manner. Having reviewed the complaints made by the appellant and considering (i) the conduct of the learned judge in allowing the judgments to be disclosed to the regulators; (ii) the invitation by the learned judge for the FSC to direct Mr. Taher to stand down as Chairman; (iii) the judge's previous findings of collusion and suspicion on the part of MBFX and Mex Clearing; and (iv) that these findings were made at the interlocutory stage of the matter, it is likely that the fair-minded observer would conclude that these circumstances give rise to an inference of apparent bias.**

Porter v Magill [2002] 2 AC 357 applied; Dr. Sengupta and another v Holmes and others [2002] EWCA Civ 1104 applied; Southern Equities Corporation Limited (In Liquidation) and ors v Bond and ors [2000] SASC 450 applied; Locabail (UK) Ltd v Bayfield Properties Ltd [2000] 1 All ER 65 applied.

- 2. The facts of the case will determine whether it is appropriate for the judge to recuse himself. Recusal is a highly fact-sensitive issue, so it ought not to be lightly done. An**

appellate court is able to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances. The Appeal Court must determine whether there is a genuine possibility of bias after independently evaluating all the relevant facts and circumstances. There is no set list of circumstances under which the possibility of perceived bias may exist. However, the views expressed must be such as to lead to a concluded view, as distinct from the judge merely expressing a preliminary view. The applications which were before the Court did not require the Judge to make the disputed comments and the making of these comments fell well outside the scope of his judicial remit. Where there is real ground for doubt as to whether the test for apparent bias is established, that doubt should be resolved in favour of recusal. Consequently, the judge ought to have recused himself from all future proceedings in claims numbered BVIHC (COM) 2020/0215, 2021/0003 and 2021/0073.

Keston Riley v The Attorney General and the Director of Public Prosecutions MNIHCVAP2020/003 (delivered 17th September 2020, unreported) followed; Mengiste and another v Endowment Fund for the Rehabilitation of Tigray and others and Chubb v Endowment Fund for the Rehabilitation of Tigray and others [2013] EWCA Civ 1003 applied; Benjamin Exeter v Winston Gaymes et al and Lauron Baptiste v Vil Davis et al SVGHCVAP2016/0021 consolidated with SVGHCVAP2016/0022 (delivered 13th June 2017, unreported). followed; Otkritie International Investment Management Ltd and Ors v Mr George Urumov [2014] EWCA Civ 1315. applied.

Case Name:

Multibank FX International Corporation

V
Von der Heydt Invest S.A.

[BVIHCVAP2021/0023]
[BVIHCVAP2021/0030]
[BVIHCVAP2021/0031]

(TERRITORY OF THE VIRGIN ISLANDS)

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

Coram: **The Hon. Mr. Mario Michel, 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. Hodge Malek with him, Mr. Heffin Rees KC, Mr. Caley Wright and Mr. Oliver Clifton**

Respondent: **Mr. Alex Hall Taylor KC with him, Mr. Alexander Cook, Mr. Simon Hall, Mr. Guy Oliff-Cooper and Ms. Sarah Malik**

Issues: **Interlocutory appeal – Disclosure – Part 28 of the Civil Procedure Rules 2000 (“CPR”) - Right to inspect and copy documents mentioned in an affidavit - CPR 28.16 - Meaning of “document mentioned” - Specific disclosure - CPR 28.5 - Criteria for ordering specific disclosure – CPR 28.6 – Whether the learned judge erred in the exercise of his discretion by refusing parts of both applications for disclosure**

Result and Reason: **HELD: allowing the appeals in part, and making the orders set out at paragraph 54 of this judgment, that:**

- 1. Part 28 of the CPR deals with the disclosure and inspection of documents. By CPR 28.2(1), a party’s duty to disclose documents is limited to documents which are or have been in the control of that party, meaning that (a) the document is or was in the physical possession of the party, (b) the party has or has had a right**

to inspect or take copies of the document, or (c) the party has or has had a right to possession of it. Where a party is required by any direction of the court to give standard disclosure, that party must disclose all documents which are directly relevant to the matters in question in the proceedings as per CPR 28.4. Where a party applies for an order under CPR 28.5 and 28.6 for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs, and the order may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings. A party may also apply to the court for an order to inspect and copy documents mentioned in the classes of documents specified at CPR 28.16(10) (a) to (e), which include affidavits, claim forms and statements of case. To make such an order, the judge must be satisfied that the document sought to be produced for inspection and copying was 'mentioned' in one or other of the said classes of documents within the meaning of that expression.

2. Pursuant to the right under CPR 28.16 to inspect and copy documents 'mentioned', the party deploying the document by its mention should be prepared to permit inspection and copying. This "cards on the table" approach to disclosure is, however, not unqualified. The burden rests on the requested party to justify displacing the general right of the requesting party to inspect and copy the documents so mentioned. Accordingly, the requested party may object to their production for inspection on the basis that the document is privileged or was never in their control, or that the mention in the pleadings, affidavit etc. was not to a document. VDHI, as the requested party, did not object to the production of the requested documents on any of the first two grounds. As it pertained to Disclosure 1, the references at paragraph 59 in Priess 3 to "repeatedly signalling" and "signalling" were not mentions

of a document. These references therefore did not satisfy the threshold in CPR 28.16 and the judge did not err by refusing that part of the Disclosure 1 application. However, the references at paragraphs 49 and 50 of Priess 3 were to items in, or more likely to be in, documentary form and therefore liable to be produced for inspection and copying. Having regard to the overriding objective, fairness demanded that the parties be placed on an equal footing and the learned judge erred in refusing that part of the Disclosure 1 application. Consequently, the items set forth at sub-paragraph 1 (namely the enclosures to the CSSF Letter which had been referred to at paragraphs 49-50 of Priess 3) and at sub-paragraph 2 (namely the “documents referred to above” in the “slap in the face” email sent 4th December 2020 from Mr. Priess to Mr. Gollits) of Appendix A to Disclosure 1, fell to be disclosed under CPR 28.16.

Renaissance Ventures Ltd. et al v Comodo Holdings Ltd. BVIHCMAP2018/0005 and BVIHCMAP2018/0008 (delivered 13th July 2018, unreported) followed; Rubin v Expendable Ltd and others [2008] 1 WLR 1099 applied; National Crime Agency v Abacha and Others [2016] EWCA Civ 760 applied.

3. Pursuant to CPR 28.5 and 28.6, an order for specific disclosure requires a party to disclose documents or classes of documents specified in the order or to search for such documents and disclose those so found. Such disclosure will only be ordered where the documents are directly relevant to one or more issues in the proceedings. When deciding whether to order specific disclosure, the court must consider whether disclosure is necessary to dispose fairly of the claim or to save costs. As it pertains to Disclosure 2, the judge treated it as being the same as Disclosure 1 and failed to carry out a weighing exercise. His approach to the determination of the Disclosure 2 application under CPR 28.5 and 28.6 was

therefore incorrect, which affected the proper exercise of his discretion. In such circumstances, the Court of Appeal can exercise the discretion afresh. On reviewing the documents sought to be disclosed, the Court was satisfied that some, but not all of them, may be of some relevance to the issues raised in the application to discharge the WFO and the application to set aside the representative order. The Court therefore orders disclosure of the documents listed at 4, 6 and 13 only of Appendix A to the Disclosure 2 application, and refused under CPR 28.5 and 28.6 to order disclosure by inspection and copying of the notes, transcripts and/or documents used to prepare paragraph 39 of Priess 5 specified in Appendix B to Disclosure 2.

Dr. The Honourable Timothy Harris v Dr. The Right Honourable Denzil Douglas SKBHCVAP2019/0026 (delivered 9th December 2021, unreported) followed.

Case Name: **Multibank FX International Corporation**
v
Von der Heydt Invest S.A.

[BVIHCMAP2022/0024]
(TERRITORY OF THE VIRGIN ISLANDS)

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

Coram: **The Hon. Mr. Mario Michel, 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. Hodge Malek with him, Mr. Heffin Rees KC, Mr. Caley Wright and Mr. Oliver Clifton
Respondent:	Mr. Alex Hall Taylor KC with him, Mr. Alexander Cook, Mr. Simon Hall, Mr. Guy Oliff-Cooper and Ms. Sarah

Malik

Issues:

Commercial appeal – Appeal against refusal to adjourn trial – Appellate interference with judicial discretion - Appellate interference with case management decisions – Whether the learned judge erred in refusing to adjourn the trial – Whether the learned judge exceeded the generous ambit within which reasonable disagreement is possible in exercising his discretion - Whether the learned judge failed to take into account relevant factors in arriving at his decision

Result and Reason:

HELD: Affirming the orders made at (a), (b) and (c) of paragraph 6 hereof, and ordering VDHI to pay MBFX's costs on both the application and the appeal, which costs are to be assessed if not agreed by the parties within 21 days, that:

- 1. Case management decisions are discretionary decisions which an appellate court will be slow to interfere with. The appellate court will only interfere with a decision arrived at pursuant to the discretionary powers of a judge, if in the exercise of his judicial discretion, the judge exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.**

Dufour and others v Helenair Corporation Limited and others (1996) 52 WIR 188 followed; Employers International and Others v Boston Life and Annuity Company Ltd BVIHCVAP 2007/0005 (Re-issued 6th November 2008, unreported) followed.

- 2. Although the authorities stress the hesitancy of an appeal court to overturn a decision of the high court when that decision is made in the exercise of the judge's discretion, especially in the exercise of his case management powers, hesitancy to take a course of action should not**

lead to refusal to take that course of action, particularly when the interest of justice hangs in the balance. In this case, the Court found that a trial involving allegations of fraud of several millions of dollars by major players on the international finance stage should not be proceeded with in the face of an application for an adjournment by the party being accused of massive fraud when, less than 4 months before the trial date, pleadings had not been closed, witness statements had not been filed, experts had not yet been identified, disclosure had not yet taken place, and there were 6 pending appeals of various interlocutory decisions, all or some of which would have a direct bearing on the trial. Accordingly, the learned judge exceeded the generous ambit within which reasonable disagreement is possible and his decision was blatantly wrong.

JTrust Asia PTE Ltd. and Mitsuji Konoshita and A.P.F Group Co. Ltd (In receivership) v Showa Holdings Co., Ltd. et al BVIHCMAP2020/0031 (delivered 31st May 2021, unreported) distinguished; Elliot Group Ltd et al v GECC UK (formerly known as GE CAPITAL CORPORATION) et al [2010] EWHC 409 (TCC) considered.

Case Name:

**Von der Heydt Invest S.A.
v
Multibank FX International Corporation
[BVIHCMAP2022/0008]
(TERRITORY OF THE VIRGIN ISLANDS)**

Date: Tuesday, 21st February 2023

Coram: The Hon. Mr. Mario Michel, 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. Alex Hall Taylor KC with him, Mr. Alexander Cook, Mr. Simon Hall, Mr. Guy Oliff-Cooper and Ms. Sarah Malik

Respondent: Mr. Hodge Malek with him, Mr. Heffin Rees KC, Mr. Caley Wright and Mr. Oliver Clifton

Issues:

Interlocutory appeal – Worldwide freezing order – Fortification – The criteria to order fortification set out in Energy Venture Partners Ltd v Malabu Oil and Gas Ltd and PJSC National Bank Trust and another v Boris Mints and others (“the Malabu/Mints test”) – Whether the learned judge erred in his treatment of the three elements of the Malabu/Mints test that must be satisfied in an application for fortification of a cross undertaking in damages – Whether the appellant, a representative party, should be ordered to fortify the undertaking in damages, and if so, whether an order to put up US\$20 million or any other substantial amount would have the effect of stifling the appeal – Whether fortification should cater for losses suffered by third parties, the time taken for the fortification application to be heard, and the respondent’s failure to provide security for the appellant’s claim by paying the amount of the claim into court

Result and Reason:

HELD: allowing the appeal, setting aside the Judge’s order and awarding VDHI its costs of the proceedings in the court below and of the appeal, such costs to be assessed by a judge of the Commercial Court if not agreed within 21 days, and dismissing VDHI’s application for permission to adduce fresh evidence on appeal, that:

1. The three criteria that should be met before the court will order fortification are set out in Energy Venture Partners Ltd v Malabu Oil and Gas Ltd and PJSC National Bank trust and another v Boris Mints and others as: (i) whether

the applicant can show a sufficient level of risk of loss to require fortification, which involves showing a good arguable case to that effect; (ii) whether the applicant can show, to the standard of a good arguable case, that the loss has been or is likely to be caused by the granting of the injunction; and (iii) whether there is sufficient evidence to allow the court to make an intelligent estimate of the quantum of the losses. The criteria are cumulative and the applicant must satisfy all three. Only then will the court be required to consider the discretionary factors and decide whether fortification should be ordered.

Energy Venture Partners Ltd v Malabu Oil and Gas Ltd [2014] EWCA Civ 1295 followed; PJSC National Bank Trust and another v Boris Mints and others [2021] EWHC 1089 (Comm) considered.

2. The Judge found that there was sufficient evidence of a risk that Multibank could suffer and did suffer loss because of the WFO. He took into consideration that Multibank is a financial services company trading on trust; the evidence from Multibank that it had suffered actual loss from the fact that Standard & Poors (“S&P”) had declined to rate the Multibank Group in connection with the steps it was taking to secure a loan in the form of a bond for €500 million; and the fact that two institutional investors had withdrawn their offers to make substantial investments with Multibank and the Multibank Group. The finding by the Judge that there was sufficient evidence of a real risk of loss to Multibank was based on the evidence that was before him and there is no basis to interfere with that finding.
3. The test for whether the WFO is the cause of the losses suffered by Multibank is whether the losses would not have been suffered but for the WFO. The applicant can establish this by showing that the WFO was the effective cause of the loss, or the cause without which the loss would not have been suffered.

Energy Venture Partners Ltd v Malabu Oil and Gas Ltd [2014] EWCA Civ 1295 followed; PJSC National Bank Trust and another v Boris Mints and others [2021] EWHC 1089 (Comm) considered; SCF Tankers Ltd (Formerly known as Fiona Trust & Holding Corporation) and others v Privalov and others [2018] 1 WLR 5623 considered.

- 4. The Judge may not have used the language in the decided cases like ‘effective’ or ‘without which’, but it is clear from a reading of the judgment that he was aware that he was required to identify the WFO as the cause of the loss (even if there was an additional cause). Moreover, the Judge should not be faulted for finding that the WFO was a likely cause of the losses suffered by Multibank - this is what is recorded in the minutes dated 20th June 2021 of a meeting held on 17th June 2021 between representatives of S&P and representatives of Multibank Group. The WFO is also the cause that has been asserted by Multibank in its evidence. Applying the well-known principles relating to appellate reluctance to interfere with findings of fact by the judge of the lower court, this Court will not interfere with his finding that the WFO was a likely cause of Multibank’s loss. However, the allegations in the underlying proceedings were an additional or concurrent cause of the loss. A finding of concurrent causes does not mean, as the Judge found, that the WFO had to be discarded as a cause of the loss. The presence of two or more competing causes for the loss is not fatal to an application for fortification. In this case, the competing causes are the WFO and the allegations of fraud in the underlying proceedings against Multibank and Mr. Taher. The applicant must show that despite competing causes the WFO was the effective cause of the losses or the cause without which the losses would not have been suffered.**

Alta Trading UK Ltd v Bosworth and others

[2021] EWHC 1126 (Comm) considered.

- 5. An applicant for fortification must show that it is the coercive or preventive effect of the freezing injunction that caused the loss. The mere presence of a freezing injunction is not enough. It must have prevented the applicant or persons dealing with the applicant from doing something that resulted in the loss to the applicant.**

Alta Trading UK Ltd v Bosworth and others [2021] EWHC 1126 (Comm) considered; Harley Street Capital Limited v Tchigirinsky & others [2005] EWHC 2471 (Ch) considered.

- 6. The Judge erred as a matter of principle in not considering the underlying allegations of fraud as an effective cause of the loss suffered by Multibank, and that the loss suffered from the WFO included reputational loss from the effect of the WFO. There is no satisfactory proof that the loss from the WFO, if any, was caused by the coercive or preventive effect of the WFO. These are matters that should have factored into the causes of the loss suffered by Multibank, and the assessment of that loss in fixing the level of the fortification.**
- 7. The burden of disentangling the loss and showing what portion of it was caused by the freezing injunction rests squarely on the applicant for fortification (Multibank). In this case, the evidence of loss consists of assertions without supporting documents or other independent support. It was not updated to reflect the loss actually suffered by Multibank during the year since the evidence was filed. Additionally, there was no attempt by Multibank to disentangle (a) the loss caused by the allegations of fraud (which they deny) from the loss caused by the WFO; and (b) the loss caused by the coercive or preventive effect of the WFO from the loss caused by the reputational effect of the WFO. The estimate by**

Multibank of a loss of US\$20 million does not have an evidential basis. It is simply an estimate of a minimum loss. The Judge erred in accepting this figure without conducting his own estimate of the loss. In the circumstances, Multibank has failed to discharge the burden of showing an intelligent estimate of the loss from the WFO and the Fortification Order of US\$20 million by the Judge should be set aside.

Alta Trading UK Ltd v Bosworth and others [2021] EWHC 1126 (Comm) considered.

8. This Court is not in a position on the state of the evidence to disentangle the losses, even applying a liberal approach, and come to an intelligent estimate of the loss caused by the WFO that should be covered by fortification. Remitting the matter to the Judge is even less attractive for any number of reasons including that he would have to work with the same evidence.

VDHI's application for permission to adduce fresh evidence in the appeal is dismissed:

Case Name:

Naser Taher

v

**[1]Mex Clearing Limited
[2]Mex Securities S.A.R.L.
[3]Multibank FX International Corporation
[4]Von Der Heydt Invest S.A.**

**[BVIHCMAP2022/0030]
(TERRITORY OF THE VIRGIN ISLANDS)**

Date:

Tuesday, 21st February 2023

Coram:	The Hon. Mr. Mario Michel, Justice of Appeal The Hon. Mr. Paul Webster, Justice of Appeal [Ag.] The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]				
Appearances:	<table> <tr> <td data-bbox="318 449 633 554">Appellant:</td><td data-bbox="633 449 1481 554">Mr. Alex Hall Taylor KC with him, Mr. Alexander Cook, Mr. Simon Hall, Mr. Guy Oliff-Cooper and Ms. Sarah Malik</td></tr> <tr> <td data-bbox="318 592 633 667">Respondents:</td><td data-bbox="633 592 1481 667">Mr. Hodge Malek with him, Mr. Heffin Rees KC, Mr. Caley Wright and Mr. Oliver Clifton</td></tr> </table>	Appellant:	Mr. Alex Hall Taylor KC with him, Mr. Alexander Cook, Mr. Simon Hall, Mr. Guy Oliff-Cooper and Ms. Sarah Malik	Respondents:	Mr. Hodge Malek with him, Mr. Heffin Rees KC, Mr. Caley Wright and Mr. Oliver Clifton
Appellant:	Mr. Alex Hall Taylor KC with him, Mr. Alexander Cook, Mr. Simon Hall, Mr. Guy Oliff-Cooper and Ms. Sarah Malik				
Respondents:	Mr. Hodge Malek with him, Mr. Heffin Rees KC, Mr. Caley Wright and Mr. Oliver Clifton				
Issues:	Commercial appeal – Service outside jurisdiction by alternative method – Civil Procedure Rules 2000 (“CPR”) – Rule 7.8A – Whether service under rule 7.8 was impracticable - Test of impracticability - Whether the judge failed to consider or give sufficient weight to the principle in Abela and others v Baadarani - Whether the judge was wrong to make the order for service out by alternative means at paragraph 1 of the CMC Order - Whether the sole reason for making the order was to allow VDHI to effect expeditious or speedy service - Whether the learned judge was wrong to find that service of the Amended Statement of Ancillary Claim and other documents on Mr. Taher was impracticable in circumstances				
Result and Reason:	HELD: granting leave to appeal; dismissing the appeal; and making an order that the applicant/appellant, Mr. Taher, shall pay VDHI’s costs in the appeal, such sum to be assessed by a judge of the Commercial Court if not agreed within 21 days, that:				
	1. Mr. Taher has satisfied the test of a real (as opposed to a fanciful) prospect of success required for permission to appeal against paragraphs 1 to 3 of the CMC Order dated 18th March 2022. Accordingly, leave to appeal is granted and the draft notice of appeal filed with the application for leave to appeal is deemed filed.				

2. An appellate court will be slow to overturn decisions of a lower court made in the exercise of a judicial discretion. It may only do so where it has been shown that the judge below committed an error in principle in that the judge failed to take into account or gave too little weight to relevant factors or took into account or was influenced by irrelevant factors or considerations, and where the decision reached is so outside the generous ambit within which reasonable judicial disagreement is possible as to be clearly or blatantly wrong. In relation to appeals from case management decisions, an appellate court is required to exercise even more restraint before deciding to overturn case management orders made by a judge who applied the correct principles, has taken account of relevant considerations, and not factored into his determination irrelevant factors.

Dufour et al v Helenair Corporation Limited et al (1996) 52 WIR 188 applied; Byers and Others v Chen Ningning [2021] UKPC 4 applied; Ming Siu Hung and others v J.F. Ming Inc and another [2021] 1 BCLC 341 applied; Employers International and Others v Boston Life and Annuity Company Limited BVIHCVAP2007/0005 (delivered 4th July 2007, unreported) applied; JTrust Asia Pte Ltd v Mitsuji Konoshita et al BVIHCMAP2020/0022 (delivered 31st May 2023, unreported) applied; Showa Holdings Co. Ltd v Nicholas James Gronow and John David Ayres (As Receivers) BVIHCMAP2020/0031 (delivered 31st May 2021, unreported) applied.

3. CPR 7.8(1) stipulates the methods by which a claim form may be served out of the jurisdiction on a party to civil proceedings. These methods, which are referred to as the usual or conventional methods of effecting service out of the jurisdiction are:
(a) by a method provided by rule 7.9

(service through foreign governments or judicial and consular authorities) or rule 7.11 (service on a State); (b) in accordance with the laws of the country in which it is to be served; or (c) personally by the claimant or the claimant's agent. CPR 7.8A deals with applications for service out by alternative methods of a claim form. An application for an order for alternative service is predicated upon service under CPR 7.8 being 'impracticable'. The court, when considering CPR 7.8A and whether it is impractical to serve the defendant out of the jurisdiction through any of the methods specified in CPR 7.8(1), must consider and apply the overriding objective as set out at CPR 1.1. This requires the court to deal with cases justly, ensuring that all parties are, so far as practicable, on an equal footing, to save expense, and to ensure the particular case is dealt with expeditiously. In considering whether to exercise its discretion under CPR 7.8A, the court must also bear in mind that the fundamental purpose of service of legal proceedings is to ensure that the claim and the allegations made against the party to be served (the defendant), are brought to the attention of the defendant, who is given an opportunity to respond to them in a timely manner, and before they are considered by the trial court. This is a fundamental principle of 'open justice'.

Rules 1.1, 7.8(1), and 7.8A of the Civil Procedure Rules 2000 applied; *Abela and others v Baadarani* [2013] UKSC 44 applied; *Flavio Maluf v Durant International Corp et al* [BVIHCMAP2021/0025] (delivered 13th January 2022, unreported) applied.

4. The term 'impracticable' in CPR 7.8A(1) does not equate with impossible. It means, taking all relevant considerations into account it is 'not practically possible', in the circumstances of the particular case, to

effect service of the claim form on a defendant out of the jurisdiction. Whether it is impracticable to effect service on a defendant out of the jurisdiction using one of the modes of service specified at CPR 7.8(1), is a question of fact to be decided by the judge upon cogent evidence provided by the applicant for an alternative or substituted method of service under CPR 7.8A. Proof of 'impracticability' is not to be established only by proof of prior unsuccessful attempts to serve the defendant by the usual methods or means of service of the claim form. This may take the form of evidence as to unsuccessful attempts to effect service by one or more of the methods stipulated for service under CPR 7.8(1); or by establishing, through expert evidence or otherwise, that none of these methods are lawful or practically possible or available under the laws of the foreign country in which service out on the defendant is sought to be effected; or by other cogent evidence as to the impracticality (which need not raise to the level of impossibility) of effecting service through diplomatic means or by the Hague Convention or by personal service on the defendant in the foreign country.

JSC VTB Bank v Alexander Katunin et al BVIHCM2014/0062 & BVIHCM2016/159 (delivered 11th October 2018, unreported) applied; Abela and others v Baadarani [2013] UKSC 44 distinguished.

5. In this case, VDHI, as the applicant, had the burden of satisfying the judge that service on Mr. Taher through the modes of service proscribed at CPR 7.8(1), was 'impracticable'. The learned judge identified the correct test under CPR 7.8A – whether it was 'impracticable' for VDHI to serve Mr. Taher through any of the usual methods or modes of service of a claim form out of the jurisdiction provided for in CPR7.8(1). This was common ground between counsel for

VDHI and MBFX who appeared at the hearing before the judge on 18th March 2022. The learned judge also ascribed the correct meaning of the term 'impracticable' (which is not the same as a 'good reason' under the corresponding rule 6.15 of the English CPR), and in concluding that it was not fatal to the application for substituted service that VDHI had not made any prior attempt to serve Mr. Taher in the UAE through the appropriate diplomatic channels.

6. In considering evidence of impracticability, absent any prior attempt to serve the claim form by any of the usual methods permitted by CPR 7.8(1), a judge must take care to not be influenced solely by considerations of the perceived length of time it would take to effect service through one of these conventional methods, as a basis for concluding that it would be impracticable to effect service out by any such method, warranting consideration of an order for service by a substituted method on the defendant. In this case, the finding by the learned judge that service by the usual methods was 'impracticable', rested on the expert evidence as to speed (or delay) in serving the court documents in the UAE through diplomatic channels, as an available method of service permitted by CPR 7.8(1), and that it would not being possible to effect service by that method before the July 2022 trial date. In reaching his conclusions on 'impracticability' the learned judge was correct to rely, to some extent, on the uncontradicted expert evidence as to the applicable law and available avenues in the UAE for service of foreign process, and to view the period of 4 to 24 months, not as evidence of 'impossibility', but as some evidence that, given the July 2022 trial dates, it would not be possible to serve Mr. Taher through diplomatic channels before the trial date some 4 months hence.

**JSC VTB Bank v Alexander Katunin et al
BVIHCM2014/0062 & BVIHCM2016/159
(delivered 11th October 2018, unreported)
applied.**

- 7. However, Mr. Taher having been served in compliance with and through the alternative method ordered by the learned judge, and having filed his defence to the ASAC in the proceedings in compliance with the Substituted Service Order, there is no valid basis upon which to now set aside the order for substituted service. In doing so, Mr. Taher has complied with the very order for substituted service which he now appeals, and has participated in the proceedings below as an ancillary defendant. In those circumstances, it would be pointless to set aside the very order which, to a large extent, he has complied with, in circumstances where he was not only closely connected with Mex Clearing and knowledgeable about the said proceedings, but had filed an affidavit in relation to an aspect of those proceedings before the Court of Appeal.**

Case Name:

Multibank FX International Corporation

v

[1] Von Der Heydt Invest S.A.

[2] Mex Securities S.A.R.L

[3] Mex Clearing Limited

[4] Naser Taher

[BVIHCMAP2022/0032]

(TERRITORY OF THE VIRGIN ISLANDS)

Date:

Tuesday, 21st February 2023

Coram:

The Hon. Mr. Mario Michel, 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. Hodge Malek with him, Mr. Heffin Rees KC, Mr. Caley Wright and Mr. Oliver Clifton

Respondents: Mr. Alex Hall Taylor KC with him, Mr. Alexander Cook, Mr. Simon Hall, Mr. Guy Oliff-Cooper and Ms. Sarah Malik

Issues:

Commercial appeal – Representative parties – Part 21 of the Civil Procedure Rules 2000 - Whether the learned judge erred in determining that the Noteholders had actionable claims against the Ancillary Defendants – Whether the learned judge erred in failing to consider properly or at all, whether the Representative Order was justified or appropriate, including as to the prejudice caused to MBFX by the Noteholders not being party to the proceedings in terms of disclosure, the effectiveness of adverse costs orders and the undertaking in damages – Whether the learned judge erred by taking into account irrelevant matters and failing to take into account relevant matters, to the extent that the judge did consider whether VDHI was a fit and proper representative – Whether the learned judge erred in concluding that VDHI was entitled to make its application for the Representative Order ex parte

Result and Reason:

HELD: dismissing the appeal and ordering MBFX to pay VDHI's costs, such costs to be assessed by a judge of the Commercial Division of the High Court, if not agreed within 21 days, that:

1. MBFX has satisfied the test of a real (as opposed to fanciful) prospect of success and permission is granted to MBFX to appeal the order of Jack J dated 18th March 2022 (and judgment dated 28th March 2022) dismissing MBFX's application filed on 6th July 2021 to set aside the Representative Order made ex parte on 21st June 2021 appointing VDHI as a representative claimant in No. 73 of 2021.

Further, MBFX's draft notice of appeal submitted with its leave application is deemed filed and will be treated as its notice of appeal from the said dismissal order and judgment.

Othneil Sylvester v Faelleseje Civil Appeal No. 5 of 2005 (delivered 20th February 2006, unreported) followed.

2. The issue raised by MBFX in its application to set aside the Representative Order of whether the underlying claims made in the Amended Ancillary Claim Form and Amended Statement of Ancillary Claim were actionable, is nothing short of a collateral attack on the ancillary claim made. This issue is more appropriately raised by way of an application to strike out the Ancillary Claim against Mex Securities and MBFX; or, as was done, in the application brought by MBFX to discharge the WFO on the basis that no cause of action (as pleaded) arises or is actionable by the Noteholders before the courts in BVI. This issue having been raised and rejected by the judge below, which refusal is subject to MBFX's appeal against the judge's refusal to set aside the WFO on that ground, it is not appropriate for MBFX to raise this issue by way of an application to set aside the Representative Order made ex parte on notice to MBFX. Accordingly, it was not open to MBFX to raise this issue either in its application to set aside the Representative Order or on appeal against the judge's order refusing the said application.
3. In any event, the learned judge cannot be faulted for the way in which he disposed of this issue. In considering an application by MBFX to set aside the Representative Order the judge need only have satisfied himself, at that stage in the proceedings, that, as pleaded, VDHI had made out an actionable cause of action under BVI law. In this regard, the judge was clearly satisfied that VDHI had done so on the basis, inter alia, of a conspiracy by to defraud the Noteholders of their investment by entering

into the Tomlin (Consent) Order which led to the sum of €36.4 million being paid out of Mex Securities' accounts at MBFX to Mex Clearing. It was not for the learned judge at that stage to go further and to conclusively determine this issue in a summary way, particularly as he was not then considering an application to strike out the Ancillary Claim or for summary judgment on the basis that the Ancillary Claim was unsustainable in law, or that VDHI and/or the Noteholders had no standing to bring such a claim whether by virtue of clause 7.2(d) of the Terms and Conditions of the Private Placement Memorandum ("PPM"), or that they had not brought an *action oblique* under the laws of Luxembourg, or some other form of derivative action. Accordingly, this first ground of appeal provided no basis upon which this Court could set aside the Dismissal Order.

4. Rule 21.1(1) of the Eastern Caribbean Civil Procedure Rules ("EC CPR") uses the term 'same or similar' to define the kind of interest in proceedings that persons of the class must have in order to invoke the court's jurisdiction to make an order appointing a representative party in the said proceedings. By rule 21.1(2) the court may appoint either one or more of such persons of that class with the same or a similar interest or a body having a 'sufficient interest' in the proceedings as a representative party. Accordingly, the threshold requirement under EC CPR 21.1(1) is wider than the threshold requirement under the corresponding English CPR rule 19.6(1) where members of the class must have the 'same interest'. This provision in the EC CPR 21.1(1), like the corresponding provision in the English CPR 19.6(1), must be given a purposive interpretation. It gives the courts in this jurisdiction a wider scope and discretion when considering whether it is proper to make a representative order in civil proceedings.

Lloyd v Google [2021] UKSC 50 applied.

5. Part 21 of the CPR is silent on the question of the distribution of the realized proceeds of a money judgment to members of a represented class. However, where a representative claimant is successful in the claim and damages or some other monetary compensation is awarded and recovered from the defendant(s), the representative party can approach the court under CPR 26.1(2)(w) for directions as to how the money recovered ought properly to be distributed to the persons comprising the class of persons represented. While some circumstances may present a practical difficulty in accurately or fully identifying all members of the class, this does not prevent a court from making an order appointing a representative party to proceedings provided the court is satisfied that there is an identifiable class which have a common or similar interest in the litigation.

Rule 26.1(2)(w) of the Civil Procedure Rules 2000 applied; *Lloyd v Google* [2021] UKSC 50 applied.

6. There was sufficient evidence before the learned judge to satisfy the threshold requirement under EC CPR 21.1(1) that the members of the class must have 'the same or a similar interest' in the proceedings. Clearly, the three Funds managed by VDHI, as investors in the Notes, have the same or similar interest in having the Tomlin (Consent) Order set aside and in the recovery of the funds transferred out of the accounts (FE 2 and FE 3) in the name of Mex Securities at MBFX to Mex Clearing. Likewise, the other Noteholders have the same or a similar interest as the three Funds in doing so. Additionally, VDHI had, at the time of making the Representative Order, a 'sufficient interest' in the extant proceedings before the court below to be appointed the representative claimant of the Funds and the other Noteholders constituting the class of Noteholders with the same or a similar interest in bringing the claims. Giving the expression

‘sufficient interest’ a purposive interpretation, VDHI, both in its capacity as the manager of the three Funds which invested in the Notes, and as the entity authorized by the resolution passed at the EGM to represent the wider body of Noteholders in the said proceedings, also satisfies this basic requirement of CPR 21.1(2)(a).

Lloyd v Google [2021] UKSC 50 applied.

- 7. Three conditions must be satisfied for the appointment of a representative party. These are: (i) the parties or the class of persons must have the same or a similar interest in the proceedings; (ii) they must have a common grievance; and (iii) the relief sought must be beneficial to all members of the class. VDHI, as manager of the Funds, and the Noteholders have the same or a similar interest in the Ancillary Claim. That claim seeks to set aside the Tomlin (Consent) Order on various grounds, including alleged fraud by Mex Clearing and MBFX. Likewise, the Funds managed by VDHI and the Noteholders have a common grievance, which is that the Tomlin (Consent) Order was entered by these parties as part of an alleged fraudulent scheme, said to involve Mex Securities, Mex Clearing and MBFX, to defraud the Funds and the Noteholders of their investments in the Notes up to the sum of €36.4 million. Accordingly, there is no relevant conflict of interest between VDHI and the Noteholders in these proceedings, as they have the same or similar interest in the claims against the Ancillary Defendants (Mex Securities, Mex Clearing and MBFX). The concern that Noteholders may also have claims or potential claims against VDHI and/or VDH AG, which claims are not part of the proceedings in No. 73 of 2021, is irrelevant to the question of whether VDHI is an appropriate representative party in the said proceedings.**

Pan Atlantic Insurance Co Ltd v Pine Top

Insurance Co Ltd [1989] 1 Lloyd's Rep 568 applied; Bedford (Duke) v Ellis [1901] AC 1 applied.

- 8. CPR 21.2(5) permits applications for the appointment of a representative claimant to be made without notice. However, this is not determinative of the application proceeding without notice before the court, as the judge, in the exercise of his discretion, has the power to direct that notice of such an application be given to any person. An application to appoint a representative claimant is not of the genesis of 'an order to be made against' a defendant (such as injunctions) but is more in the nature of 'an administrative exercise' to enable proceedings to be brought, proceeded with or defended by a representative, in circumstances where there is a class of claimants or defendants having the same or a similar interest in the proceedings. Accordingly, the learned judge did not commit any error of principle in deciding to ultimately proceed with the application ex parte.**

Rule 21.2(5) of the Civil Procedure Rules 2000; Re First Express Ltd [1992] BCLC 824 distinguished; National Bank of Jamaica Ltd v Olint Corp Ltd (Practice Note) [2009] 1 WLR 1405 distinguished.

- 9. The sale by VDH KG of its interest in VDHI in February 2022 to an entity ultimately controlled by Mr. von Boetticher, whilst material and whilst not disclosed by VDHI at the discharge stage of the proceedings in the court below or during the April 2022 Special Sitting, does not render VDHI unsuitable to be appointed or to continue as the representative claimant in the proceedings below. This change in its ownership does not go to the threshold requirement that VDHI must have a sufficient interest in the proceedings below in order to be appointed as the representative claimant of the class or classes of Noteholders seeking the setting aside of the Tomlin (Consent) Order and**

recovery of the monies transferred from the accounts of Mex Securities with MBFX following such order being made. Accordingly, the question of a re-grant of the Representative Order does not arise for consideration. However, if it did, this Court, in exercising the discretion afresh, would order the regrant of the Representative Order appointing VDHI as the representative claimant in the proceedings below for the reasons set out at paragraphs 82,83 and 137 of the judgment.

Case Name: **Multibank FX International Corporation**
v
Von Der Heydt Invest S.A.

[BVIHCVAP2021/0009]
(TERRITORY OF THE VIRGIN ISLANDS)

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

Coram: **The Hon. Mr. Mario Michel, 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. Hodge Malek with him, Mr. Heffin Rees KC, Mr. Caley Wright and Mr. Oliver Clifton
Respondent:	Mr. Alex Hall Taylor KC with him, Mr. Alexander Cook, Mr. Simon Hall, Mr. Guy Oliff-Cooper and Ms. Sarah Malik

Issues: **Interlocutory Appeal – Worldwide Freezing Order (“WFO”) - Refusal of trial judge to discharge WFO – Appellate interference with exercise of judge’s discretion – Test for grant of application for WFO - Good arguable case – Whether VDHI had standing to bring claim – Whether VDHI, as a third party, had sufficient interest to challenge consent order – Whether applicant for a WFO must have an existing**

claim or a claim that he can institute immediately or within a specified time – Whether VDHI's claims capable of producing a money judgment – Risk of Dissipation – Whether just and convenient to grant and or continue WFO - Material non-disclosure - Whether VDHI committed material non-disclosure at the ex parte application – Application to adduce fresh evidence – Ladd v Marshall principles

Result and Reason:

HELD: Dismissing the appeal and the first and second applications for permission to adduce fresh evidence; ordering the appellant, Multibank, to pay the costs of the appeal and the costs of the first application for permission to adduce fresh evidence, and VDHI to pay the costs of the second fresh evidence application, all such costs to be assessed by a judge of the Commercial Court if not agreed within 21 days, that:

1. A freezing injunction is an interlocutory order of the court granted in aid of enforcement of a present or future judgment. Its purpose is to preserve the assets of the defendant in circumstances where the court is satisfied that preservation is necessary so that the assets can be available, if necessary, to satisfy a money judgment obtained by the claimant. It can also be granted to freeze the assets in the name of a third party (a non-cause of action defendant or "NCAD"), if the court is satisfied that the assets of the NCAD are beneficially owned by a person against whom a substantive claim is asserted. Whether an applicant will be successful in its application for a freezing injunction depends on whether the court is satisfied that: (i) there is a good arguable claim in the amount sought to be frozen; (ii) there is a real risk that the respondent will dispose of its assets in such a manner that a judgment against it will go unsatisfied; and (iii) it is just and convenient to make the order sought.

TSB Private Bank International SA v Chabra [1992] 2 All ER 245 applied.

2. **VDHI, in making its ex parte application for the freezing injunction (“Stage 1”), and then later at the inter partes hearing to continue the injunction (“Stage 2”), was obligated at both stages to prove that it had a good arguable claim in the amount sought to be frozen. The threshold for establishing a good arguable case is not a high one and an applicant only has to satisfy the court that its case is more than barely capable of serious argument, and yet not necessarily one that the judge believes has a better than 50% chance of success.**

Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Niedersachsen [1984] 1 All ER 398 applied.

3. **On the issue of good arguable case, VDHI had to establish that it had standing to bring the claim in its own right or as a representative of the Noteholders, and whether it had sufficient interest as a third party to challenge the Consent Order. There was sufficient material before the Judge at Stage 1 to satisfy the requirement of VDHI’s standing to represent both the VDHI Managed Funds and the Noteholders. VDHI, as the managers of the three funds which invested in the Notes also had sufficient interest to apply to set aside the Consent Order to protect the Noteholders’ interests.**

Fourie v Le Roux and others [2007] UKHL 1 applied; Convoy Collateral Ltd v Broad Idea International Ltd [2002] 2 WLR 703 applied; Roshan v Singh and others [2017] EWHC 176 (Ch) considered; Smagin v Yegiazaryan and another [2021] EWHC 1383 (Comm) considered.

4. **It is not a requirement that an applicant for a WFO must have an existing claim or a claim that it can institute immediately or within a specified time, nor that a right to bring such**

proceedings should have already arisen when the application is made. What is necessary is that the applicant must satisfy the court to a sufficient degree of certainty that a right to bring proceedings will arise, and that proceedings will be brought, whether in the domestic court or before another court or tribunal. In this case, VDHI had not filed a claim at Stage 1, but had pleaded a claim for unlawful means conspiracy, listing the bare factual allegations and gave undertakings to issue proceedings. This was enough to satisfy the Judge to a sufficient degree of certainty at the Stage 1 hearing that notwithstanding the absence of a pleaded claim, even in draft, VDHI had claims against the Defendants. Accordingly, the learned judge did not err in finding at Stage 1 that VDHI had a good arguable case for claims for at least the tort of unlawful means conspiracy and for setting aside the Consent Order under the inherent jurisdiction of the court. Furthermore, the issue of VDHI having existing claims was put on a better foundation by the time the proceedings got to Stage 2 with the issuance of a claim form and statement of claim.

Fourie v Le Roux and others [2007] UKHL 1 applied; *Convoy Collateral Ltd v Broad Idea International Ltd* [2002] 2 WLR 703 applied.

5. A claim for a freezing injunction should result in a judgment for the payment of a sum of money, in default of which the judgment creditor can enforce the judgment against the assets that have been frozen by the injunction. VDHI's claims include damages for unlawful means conspiracy which, if successful, will result in a monetary award to VDHI on behalf of the Noteholders. In addition, if the claim for a declaration setting aside the Consent Order is granted, this could lead to a further order for the repayment of the funds transferred out of the accounts following the entry of the Consent

Order. These claims satisfy the money claims requirement for the purposes of applying for a freezing injunction.

- 6. VDHI has established that it had a good arguable case of fraud against Multibank and there is no basis to interfere with Jack J's finding to this effect.**
- 7. To satisfy the requirement of dissipation, there must be a real risk, judged objectively, that a future judgment would not be met because of unjustifiable dissipation of assets. It is not enough to prove that the defendant has the ability to dissipate his assets. Cogent evidence of the risk of dissipation must go to the defendant's propensity to dissipate his assets unjustifiably from which the court can infer a serious risk of dissipation. In this case, there was evidence to support the finding of a good arguable case of an unlawful means conspiracy against the Defendants to misappropriate the €36.4 million in the FE accounts of Mex Securities at Multibank. In addition, Multibank was a part of the alleged conspiracy and the €36.4 million in the FE accounts had been removed and was no longer held by an entity within the Multibank Group. There was sufficient evidence before the Judge at Stage 1 to satisfy him that there was a real risk of dissipation and a fortiori at Stage 2 when he had a more complete picture of the evidence and the benefit of counsels' submissions.**

Green Elite Limited (in liquidation) v Mr. Fang Ankong et al BVIHCMA2019/0030 (delivered 11th June 2021, unreported) followed; Fundo Soberano De Angola and others v Santos and others [2018] EWHC 2199 (Comm) applied; Lakatamia Shipping Company Ltd v Morimoto [2019] EWCA Civ 2203 considered.

- 8. The grant or continuation of an injunction is not automatic even in a case where a good**

arguable case and a risk of dissipation have been established. The court must also be satisfied that it is just and convenient to grant or continue the injunction. Consideration must be given to the effect that granting a freezing injunction would have on a company's business. Multibank asserts that it is a substantial and established trading company operating internationally and the stigma attached to a freezing injunction against the company is damaging to its commercial interest and should weigh heavily in the assessment of just and convenient. However, the evidence shows that Multibank is not a trading company in the popular sense of being a company engaged in the buying and selling of goods. This limits the purported reputational loss. The Court therefore finds it just and convenient to continue the WFO until trial or further order.

Section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act considered; Petroceltic Resources Limited v Archer [2018] EWHC 671 (Comm) considered; Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Niedersachsen [1984] 1 All ER 398, considered.

9. An applicant making an ex-parte application has a duty to give full and frank disclosure of all material facts. Material non-disclosure is a ground for discharging a freezing injunction. In considering the issue of material non-disclosure as alleged by Multibank, the Court should bear in mind that, particularly in heavy commercial cases, the borderline between material facts and non-material facts may be somewhat uncertain. It is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be

readily and summarily established. Upon consideration of the allegations by Multibank of material non-disclosure and the evidence before this Court, it cannot be said, whether taken individually or cumulatively, that the allegations amount to material non-disclosures and are sufficient to discharge the WFO.

Brink's Mat Ltd v Elcombe and others [1988] 1 WLR 1350 applied; Crown Resources AG v Vinogradsky and others [2001] Lexis Citation 08 considered.

10. In fresh evidence applications, all three limbs of the test in Ladd v Marshall must be satisfied, albeit the application of the test is more relaxed in interlocutory appeals than in appeals from final judgments after trial. Bearing these principles in mind, the applications to adduce fresh evidence by Multibank filed on 22nd April 2022 and by VDHI filed on 27th January 2023, have not satisfied the test for the admission of new evidence and are dismissed.

Ladd v Marshall [1954] 3 All ER 745 applied.

Case Name:

[1] Caribbean Resorts Limited
trading as Mariner's Hotel
[2] The French Verandah Inc.
v
Glennis Marlon Mills

[SVGHCVAP2020/0014]
(Saint Vincent and the Grenadines)

Date:

Thursday, 23rd February 2023

Coram:

The Hon. Dame Janice M. Pereira DBE, Chief Justice
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Stanley John KC with him Ms. Nakita Charles and Mr. Akin John

Respondent: Mrs. Zhingha Horne-Edwards

Issues:

Civil appeal – Landlord and tenant – Contractual interpretation – Whether judge erred in concluding that the first appellant relinquished any beneficial interest in the car park and knoll – Proprietary estoppel – Whether a proprietary estoppel arose in relation to the car park and knoll – Whether judge erred in failing to determine what equity, if any, the first appellant had acquired in the car park prior to the settlement agreement – Whether judge erred in failing to consider the appellants’ position that it was unconscionable for the respondent to deny the appellants’ proprietary rights in the car park and knoll area – Res judicata – Whether judge ignored the respondent’s concession that the first appellant could not be estopped via res judicata/abuse of process from pleading matters which it could have pleaded as a defence in the previous proceedings – Tenancy at will – Whether judge erred in finding that a tenancy at will had been created between the appellants and the respondent

Result/Reasons:

Held: dismissing the appeal and ordering the appellants to pay the respondent’s costs, such costs to be assessed by a Judge or Master of the High Court at no more than two-thirds of the amount awarded at the court below if not agreed within 21 days, that:

1. The purpose of a contract can be ascertained by reference to the factual matrix known to the parties at the time the contract is entered into and which forms or instructs the background against which the contract was agreed. These facts are presumed to be within the parties’ contemplation, and these facts form part of the relevant facts and circumstances upon which the interpretation of the contract depends. The learned trial judge conducted an extensive

analysis of what the terms of the settlement agreement meant as well as a lengthy assessment of the surrounding circumstances which led to its signing. Accordingly, she applied the appropriate principles in arriving at her decision that the settlement agreement transferred the lands encompassing the car park and knoll to the respondent absolutely free of incumbrances.

Halstead (Donald) v The Attorney General of Antigua and Barbuda (1995) 50 WIR 98 followed; Reardon Smith Line Ltd v Hansen-Tangen; Hansen-Tangen v Sanko Steamship Co [1976] 3 All ER 570 applied; Bahamas International Trust Co Ltd and another v Threadgold [1974] 3 All ER 881 applied.

2. In order to establish proprietary estoppel, the appellants would be required to show that there was some representation either by words or by conduct on the part of the respondent that they were entitled in equity to an interest in the said property and that they relied on those representations or acts to their detriment. The appellants would have to show that it would have been unconscionable for the respondent to seek to exclude them from the use of the properties. The appellants having been parties to the settlement agreement and having agreed that the property was transferred to the respondent free and clear of all incumbrances and having made promises to hold the respondent harmless from any matters competent to be raised whether known or unknown, they were estopped from making a claim for a beneficial interest in the car park and knoll area and the learned judge rightly so found.

Walsh v Ward and others and other appeals (2015) 87 WIR 101 applied.

3. Proprietary estoppel is an equitable doctrine rooted in the fundamental principle of

unconscionability. Put simply, the question of whether it would be unconscionable for a court to allow a party to resile from the assurance or representation made or given to another party is to be approached in the round as part of a broad inquiry. It is not to be approached in a compartmentalised way whereby each element or ingredient of proprietary estoppel is considered as free-standing, leading to a court accepting or rejecting the claim where it finds each element may not have fully made out. While the learned judge accepted that CRL had expended monies to develop the car park, by signing the settlement agreement, the appellants accepted that the car park and knoll had been transferred to the respondent and they retained no beneficial interest in them. Accordingly, it would not have been unconscionable for the respondent to assert beneficial ownership over those areas and deny the appellants' proprietary rights.

Gillett v Holt and another [2000] 2 All ER 289 applied.

4. The principle of res judicata would necessarily arise where an issue could or should have been raised in previous civil proceedings. In this matter it cannot be said that the first appellant would not have been in a position; indeed, would not have had an obligation to raise the issue of its beneficial interest in the car park during the discussions leading up to the execution of the settlement agreement. It was an issue that ought to have been brought to the attention of various parties. Having failed to do so and being unable to indicate the existence of any special circumstances entitling them to re-open that claim in the interest of justice, the trial judge was correct in her conclusion that res judicata applied.

Virgin Atlantic Airways v Zodiac Seats UK Ltd [2013] UKSC 46 applied; Halstead (Donald) v The Attorney General of Antigua and Barbuda (1995) 50 WIR 98 followed.

5. A tenancy at will may be implied in a situation where a person is in possession of property by the consent of the owner. A tenancy such as this is determinable at the will of the owner of the land. The owner may give such notice of termination by some act of the landowner on the property or off the property inconsistent with the continuation of the tenancy. Accordingly, having determined that the appellants were tenants at will, the learned judge was correct in concluding that by bringing the action for trespass the respondent had determined the tenancy at will. Further, having concluded that the appellants' tenancy at will had been terminated, the finding that the appellants became trespassers naturally followed.

Whaldama Brooks (aka Ras B) et al v Kenneth Brooks et al AXAHCV/2006/0006 (delivered 25th January 2008, unreported) followed.

6. The right to bring an action to recover land is barred whenever 12 years has elapsed from the time when the right of action accrued. That right of action only accrues when a person is in adverse possession of the land. Time only begins to run when adverse possession is taken of the land. This was not a situation where it could be said that the land was in possession of some person in whose favour the limitation period could run. The appellants were not squatters but were persons who entered into possession with the knowledge and permission of the property owner, IHL, and the trial judge correctly found this to be the case. Therefore, there could be no adverse possession and the issue of the limitation period was a non-issue.

Sections 17(1) and 19 of the Limitation Act Cap 129, Laws of St. Vincent and the Grenadines considered; Michael Findlay v Elroy Arthur SVG Civil Appeal No. 17 of 2010 followed.

Case Name:

Cliff Williams

v

Mary John

[ANUHCVP2020/0015]

(ANTIGUA AND BARBUDA)

Date:

Thursday, 23rd February 2023

**Coram for
delivery:**

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

Appearances:

Appellant:

Mr. Sylvester Carrott

Respondent:

Mr. Rushaine Cunningham

Issues:

Civil appeal – Defamation – Libel - Effect of a failure to file witness statements – Discretion of trial judge to limit cross examination - Rule 29.11 of the Civil Procedure Rules 2000 – Whether learned judge erred in confining the scope of the appellant’s cross-examination to matters contained in the respondent’s witness statement

**Result and
Reason:**

HELD: allowing the appeal on ground 1 and setting aside the decision of the learned judge in its entirety, remitting the claim to be retried by a different judge of the High Court and awarding prescribed costs in the court below and two thirds of those costs on appeal in accordance with rules 65.5 and 65.13 of the CPR, that:

- 1. Rule 29.11 of the Civil Procedure Rules 2000 (“CPR”) merely provides that if a witness statement or witness summary is not served in respect of an intended witness within the time**

specified by the court, the witness may not be called unless the court permits. Such permission may not be granted at the trial unless the party seeking permission has a good reason for not previously seeking relief under rule 26.8. CPR 29.11 does not provide any warrant for limiting the cross-examination of the party in default. Further, a judge purporting to exercise their discretion under CPR 39.2 to limit cross-examination, must exercise such discretion judicially. The judge can be expected to articulate the reason why a particular line of cross-examination is being curtailed.

Rules 29.11 and 39.2 of the Civil Procedure Rules 2000 applied.

2. In this case, the learned judge made no reference to rule 39.2 in her ruling. The sole discernible reason given by the judge is that 'it is the law' that where a party is 'without his witness statement at trial' he is limited to cross-examination on the evidence contained in the witness statement of the other party. The flaw in the learned judge's reasoning is in thinking that to permit the appellant to put suggestions to the respondent based on matters contained in his defence would have the effect of permitting him to give evidence through the back door. Indeed, what is put in cross-examination is not evidence in the case. The evidence is the witness' answer. Accordingly, whatever the appellant may have put to the respondent could not become evidence in the case unless the respondent accepted the suggestions. Notwithstanding that the appellant was prevented from adducing evidence, he was still entitled to probe the respondent on any issue, provided it was relevant. Additionally, the learned judge's decision not to consider the defence at trial and when writing her judgment was also wrong in law in the circumstances where the appellant's defence had not been struck out. Indeed, the pleadings define the issues in

dispute between the parties. This is different from weighing and assessing the evidence to be accepted. To review pleadings with a view to identifying the issues in dispute does not have the effect of allowing evidence through the backdoor.

3. For the foregoing reasons, the Court was of the view that the learned judge erred in law in holding that because the appellant was prevented from calling evidence, the scope of the appellant's cross-examination of the respondent was necessarily limited to matters contained in the respondent's witness statement. Such a ruling undoubtedly led to a procedural irregularity which produced unfairness to the appellant, who was restricted in the scope and extent of probing that he might otherwise have deployed in cross-examination.

APPLICATIONS AND APPEALS

Case Name:

Augustin Pascall

v

The Public Service Commission

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

Date:

Monday, 20th February 2023

Coram:

**The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Gerard St.C Farara, Justice of Appeal
[Ag.]**

Appearances:

Appellant: Dr. Francis Alexis KC with him, Ms. Alicia Lawrence

Respondent: Ms. Karen Samuel

Issues: Application for leave to appeal- No leave required - Section 33.2 (g)(2) of the West Indies Associated States Supreme Court (Grenada) Act

Type of Order : Oral Decision

Result / Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:

1. The notice of application for leave to appeal filed on 7th September 2021 is deemed to be the notice of appeal and is further deemed to be properly filed.
2. The appellant will file and serve skeleton submissions within 14 days of today's date or by 6th March 2023.
3. The respondent will file and serve skeleton submissions in response within 14 days thereafter or by 23rd March 2023.
4. The hearing of this appeal is adjourned to the next sitting of this Court in Grenada slated to commence the week of 17th July 2023.
5. The stay of proceedings granted on 6th April 2022 will continue pending the hearing and determination of the appeal.

Reason: The application for leave to appeal and for a stay of execution filed on 7th September 2021, having come up for hearing before the Court on 6th April 2022 and the Court having determined that leave to appeal the decision of Justice Agnes Actie of 24th August 2021 is not required in accordance with section 33(2)(g)(2) of the West Indies Associated States Supreme Court (Grenada) Act, the Court hereby made the orders above.

Case Name: The National Lotteries Authority
v
Jerome De Roche

**[GDAHCVAP2021/0025]
(GRENADA)**

Date: Monday, 20th February 2023

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

Appearances:

Appel: Mr. Ruggles Ferguson with him, Ms. Danyish Harford

Respondent: Ms. Melissa Modeste-Singh

Issues: Motion for leave to appeal to His Majesty in Council - Section 104 of the Constitution of Grenada - Final decision of the Court of Appeal in civil proceedings in which the matter in dispute on the intended appeal to His Majesty in Council is upwards of the value of Fifteen Hundred Dollars - Section 4 of the West Indies Associated States (Appeals to Privy Council) (Grenada) Order 1967

Type of Order Oral Decision

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The applicant is hereby granted conditional leave to appeal to His Majesty in Council in respect of a judgment of the Court of Appeal delivered on 21st November 2022.
2. The applicant shall within 90 days of the date of this order enter into good and sufficient security to the satisfaction of the court in a sum equivalent to £500 for the due prosecution of the appeal and the payment of all such costs as may become payable by the applicant in the event of him not obtaining an order granting him final leave to appeal or of the appeal being dismissed for non-prosecution or of the Judicial Committee ordering the applicant to pay the costs of the appeal.

3. The applicant shall within 90 days, take all necessary steps for the purpose of procuring the preparation of the record and the dispatch hereof.

Reason:

The Court considered an application by motion for leave to appeal to the Privy Council, a decision of the Court dated 21st November 2022 where the Court allowed an appeal against the judgment of the court below awarding damages to the respondent in the sum of EC\$540,000.00.

The Court considered that the application for leave to appeal was premised on the fact that the judgment of the Court which the applicant is seeking to appeal is a final decision of the Court in civil proceedings in which the matter in dispute is upwards of the value of EC \$1500.00. The Court noted the affidavit of the applicant in support of the application in which the applicant deposes that his application is in compliance with Section 104 of the Constitution of Grenada and Section 4 of the West Indies Associated States (Appeals to Privy Council) (Grenada) Order 1967.

The Court was satisfied that the applicant met the requirements for the grant of leave to appeal to the Privy Council.

Case Name:

**Johnny Julien
v
Anthony Charles**

**[GDAHCVAP2020/0013]
(GRENADA)**

Date:

Monday, 20th February 2023

Coram:

**The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Gerard St.C Farara, Justice of Appeal**

[Ag.]

Appearances:

Appellant: Mr. Ian Sandy

Respondent: No appearance

Issues:

Interlocutory appeal - Appellate review of trial judge's discretion - Rule 26.4 of the Civil Procedure Rules 2000 - General power of court to strike out statement of claim for failure to comply with rules or order of court - Striking out of statement of claim by trial judge on judge's own motion - Order made for the filing of trial bundle by claimant - CPR 39.4 - Failure by appellant to file a trial bundle in lower court proceedings - Learned judge stated in transcript that she had no choice but to "strike out the claim" - Learned judge's order stated that the claim was dismissed and struck off the court's list - Whether learned judge erred in the exercise of discretion by striking out the statement of claim - Whether the striking out of the statement of the claim was too draconian - Whether learned judge's decision clearly or blatantly wrong - Whether learned judge should have made an unless order instead of striking out the statement of claim

Type of Order

Oral Judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is allowed.
2. The order of the high court dated 27th October 2020 is set aside in part, that is, to the extent that by the said order the statement of claim filed by the appellant stood dismissed and was accordingly struck out by the learned judge.
3. The appellant shall file the necessary trial bundles within 14 days, that is, no later than 7th March 2023.
4. The matter is remitted to the high court for further case management.
5. No order as to costs.

Reason:

The respondent in the appeal did not appear and there was no appearance on his behalf by counsel. The respondent was served to be present in Court today but he indicated to the Registrar of the High Court that he would not be present today and gave no reason for his non-appearance.

Before the Court was a notice of appeal by which the appellant appealed against the order of a judge of the high court dated 27th October 2020 by which the learned judge made the following order:

“The statement of claim filed by the claimant and the counterclaim filed by the defendant stand dismissed and are accordingly struck out from the court’s list.”

The appellant appealed against that portion of the order by which his statement of claim stood dismissed and was accordingly struck out by the learned judge. In his notice of appeal the appellant relied on 4 main grounds of appeal. The Court considered the written submissions filed by learned counsel on behalf of the appellant and the Court noted the failure of the respondent to appear at the hearing of the appeal. The Court also considered the principles as set out in the decision of the Caribbean Court of Justice in Barbados Rediffusion Service Ltd. v Mirchandani et al (No. 2) BB 2005 CCJ 001, specifically where the CCJ at paragraph 45 stated:

“Broadly speaking, striking out orders should be made either when that is necessary in order to achieve fairness or when it is necessary in order to maintain respect for the authority of the court’s orders.”

And also at paragraph 53 where it was stated that:

“There was no attempt by Husbands J or for that matter the Court of Appeal to carry out any sort of balancing exercise and they failed to take into account any of the relevant factors referred to above.”

Having considered the appellant’s submissions, the

Court was satisfied that the learned judge below did err as a matter of principle in failing to carry out a balancing exercise and in failing to take into account certain of the relevant factors that ought to have been taken into account in reaching a decision to strike out the statement of claim. The Court was therefore satisfied that the appeal ought to be allowed to the extent that it was an appeal against the striking out of the statement of claim only.

Case Name:

Clifton Smith

v

The King

**[GDAHCRAP2018/0021]
(GRENADA)**

Date:

Monday, 20th February 2023

Coram:

**The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Vicki Ann Ellis, Justice of Appeal
The Hon. Mr. Gerard St.C Farara, Justice of Appeal
[Ag.]**

Appearances:

Appellant: In Person

Respondent: Mr. Howard Pinnock, Senior Crown Counsel

Issues:

Criminal Appeal - Appeal against sentence - Rape of a male - Sentence was manifestly excessive - Whether the learned judge failed to take into consideration that the appellant pleaded guilty at the first opportunity

Type of Order

Oral Judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The sentence of 10 years 6 months imprisonment imposed on the appellant is varied to a sentence of 8 years 8 months imprisonment.

Reason:

The appellant appealed the sentence of 10 years 6 months imprisonment imposed on him by the learned judge following a plea of guilty to the offence of Rape of a male. The Court noted that Mr. Smith was unrepresented and made no submissions to the Court. Mr. Pinnock conceded that the sentence was excessive and should be varied from 10 years 6 months imprisonment to 8 years 8 months imprisonment. The appellant Mr. Smith was in agreement with the submission of Mr. Pinnock that the sentence should be reduced. The Court also accepted Mr. Pinnock's submission and consequently varied the sentence of the learned judge.

Case Name:

Edward Joseph

v

The King

**[GDAHCRAP2017/0023]
(GRENADA)**

Date:

Tuesday, 21st February 2023

Coram:

**The Hon. Dame Janice M. Pereira DBE, Chief Justice
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal**

Appearances:

Appellant: Mr. Ruggles Ferguson and Mrs. Sherrine Francis Hackett

Respondent: Mr. Howard Pinnock

Issues:

Application to amend notice of appeal - No objection

by respondent

Type of Order:

Oral Decision

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The application to amend the grounds of appeal to put forward the additional ground that the delay causes a breach of the appellant's constitutional right to a fair hearing within a reasonable time, is allowed.

Reason:

The Court read the written submissions filed by both the applicant and the respondent in relation to the application to amend the grounds of appeal. There was no objection by the respondent to the application and the Court was of the view that the application ought to be granted.

Case Name:

Ashley Augustine

v

The King

**[GDAHCRAP2019/0013]
(GRENADA)**

Date:

Tuesday, 21st February 2023

Coram:

**The Hon. Dame Janice M. Pereira DBE, Chief Justice
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal**

Appearances:

Appellant:

Mr. Ruggles Ferguson appearing amicus curiae

Respondent:

Mr. Howard Pinnock

Issues:

Application for legal aid

Type of Order:

Directions

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

Mr Ruggles Ferguson assisted by Ms. Herricia Willis shall represent the appellant in the proceedings going forward and to assist him in preparing an affidavit of means.

Reason:

The Court, noting that there was no evidentiary basis put before it in support of the appellant's application for legal aid and being of the view that it was in the interest of justice that such evidence be provided, directed that Ms. Herricia Willis who indicated to the Court her willingness to assist counsel Mr Ferguson for the appellant would assist the appellant in preparing an affidavit of means and will further assist in his appeal.

Case Name:

Edward Joseph

v

The King

**[GDAHCRAP2017/0023]
(GRENADA)**

Date:

Tuesday, 21st February 2023

Coram:

**The Hon. Dame Janice M. Pereira DBE, Chief Justice
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal**

Appearances:

Appellant:

Mr. Ruggles Ferguson and Mrs. Sherrine Francis Hackett

Respondent:

Mr. Howard Pinnock

Issues: Criminal appeal - Appeal against sentence - Unavailability of transcript - Delay of over 4 years in the preparation of the transcript

Type of Order: Oral judgment

Result / Order: IT IS HEREBY ORDERED THAT:
1. The appeal is allowed.
2. The sentence is substituted for one of time served.

Reason: The Court noted that the transcript of proceedings had not yet been prepared and so could not proceed with the hearing of the appeal. In addition to the severe delay of over 4 years in the preparation of the transcript, the Court took into consideration the submissions of either party and the fact that the appellant had been subject to a flogging after the sentence had been passed and this fact was not disputed by the respondent.

Having regard to the totality of the circumstances, including the fact that the appellant would have served his entire sentence by November 2023, the Court was of the view that the appropriate course must be to allow the appeal and to substitute the appellant's sentence to one of time served.

Case Name: Richardson Donald
v
[1] Anthony Charles
[2] Donna Charles
[GDAHCVAP2019/0012]
(GRENADA)

Date: Thursday, 23rd February 2023

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

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

Appearances:

Applicant: Mrs. Avril Trotman-Joseph

Respondent: Mr. Kadeem Strachan

Issues:

Application for variation of order - Whether the 2019 Leslie S. Barry Cantilever Retaining Wall Option 01 is required to be modified due to the impossibility of building it along the parties' common boundary - Whether the variation is necessary to allow the applicant to comply with the Court's order - Whether the Court is in a position to make an order in relation to the placement of the retaining wall

Type of Order:

Oral Decision

Result / Order:

IT IS HEREBY ORDERED THAT:

The application to vary this Court's order dated 19th July 2021 is deferred and there shall be liberty to apply in respect thereof.

Reason:

The Court noted that the variation sought by the applicant was based on practical and technical considerations which it was not in a position to decide upon. Accordingly, the Court directed that the parties engage in settlement discussions and consult impartial engineers to determine where the retaining wall is to be placed and whether the original design can be constructed as ordered. In the interim, the application was deferred and the parties were given liberty to apply in respect thereof.

Case Name:

**Jude Lessey
v
The King**

**[GDAHCRAP2016/0015]
(GRENADA)**

Date: Thursday, 23rd February 2023

Coram: The Hon. Dame Janice M. Pereira DBE, Chief Justice
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant: Ms. Danyish Harford holding papers for Mr. Ruggles Ferguson

Respondent: Mr. Howard Pinnock

Issues: Criminal Appeal - Abandonment of appeal - Rule 59 of the Eastern Caribbean Supreme Court, Court of Appeal Rules 1968 - Nardis Maynard v The Queen SKBHCRA2004/0012 (delivered 10th June 2022, unreported)

Type of Order: Directions

Result / Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:

1. The appellant shall file with the registrar, a signed notice of abandonment of appeal in Form 15 in Appendix C of the Eastern Caribbean Supreme Court, Court of Appeal Rules 1968.
2. Upon such notice being given, the appeal shall be deemed to be dismissed.

Reason: The Court noted that rule 59 of the Eastern Caribbean Supreme Court, Court of Appeal Rules 1968 (“the Rules”) sets out the procedure for the abandonment of an appeal. The Court also noted its decision in Nardis Maynard v The Queen which affirmed that the proper procedure for abandoning an appeal is by the appellant giving written notice of abandonment in

Case Name:

**Wayne Hazzard
v
Capital Bank International (In receivership
David Holukoff ,
Receiver of Capital Bank International)**

**[GDAHCVAP2021/0034]
(GRENADA)**

Date:

Thursday, 23rd February 2023

Coram:

**The Hon. Dame Janice M. Pereira DBE, Chief Justice
The Hon. Mde. Margaret Price-Findlay, Justice of
Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**

Appearances:

Appellant: Ms. Deborah Mitchell

Respondent: Ms. Karen Samuel

Issues:

Interlocutory appeal - Default judgment/ judgment on trial - Whether the learned judge misdirected herself and erred in law in granting what was in the nature of a default judgment; whether the learned judge satisfied herself that the respondent was entitled to the relief sought – Whether relief granted on the basis of her being satisfied that the appellant was served and did not put in an appearance - Further or alternatively, whether the learned judge misdirected herself and erred in law in treating the first hearing of the fixed date claim as the trial in breach of the mandatory prohibition in Practice Direction No. 5 of 2020 (which was then in force)

Type of Order

Oral Judgment

Result / Order:

**IT IS HEREBY ORDERED THAT:
1. The appeal is dismissed.**

2. The judgment entered up against the appellant on 26th November 2020 is affirmed.
3. Costs of the appeal to the respondent, fixed in the sum of \$500, to be paid on or before 24th March 2023.

Reason:

The appellant in this matter borrowed money from the respondent bank, the loan was partly secured by mortgage for over \$70,000.00. Other monies were advanced to the appellant. Eventually he defaulted on his payments and the respondent bank filed a fixed date claim form claiming \$176,608.91 principal, interest amounting to \$358,677.35 and statutory interest. There were also claims for late charges and fixed costs in the sum \$2,000.00 and the cost of service, \$1,000.00. The appellant was served with the fixed date claim form. The appellant did not acknowledge service or defend the claim. The date of the first hearing of the claim form was 26th November 2020. The appellant was not present at the hearing. Judgment was entered against the appellant and the judgment was served on the applicant on 21st January 2021.

Having been served, the appellant did nothing to contest the judgment. Up to 10 months passed and in November 2021 when execution proceedings were commenced against him, he applied to this Court for an extension of time to appeal against the judgment that had been entered against him which was granted. He filed his notice of appeal on 21st December 2021.

The appellant raised potential defences of limitation in respect of various sums of interest and as to the amount secured by the mortgage. , However the Court was not satisfied that any these defences or any other matter in this case rises to the level of the exceptional defence or exceptional circumstance that would be required for this Court to exercise its discretion to allow the claim to go forward. The court was also satisfied that there was no real issue that the debt claimed was not due albeit raised as a mortgage claim. In the circumstances, the Court was constrained to dismiss the appellant's appeal against

the judgment entered up against him in November 2020..

Case Name:

[1] Karen Allen
[2] Steven Fagan
[3] Marie Carole Lidbetter
v
[1] Registrar of Companies
[2] Financial Services Commissioner
[3] Rueben Meade
[4] Fotis Andrianakos
[5] Montobacco Limited
[6] Emerald Metal Co. Limited
[7] 888 International Limited
[8] Edmond Elbaz

[MNIHCVAP2022/0008]
(MONTSEERRAT)

Date:

Thursday 23rd February 2023

Coram:

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

Appearances:

Appellants: Karen Allen in person and on behalf of the other appellants/applicants

Respondent: Ms. Renee Morgan for the 1st and 2nd Respondents

Issues:

Application to revoke order of a single Judge -
Application for an Order to stay proceedings - CPR
Part 62 - Whether leave to appeal was required to file
the instant appeal - Prospect of Success -

Type of Order

Oral Decision

Result / Order:

IT IS HEREBY ORDERED THAT:

The application made on 21st October 2022 to revoke the order of the court below made on 7th October 2022 and for a stay of the proceedings is denied.

Reason:

The Court noted that it has no jurisdiction to entertain the application and could not grant the orders that were sought by the applicants.

Case Name:

**[1] Peter Toussaint
[2] Terentia Nigel Toussaint-Carroll
[3] The Heirs of Thelma Toussaint
v
Peter Bernard

[SLUHCVAP2022/0017]
(SAINT LUCIA)**

Date:

Thursday 23rd February 2023

Coram:

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

Appearances:

Applicants:

**Mr. Peter Toussaint in person
Ms. Terentia Nigel Toussaint-Carroll in person and for the 3rd applicant**

Respondent:

No appearance

Issues:

Application for leave to appeal - Whether leave to appeal ought to be granted - Whether applicants have shown good prospects of success on appeal - Leave to appeal application made more than 14 days after the date of the learned judge's order - Application made out of time with no permission sought or granted in respect of an extension of time

Type of Order: Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:

The application for leave to appeal, being made out of time, is accordingly dismissed.

Reason: Before the Court was an application for leave to appeal from the interlocutory decision made by the learned judge of the High Court on 20th September 2022. Pursuant to rule 62.2(1) of the Civil Procedure Rules 2000, where an appeal may be made only with the leave of the court below, a party wishing to appeal must apply for leave to appeal within 14 days of the order against which leave to appeal is sought. The notice of application was dated 20th October 2022 and was signed by the litigant in person, the 2nd applicant.

On the face of the application was a stamp from the registry of the Supreme Court dated 27th October 2022 and there was also a stamp indicating that the said application was filed with the Court of Appeal on 17th November 2022. It was clear on the face of the application that it was out of time, even taking into account the date of the application which was approximately 30 days after the order with respect to which leave to appeal had been sought. Accordingly the application was out of time.

Case Name: Levar Devere Browne
v
The Chief of Police
[SKBMCRAP2021/0003]
(SAINT KITTS AND NEVIS)

Date: Thursday 23rd February 2023

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

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

Appearances:

Appellant: Mr. Perry Joseph

Respondent: Mr. Bervis Burke for the Director of Public Prosecutions

Issues:

Criminal Appeal - Section 4(1)(a), 6(3) and 29 of the Drug (Prevention and Abatement of the Misuse and Abuse of Drug) Act - Section 185(2)(b) of the Customs Act - Section 103(1)(b) of the Customs Act - Section 45(3)(9)(1)(a) and 182(1) of the Customs Act - Whether the learned magistrate erred in finding that appellant was in possession of a controlled drug - Constructive Possession - Bill of Lading - Whether the bill of lading gave rise to implied possession by the appellant - Physical possession of goods - Whether goods, despite being in the physical possession of customs, were in the control of appellant - Whether possession of the controlled drug passed to the appellant by virtue of possession of the bill of lading - Whether the magistrate erred in law in finding that the prosecution did not have to prove that the appellant suspected or had reason to suspect that the substance or product was a controlled drug - Importation of Goods - Whether the prosecution established that the appellant was an importer of controlled drugs

Type of Order

N/A

Result / Order:

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name:

**Kenton Chance
v
Adrian DaSilva**

**[SVGMCVAP2021/0006]
(SAINT VINCENT AND THE GRENADINES)**

Date: Thursday, 23rd February 2023

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

Appearances:

Appellant: Mr. Jomo Thomas

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

Issues: Magisterial civil appeal - Defamation - Whether the learned magistrate erred when she convened the trial without allowing the appellant to obtain the criminal trial transcript - Whether the learned magistrate erred when she denied the appellant's request to summon another magistrate as witness - Whether the learned magistrate failed to consider the defences to defamation - Whether the learned magistrate failed to acquaint herself with the evidence led at trial - Whether the learned magistrate erred by failing to provide reasons for her decision

Type of Order N/A

Result / Order: IT IS HEREBY ORDERED THAT:
Judgment is reserved.

Case Name: Ng Min Hong
v
Somarli Lie

[BVIHCMAP2022/0068]

(TERRITORY OF THE VIRGIN ISLANDS)

Date: Friday, 24th February, 2023

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

Appearances:

Appellant: Mr. Alain Choo-Choy KC

Respondent: Mr. Matthew Hardwick KC with him Mr. Richard Evans
and Dr. Alecia Johns

Issues: Interlocutory Appeal - Disclosure - Appellate Restraint - Whether the Judge was plainly wrong to find as a fact that the appellant had practical control of the Documents for the purpose of the CPR 28.2(2) duty of disclosure - Access to Documents - Whether there was an agreement that appellant could disclose the documents for the purposes of proceedings in the BVI - Whether the Judge failed to properly consider whether there was a currently existing understanding or arrangement for the appellant to have free access to the relevant documents - Whether the evidence before the judge supported a finding of an existing understanding or arrangement for free access

Type of Order: N/A

Result / Order: IT IS HEREBY ORDERED THAT:

1. Judgment is reserved.
2. The undertaking reflected in the order of 20th January 2023 is extended pending the determination of the appeal with liberty to apply.