

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

COMMONWEALTH OF DOMINICA
VIDEOCONFERENCE

Monday 21st November 2022 to Friday 25th November 2022

JUDGMENT

Case Name: **The National Lotteries Authority**

v

Jerome De Roche

[GDAHCVAP2021/0025]
(Grenada)

Date: **Monday, 21st November 2022**

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

Appearances:

Appellant: **Mrs. Melissa Modeste-Singh**

Respondent: **Ms. Danyish Harford**

Issues: **Civil appeal – Breach of contract – Failure to present winning lotto ticket – Non-payment of winning jackpot – Pleadings – Rules 8.7 and 8.7A of the Civil Procedure Rules 2000 – Evidence – Witness statements – Whether the judge erred in law in permitting the respondent to adduce evidence that he had presented the winning ticket to the appellant’s agent when this fact was essential to the cause of**

action but was never pleaded in the statement of claim – Whether a party's case can be conducted on a footing which formed no part of its pleaded case

Result/Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is allowed.
2. The orders of the judge are accordingly set aside.
3. The respondent shall pay two-thirds of the appellant's prescribed costs in the court below and, on this appeal, two-thirds of that amount.

Reason:

1. The claimant must plead the essential facts that constitute its case, and those facts must be sufficient to establish a cause of action and to enable the other side to know the case it has to meet in sufficient detail. CPR 8.7A prohibits reliance on allegations or facts not pleaded unless the judge gives permission, or the parties agree. In this case, the respondent was required to plead, pursuant to CPR 8.7, the allegation that the respondent had presented and signed the winning ticket. This was a critical element of the cause of action, and was the central issue in dispute. However, the respondent's pleaded case rested simply on his having purchased the winning ticket.

East Caribbean Flour Mills Limited v Ormiston Ken Boyea; Saint Vincent and the Grenadines Civil Appeal No. 12 of 2006 (delivered 16th July 2007); [2007] ECSCJ No. 110 applied; McPhilemy v Times Newspapers Ltd [1993] 3 All ER 775 applied; Saint Lucia Motor & General Insurance Co. Ltd v Peterson Modeste SLUHCVAP2009/008 (delivered 11th January 2010, unreported) considered; Rules 8.7 and 8.7A of the Civil Procedure Rules 2000 considered.

2. A witness statement constitutes the evidence

to prove an allegation of fact made in the statement of claim. It provides the details or particulars of the issues that arise from the pleader's case. Its contents must, on analysis, be capable of being properly regarded as particulars or details of allegations already made in the pleadings. Once the case is sufficiently pleaded, then a witness statement may furnish the particulars and details of the allegations or facts contained in the pleadings. Additional particulars do not constitute a change of case, provided that the allegation was sufficiently pleaded.

Cedar Valley Springs Homeowners Association Incorporated v Hyacinth Pestaina and others ANUHCVP2016/0009 (delivered 18th January 2017); [2017] ECSCJ No. 5 applied; Saint Lucia Motor & General Insurance Co. Ltd v Peterson Modeste Saint Lucia HCVAP2009/008 (delivered 11th January 2010, unreported) considered.

3. There is a need for the trial court to give careful scrutiny to whether the impugned material in the witness statement can properly be characterised as particulars of allegations already made in the statement of case or are new allegations. In this case, where the respondent asserted for the first time in his witness statement that he had signed and presented the winning ticket, this was not a case of furnishing particulars of an allegation already pleaded; it was a new allegation. It follows that the judge fell into error to the extent that the judge's summary of the respondent's case states that the respondent pleaded that he had presented the winning ticket but was informed by the agent that it was invalid because the draw was cancelled, as no such allegation is made in the respondent's statement of claim.

East Caribbean Flour Mills Limited v Ormiston Ken Boyea Saint Vincent and the Grenadines Civil Appeal No. 12 of 2006 (delivered 16th July 2007); [2007] ECSCJ No. 110 considered.

4. Where a judge is minded to exercise his or her power to make orders of her own initiative, he or she is mandated, pursuant to CPR 26.2, to give the other party a reasonable opportunity to make representations. In this case, the judge seems to have missed an egregious and fundamental inconsistency; namely, the fact that the respondent never pleaded that he had presented the winning ticket but had in fact pleaded that when he discovered that he had purchased the winning ticket, he had already lost the ticket, but, inconsistent with that pleading, he had asserted in his witness statement that he had presented the winning ticket but was told it was cancelled. It is clear that the judge never apprehended that the pleadings did not in fact contain an allegation that the respondent had presented the winning ticket, accordingly there can be no question of her implicitly exercising her discretion to permit the respondent to rely on facts in his witness statement which he had not pleaded. It follows that in circumstances where the judge seems not to have been alive to the inconsistency, it cannot be said that she impliedly exercised her discretion to give permission for that fact (presentation of the ticket) to be relied on.

Rule 26.2 of the Civil Procedure Rules 2000 considered.

5. Despite the advent of witness statements, there is a need for strict compliance with CPR 8.7. A concise statement of the facts relied on must still be included in the statement of case. Where pleadings are deficient for the failure to plead an important factual detail, which was an essential element of the cause of action, the defect could not be cured by simply inserting the evidence into a witness statement. It follows that in order to be compliant with CPR 8.7, the respondent was required to amend the statement of case to plead presentation of the ticket and to correct the dates and sequence of

events.

Rule 8.7 of the Civil Procedure Rules 2000 considered; Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Seebalack [2011] 2 LRC 176; [2010] UKPC 15 considered. London Passenger Transport Board v Moscrop [1942] 1 All ER 97, 105 considered; George W. Bennett Bryson's & Co. Ltd. v George Purcell ANUHC VAP2011/0023 (delivered 28th February 2018); [2018] ECSCJ No. 39 considered.

Case Name:

[1] VERE BIRD JR.
[2] GASTON BROWNE
[3] MARY CLAIRE HURST
[4] LESTER BIRD
[5] MOLWYN JOSEPH
[6] SHARON KENTISH
[7] JIM GALLOWAY

et al

v

THE COMMISSIONER OF POLICE

**[ANUMCRAP2010/0015]
(Antigua and Barbuda)**

Date:

Tuesday, 22nd November 2022

**Coram for
delivery:**

**The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of
Appeal
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal**

Appearances:

Appellant:

**Ms. Rose-Mary Reynolds holding papers for Mr.
Anthony Astaphan, SC and Ms. Rika Bird**

Respondent:

**Ms. Shannon Jones- Gittens, Office of the Director of
Public Prosecutions**

Issues:

Criminal appeal – Public Order Act – Addressing a public meeting without permission - Whether the Public Order Act expressly exempts from its application trade union meetings held on Labour day – Whether the meeting which took place at the V. C. Bird bust was a meeting or rally of the Union – Approach of appellate court to magistrate’s findings of fact — Principles governing appellate interference with findings of fact

Result and Reason:

HELD: dismissing the appeal and affirming the conviction and sentence, that:

1. As a matter of law, the Public Order Act expressly exempts from its application, trade union meetings for the celebration of Labour Day. Once there is a meeting organised by a trade union on Labour Day, the requirement to obtain permission for that meeting or to speak thereat does not apply. The denial of permission to speak by the Commissioner of Police at a Labour day meeting was flawed ab initio. This being a Labour Day event to be organised by the Union, there was no requirement as a matter of law, for the Union to seek permission from the Commissioner of Police to hold or organise the meeting. Likewise, there was also no requirement to submit a list of speakers for permission to speak at the meeting or rally. A prosecution founded upon a breach of the Public Order Act in circumstances where it was expressly disapplied would be contrary to law. The union’s meeting however was usurped and overtaken by the appellants resulting in the Union’s General Secretary abandoning the meeting and leaving the scene. What actually transpired was not a meeting of the Union to celebrate Labour Day. The evidence was clear that the appellants spoke at a meeting without the Commissioner’s permission. Thus, the disapplication of the Public Order Act was not engaged.

Sections 3, 8(b), 9(1)(b) and Section 21(1) of the Public Order Act, Cap. 357 of the Laws of Antigua and Barbuda applied; Section 5 of the First Schedule of

the Public Order Act Cap. 357 of the Laws of Antigua and Barbuda applied.

2. Where a magistrate whose function it is to make findings of fact has done so, and there is evidence which shows that his findings may be justified, it is not the function of the Court of Appeal to interfere by substituting its own view of the facts. In the present case, the magistrate's finding that none of the appellants fell under the statutory exception in section 5 of the First Schedule was clearly open to him on the evidence. It cannot be said that the magistrate's further finding that the appellants addressed a meeting in a public place at the V. C. Bird bust without the prior permission of the Commissioner of Police contrary to section 8 (b) of the Public Order Act was one which no reasonable magistrate could have reached and was therefore justified, on the evidence.

Peters v Peters [1969] 14 WIR 457 applied; Section 8(b) of the Public Order Act, Cap. 357 of the Laws of Antigua and Barbuda applied.

Type of Order:

Oral Judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal is allowed.**
- 2. The term of imprisonment is varied to take account of the additional 251 days which the appellant spent on remand from 6th November 2012 to 15th July 2013.**

Reason:

The Court engaged in an arithmetical exercise and held that the appellant spent an additional 251 days on remand from 6th November 2012 to 15th July 2013. The Court was of the view that when added to the term of 396 days which the learned judge took into account, it amounted to a total of 647 days which should have been deducted from the appellant's

sentence of 12 years, that 12-year term calculated in days being 4,383 days. Therefore, by the arithmetical process of deducting 647 days from 4,383 days, the appellant was left with a balance of 3,736 days on the sentence to run as from 15th April 2016.

Case Name:

**[1] Frederick Baron
[2] Atherton Martin
[3] Severin McKenzie
[4] Joan Ettienne**

v

Blaircourt Property Development Limited

**[DOMHCVAP2015/0005]
[DOMHCVAP2015/0009]
(Commonwealth of Dominica)**

Date:

Wednesday, 23rd November 2022

**Coram for
delivery:**

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**

Appearances:

Appellants:

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

Respondent:

Mr. Jeffrey Douglas-Murdock

Issues:

**Civil Appeal – Trespass – Whether the appellants had
lawful business in connection with Blaircourt
property – Whether the appellants departed from the
Blaircourt property within a reasonable time after
being asked to leave - Approach of appellate court
on review of trial judge’s factual findings - Whether
the judge erred in law and in fact in the treatment of
the evidence insofar as each appellant’s evidence
was not considered individually – Whether a**

judgment in other proceedings constituted admissible evidence – Exclusive possession - Proper party to bring claim - Whether the respondent was the proper party to bring the claim

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal is allowed.**
- 2. The order and declaration of the learned judge that:**
 - a. The defendants are liable in trespass with respect to the Blaircourt property.**
 - b. Atherton Martin, Severin Mc Kenzie, and Joan Etienne must each pay \$1,500.00 and Frederick Baron \$1,000.00 as damages to the claimant.**
 - c. The defendants each pay the claimant, \$5,000.00 as exemplary damages; and**
 - d. The claimant is entitled to prescribed costs, are set aside.**
- 3. The appellants are awarded prescribed costs in the court below and twenty-five percent on appeal.**

The counter-appeal is dismissed.

Reason:

- 1. It is a function of the trial judge who has seen and heard the witnesses to form his own evaluation of the credibility or reliability of the evidence. The mere fact that a trial judge has not expressly mentioned a particular piece of evidence does not mean that he overlooked it. An appellate court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into consideration.**

Matteo Volpi v Gabrielle Volpi and another [2022] EWCA Civ 464 applied; Henderson v Foxworth Investments Ltd and another [2014] UKSC 41 applied; Re F (Children) [2016] EWCA Civ 546 applied; Watt (or Thomas) v Thomas

[1947] AC 484 applied.

- 2. The difficulties attendant upon a successful prosecution of an appeal against factual findings and the chariness of an appellate court in overturning findings of fact of a trial judge are well established. Where any finding involves an evaluation of facts, an appellate court must take into account the fact that the judge has reached a multi - factorial judgment, which takes into account his assessment of many factors. The correctness of the evaluation is not undermined by challenging the weight the judge has given to elements in the evaluation, unless it is shown that the judge was plainly wrong and reached a conclusion which on the evidence he was not entitled to reach.**

Perry v Raleys Solicitors [2019] UKSC 5 considered; Langsam v Beachcroft [2012] EWCA Civ 1230 applied; Henderson v Foxworth Investments Ltd and another [2014] UKSC 41 applied; Fage UK Ltd and another v Chobani Ltd and another [2014] EWCA Civ 5 applied.

- 3. The duty of the trial judge to give reasons for decision is necessary for due process and the administration of justice. Fairness requires that the parties, moreso the losing party, should be in no doubt as to why they lost or won. The extent of the duty or the reach of what is required to fulfill it depends on the subject matter. The judgment needs to make it clear both to the parties and to the appellate court, the judge's reason for his conclusion on the critical issues. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view.**

Flannery and another v Halifax Estate Agencies Ltd (Trading as Colleys Professional Services) [2000] 1 WLR 377 applied; English v Emery Reinbold & Strick Ltd. [2002] EWCA Civ 605

applied; Fage UK Limited v Chobani UK Limited [2014] EWCA Civ 5 applied.

4. It is well established that a person entering private property should have a lawful or legitimate purpose for so doing. The entry must be justified by showing that the entry was with the consent of the occupier or the entrant otherwise had lawful authority to enter the premises. There is an implied licence to any member of the public coming on lawful business to come through the gate and knock on the door. The purpose for entering has to be legitimate and involve no interference with the occupier's possession or injury to any person present. A desire to satisfy one's curiosity is not a lawful purpose for entering private property.

Entick v Carrington [1558-1774] All ER Rep 41; Roy v O'Neill [2020] HCA 45 applied; Robson and another v Hallett [1967] 2 QB 939 applied; Halliday v Nevill [1984] HCA 80 considered.

5. The proper claimant in trespass is the person who has or is deemed to be in possession. Where land is vacant the owner has sufficient possession to sue in trespass. It was unchallenged that only villas 2,6 and 7 were occupied by tenants at the time. Villas 3 and 4 were vacant and unoccupied at the material time and thus were in possession of Blaircourt. Therefore, Blaircourt was authorized to bring the claim in trespass.
6. An authority to enter land may be revoked and if revoked, the entrant has no authority to remain on the land but must leave as soon as is reasonably practicable. When a licence is revoked, and as a result of which, something has to be done by the licensee, a reasonable time must be implied in which he can do so. There is no evidence that after the licence was revoked, the appellants sought to ignore or ignored the revocation by remaining on the Blaircourt property or delayed in leaving. Thus,

it is reasonable to infer that the appellants left the property with reasonable expedition or within a reasonable time after being told to leave. In the circumstances, they would not be considered as trespassers.

Murat Kuru v State of New South Wales [2008] HCA 26 applied; Robson and another v Hallett [1967] 2 QB 939 applied.

- 7. The general principle is that factual findings by one judge cannot bind another judge in different proceedings. The rule extends to render factual findings made by judges in civil cases inadmissible in subsequent proceedings unless the party against whom the finding is sought to be deployed, is bound by it by reason of an estoppel per rem judicatum. The rule precludes reliance on criminal convictions in subsequent civil proceedings and applies to findings of fact in civil proceedings.**

Hollington v F. Hewthorn and Company Limited and another [1943] KB 587 applied; Calyon (a company incorporated under the laws of the Republic of France) v Irene Michailaidis & ors [2009] UKPC 34 applied; Rogers and another v Hoyle (Secretary of State for Transport and another intervening) [2015] QB 265 applied.

- 8. On the issue of costs, the general rule is that costs follow the event. The unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order having regard to all the circumstances. It is not automatic that the costs of the successful party will be reduced because it lost on some issues. The more significant and self-contained the issues on which the successful party has lost, the more likely it is that some downwards costs adjustment for that failure is appropriate.**

The Serious Fraud Office and another v Litigation Capital Limited and others [2021] EWHC 2803 applied.

Case Name:

Sun Vessel Global Limited
v
[1] HQ Aviation Limited
[2] Great Lakes Reinsurance (UK) SE

[BVIHCMAP2022/0017]
(Territory of the Virgin Islands)

Date:

Thursday, 24th November 2022

**Coram for
delivery:**

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. Jerry Samuel

Respondents: Mr. Matthew Reeve and Ms. Olga Osadchaya

Issues:

Commercial appeal – Section 404 of the BVI Merchant Shipping Act, 2001 – Pre- Judgment Interest - Limitation fund - Whether Section 404 of the Merchant Shipping Act should be construed as requiring the court (in a case where the shipowner/wrongdoer has elected not to constitute a limitation fund) to apply, to any pre-judgment interest on damages, the same rate of interest as would have been prescribed if a limitation fund had in fact been constituted – Exercise of judicial discretion – Appellate court’s interference with judge’s discretion to award of interest – Statutory interpretation – Section 18(3) of Legal Profession Act, 2015 – Costs – Whether the judge correctly permitted recovery of costs incurred by foreign lawyer who was not enrolled as a legal practitioner in the Territory of the Virgin Islands

Result/Order:

IT IS HEREBY ORDERED THAT:

1. Grounds 1 and 2 of the appeal are dismissed.
2. Ground 3 of the appeal is allowed and the order of the judge allowing recovery of the pre-action costs in relation to Dr. Fox is set aside.
3. There is no order as to costs.

The Court upon delivering the judgment also gave a direction that:

The Certificate of Result in this appeal shall not be issued until 1st December 2022

Reason:

1. As a matter of statutory construction, section 404 of the BVI Merchant Shipping Act, 2001 does not expressly apply where a limitation fund has not been established. The assertion by the appellant that the prescribed rate applied as a matter of statutory construction to the case where a limitation defence was pleaded with no fund having been constituted was therefore wrong. With section 404 expressly only covering cases where a fund is constituted, it was for the appellant to provide, by its own words as 'a question of construction or interpretation' a legal basis for the application of the prescribed rate to a case where no fund was constituted. None of the explanations advanced by the appellant achieved this.

Section 404 BVI Merchant Shipping Act, 2001 No. 13 of 2021, Laws of the Virgin Islands applied.

2. There are relevant practical and legal differences between the two situations (where a limitation fund is constituted and where limits are invoked without a fund). Where a shipowner elects to constitute a limitation fund, the shipowner can fix the currency rate at which limits are converted at the time of constitution and where the applicable national law prescribes the rate of interest to be added to the fund on constitution, the shipowner can secure that rate. Prescribing the rate in

advance is of obvious practical assistance for the shipowner in calculating the amount to pay in as the limitation fund. It is a fundamentally different situation where the limit is simply invoked as a defence. Interest will be then assessed in the normal way at the end of the case, fairly taking account of all factors relevant to the assessment. Thus, it is not automatic that a shipowner, who has not provided the actual security of a fund will be entitled to the same interest rate, simply on the basis of entitlement to plead limitation.

AS Fortuna Opco BV and another v Sea Consortium PTE Ltd and others [2021] Lloyd's Law Rep Plus 48 considered; Patrick Griggs, Richard Williams, Jeremy Farr *Limitation of Liability for Maritime Claims* (4th edn, Routledge 2004) considered.

3. A judge has a discretion to award interest at such a rate and in accordance with established principles. An appeal against the use of judicial discretion will not be allowed unless the appellate court is satisfied that the judge erred in principle in the exercise of the discretion or was influenced by irrelevant factors and considerations and that as a result of the error or degree of the error in principle, the judge erred. In this case it cannot be concluded that the judge would have had no legal or factual basis to arrive at and support the decision that he made, and it cannot be said that the judge was plainly or blatantly wrong. No error of law in the approach of the judge has been demonstrated and the conclusion which he reached as to the appropriate rate of interest to be awarded fell within the generous ambit of his discretion.

Michel Dufour and others v Helenair Corporation and others (1996) 52 WIR 188 followed; *Carrasco v Johnson* [2018] EWCA Civ 87 considered.

4. The starting point for dealing with the issue of recoverability of fees claimed by persons who are not admitted to practice law in the BVI is section 18(3) of the Legal Profession Act, 2015. The fees of legally qualified, non-admitted persons are no longer recoverable as disbursements at common law since section 18(3) prevents recovery of costs in relation to anything done by a person whose name is not on the Roll.

Section 18(3) of the Legal Profession Act, 2015, Act No. 13 of 2015, Laws of the Virgin Islands applied.

5. Once a legal practitioner was assisting with a BVI matter and the work he produced was being utilised in BVI proceedings, he automatically would be purporting to act as a BVI legal practitioner. What mattered was the function performed by the foreign lawyer, not the capacity in which he or she acted. The broad test of determining functionality is that of any conduct which was broadly deemed to be assisting with the conduct of a BVI matter. Where the court has made a finding that the non-admitted lawyer was acting as a legal practitioner, then there is no need to dissect the work performed, since any administrative task would be incidental to anything done by them to assist with the conduct of the litigation. In a case like this where the judge found that BVI and English aviation law were the same and the determination of where to sue was necessarily bound up in the BVI proceedings, the conclusion is inescapable that Dr. Fox would be seeking to recover costs for assisting with a BVI matter, when he was not registered on the Roll. It would be irrelevant that at the time the work was done it was not then intended to utilise it in BVI proceedings. The learned judge erred in permitting the respondents to recover pre-action costs in respect of legal fees paid to Dr. Fox on the ground that Dr. Fox was, as a legal practitioner, providing assistance with the BVI

litigation while his name was not on the Roll.

Dimitry Vladimirovich Garkusha v Ashot Yeghiazaryan BVIHMAP2015/0010 (delivered 6th June 2016, unreported) followed; Yao Juan v Kwok Kin Kwok and another BVIHMAP2018/0042 (delivered 1st June 2021, unreported) followed; John Shrimpton and another v Dominic Scriven and others BVIHMAP2016/0031 (delivered on 3rd February, 2017, unreported) followed.

Case Name:

**Curlan Joseph
v
The King
[SLUHCRA2015/0004]**

**Clinton Gilbert
v
The King
[SLUHCRA2015/0005]
(Saint Lucia)**

Date:

Friday, 25th November 2022

**Coram for
delivery:**

**The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of
Appeal
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal**

Appearances:

**Appellants: Mr. David Moyston for Curlan Joseph
Mr. Lorne Theophilus for Clinton Gilbert**

Respondent: Ms. Tanya Alexis-Francis

Issues:

**Criminal appeal - Non-Capital murder Admissibility
of identification evidence - Sections 100, 102 & 136
of the Evidence Act - Whether the learned judge
erred in the application of section 100 of the Evidence
Act - Whether the learned judge erred in the
application of the binding precedent of Earl Hunte v**

The Queen - Whether the learned judge failed to adequately direct the jury pursuant to section 102 of the Evidence Act - Whether the learned judge failed to adequately direct the jury as regards a witness' contradictory identification evidence - Whether the learned judge failed to consider whether the trial should have been aborted when one of the prosecution's witnesses intimated that the reason for him mistakenly saying that the men he saw on the night in question were masked was because he was afraid - Whether the learned judge failed to apply the correct sentencing principles in sentencing the appellants to whole life

Result and Reason:

HELD: dismissing the appeal in respect of both appellants and affirming their convictions and sentences of life imprisonment for non-capital murder, that:

- 1. Section 100(5) of the Evidence Act does not mandate a confrontation in all circumstances where it would not be reasonable to have held an identification parade. In circumstances like the present, there is no evidential value in having the witness confirming the identity of the person whom they already have identified, at a subsequent identification parade or identification procedure. The subsequent identification procedure far from adding anything to the identification already made, could positively mislead the jury in thinking that the subsequent identification parade confirmed the identity of the accused as the person who committed the crime. This principle is also applicable to whether a confrontation should be conducted after a witness has already made an unequivocal identification of the accused. The learned judge took full cognisance of the dictates of section 100, conducted a voir dire and satisfied himself of the quality of the identification. He considered the proper construction of section 100(5) and concluded that section 100 does not make a hierarchical scheme of identification procedure mandatory. Accordingly, the learned**

judge did not err in his application of section 100.

Section 100 of the Evidence Act Chapter 4.15 Revised Laws of Saint Lucia, 2019 applied; Solicitor for Public Prosecutions (NSW) v Aaran Walford [2011] NSWSC 759 considered; Aaran Walford v Director of Public Prosecutions (NSW) [2012] NSWCA 290 considered; The Queen v D [2008] ACTSC 82 considered.

- 2. The Court of Appeal in Earl Hunte v The Queen was not required to address the issue of whether subsection 100(1)(a)(ii) should be construed as mandating the conducting of a confrontation in circumstances where it was determined that it was not reasonable to conduct an identification parade. Accordingly, the learned judge was not bound by the principles in Earl Hunte v The Queen in determining whether a confrontation was mandatory in the circumstances.**

Earl Hunte v The Queen [2011] ECSCJ No. 4 (delivered 19th January 2011) distinguished.

- 3. A perusal of the summation shows that the learned judge adequately complied with the mandatory stipulations of subsections 2 and 3 of section 102 of the Evidence Act. He highlighted that the directions related to the reliability of the evidence and emphasised that there was no other evidence connecting the appellants to the crime except the identification evidence. He warned the jury that they could only act on the identification evidence of either Talbert or Bellasse, assuming they found it credible and believable, if they find as a fact there is some special circumstance that tends to support the identification. The trial judge also gave the requisite Turnbull direction. Accordingly, the learned judge did not fail to adequately direct the jury pursuant to section 102 of the Evidence Act.**

Section 102 of the Evidence Act Chapter 4.15 Revised Laws of Saint Lucia, 2019 applied; Gerald Joseph v The Queen [2007] ECSCJ No. 3 (delivered 15th January 2007) considered.

- 4. When viewed in the context of the entire summation, the learned judge adequately cautioned the jury in relation to how to treat with the contradictory evidence of Talbert. The jury received guidance as to how to treat with the issue of credibility of the witness and what weight to attach to his evidence if they believed him to be a witness of truth, having regard to his testimony that he had identified the appellants on the night in question. The learned judge adequately warned the jury of the danger of convicting on the basis of the unreliability of identification evidence in accordance with section 136(2) of the Evidence Act and adequately warned of the dangers of the contradictory evidence given by Talbert. In the circumstances ground 4 failed.**

Section 136 of the Evidence Act Chapter 4.15 Revised Laws of Saint Lucia, 2019 applied.

- 5. The discharge of a jury is a matter of discretion and evaluation by the trial judge. Discharging a jury is a serious matter and must not be lightly done. A jury should not be discharged unless a high degree of need arises, resulting in undue prejudice to the accused, which cannot be cured by an appropriate direction to the jury. The trial judge addressed the issue of what Bellasse said about being scared and would have been of the opinion that the evidence would not result in unfairness or undue prejudice to the appellants. He was well placed to make that determination having the advantage of knowing the atmosphere of the case and the way in which the evidence later complained of appeared in court at the time. It cannot be said that the trial judge exercised his discretion wrongly in not discharging the jury. There is no real possibility or danger that the jury would have been prejudiced against the**

appellants. Neither can it be said that the trial was unfair to the appellants as a consequence of which the conviction would be unsafe.

Mitcham v The Queen [2009] UKPC 5 followed;
R v Lawson [2005] EWCA Crim 84 considered;

6. The learned judge considered the statutory principles of sentencing and the individual circumstances of each defendant as disclosed in their pre-sentence reports. Although the judge considered an appropriate starting point, he found that in the case before him, starting points may become irrelevant when the offence is so serious in the context of its aggravation that no other punishment is appropriate other than a term of life imprisonment. The learned judge was guided by the principle in *Desmond Baptiste and others v The Queen* that the weight to be attached to the fact that an offender was a first – time or young offender, would be of less relevance the more serious the offence. Accordingly, it cannot be said that the learned judge erred in law or principle in imposing the sentence of life imprisonment.

Desmond Baptiste and others v The Queen [2004] ECSCJ No. 350 (delivered 6th December 2004) followed.

APPLICATIONS AND APPEALS

Case Name:

Clarence Lewis

v

The State

**[DOMHCRA2016/0004]
(Commonwealth of Dominica)**

Date:

Monday, 21st November 2022

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

Appearances:

Appellant:	Mr. Kerron Bruney
Respondent:	Ms. Daina Matthew

Issues: Criminal appeal - Appeal against sentence - Murder - Whether learned judge erred in calculation of time spent on remand which ought to have been deducted from sentence imposed

Type of Order: Oral Judgment

Result / Order: IT IS HEREBY ORDERED THAT:
3. The appeal is allowed.
The term of imprisonment is varied to take account of the additional 251 days which the appellant spent on remand from 6th November 2012 to 15th July 2013.

Reason: The Court engaged in an arithmetical exercise and held that the appellant spent an additional 251 days on remand from 6th November 2012 to 15th July 2013. The Court was of the view that when added to the term of 396 days which the learned judge took into account, it amounted to a total of 647 days which should have been deducted from the appellant's sentence of 12 years, that 12-year term calculated in days being 4,383 days. Therefore, by the arithmetical process of deducting 647 days from 4,383 days, the appellant was left with a balance of 3,736 days on the sentence to run as from 15th April 2016.

Case Name: Vidatel Limited

PT Ventures SGPS, S.A.

**[BVIHCMAP2022/0053]
(Territory of the Virgin Islands)**

Date: Monday, 21st November 2022

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

Appearances:

Applicant: Mr. Hermann Boeddinghaus, KC

Respondent: Mr. Christopher Harris, KC with him Ms. Keshia Adonis and Ms. Georgina Peters

Issues: Commercial appeal - Revocation application - Whether Vidatel's application for the revocation of an order by a single judge should be allowed - Stay application - Whether Vidatel's stay application should be allowed - Principles for the grant of a stay - Prospects of success - Whether Vidatel's appeal has a strong prospect of success in favour of the grant of a stay - Application to adduce fresh evidence - Whether Vidatel's fresh evidence application should be allowed - Principles in Ladd v Marshall [1954] 3 All ER 745

Type of Order: Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The dismissal order of Michel JA made on 25th October 2022 is hereby set aside.
2. The stay granted on 2nd November 2022 by the Chief Justice is continued pending the hearing and outcome of the appeal.
3. Ground 1 set out in the notice of appeal shall be argued first and as a free-standing ground of appeal.

4. The fresh evidence application is stood over to abide the outcome of the hearing and determination of ground 1 contained in the notice of appeal.
5. The parties are to agree on a timetable for the submission of further skeleton arguments in relation to ground 1 of the notice of appeal to be submitted to the Court by 25th November 2022.
6. The respondent is to pay the costs for the application for a stay to be assessed if not agreed within 21 days. No order is made in respect of the timeframe for payment.

Costs of the dismissal application to be paid by the respondent to the appellant. Costs to be assessed if not agreed within 21 days. No order is made in respect of the timeframe for payment.

Reason:

The Court was of the unanimous view that the dismissal order of Michel JA made on 25th October 2022 should be set aside. The notice of appeal filed on 2nd September 2022 was timely filed in accordance with the timetable given by the learned trial judge at paragraph 6 of his order of 28th October 2022. Whereas part 62.5(2) of the Civil Procedure Rules 2000 ("CPR") refers to the court below extending time to appeal in respect of interlocutory appeals and speaks generally in CPR 62.5(3) to the court extending time under that rule, the same rule, that is, rule 62.5, does not restrict the court's general case management power given to the court whether below or on appeal under CPR 26.1(2)(k). CPR 26.1(1) makes plain that the powers contained in CPR part 26 are in addition to any powers of the court given under any rule, practice direction or any enactment unless the rule or enactment expressly provides otherwise. CPR 62.5 does not express otherwise. Under CPR 25.1 the Court is tasked with furthering the overriding objective by actively managing cases and may actively manage a case in furtherance of the overriding objective by fixing timetables or otherwise

controlling the progress of a case. For this reason the dismissal order was set aside.

As it relates to the application for a stay, the Court bore in mind the principles which govern the exercise of its discretion. Those principles are well-established and need not be repeated, but for the sake of brevity and completeness, they are:

1. As set out in the case of *C-Mobile Services Ltd v Huawei Technologies Co. Ltd* BVIHCMAP2014/0007 (delivered 2nd October 2014, unreported), the Court should take into account all the circumstances of the case.
2. A stay is the exception rather than the general rule.
3. The party seeking a stay must provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted.
4. In exercising its discretion the Court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered.
5. The Court should also take into account the prospect of the appeal succeeding and where strong grounds of appeal, or a strong likelihood of success is shown, a stay will usually be granted.

The appellant, Vidatel, grounded its application on the fifth principle and this Court agreed that this is a case where strong prospects of success have been shown. Accordingly, the Court considered that in its discretion the stay should be granted and accordingly ordered that the stay granted on the 2nd November 2022 by the Chief Justice be continued pending the hearing and outcome of the appeal.

The Court in furtherance of its case management powers also ordered that ground 1 set out in the notice of appeal be argued first and as a free-standing ground of appeal as this ground, which goes to the question of jurisdiction for the making of the appointment order, has the potential of being dispositive of the entire appeal.

The fresh evidence application is stood over to abide the outcome of the hearing and determination of ground 1 contained in the notice of appeal. The Court was of the view that ground 1 raises a point of law and it should therefore be progressed in a summary way.

In relation to the application for a stay, costs were not opposed by the respondent. The general rule is that costs follow the event, and therefore the Court ordered that the respondent pay the costs of the application for a stay, to be assessed if not agreed within 21 days. No order was made as to the timeframe for payment.

In relation to the dismissal application, the Court was of the view that notwithstanding counsel's submissions that a consent order would not have been determinative of the issue (which the Court accepted), the Court was satisfied that a consent order duly executed and presented by the parties on this issue would have been entirely consistent with furthering the overriding objective in terms of the allocation of the time and resources in respect of this issue. This is all the more so having regard to the court below fixing the timetable for appealing which was never in dispute. In the premises, the appellant shall have its costs to be paid by the respondent, to be assessed if not agreed within 21 days. Similarly, the Court makes no order as to the time frame for the payment of those costs.

Case Name:

Tino Victor

v

[1] Hubert Alexander

[2] Marcel Copiel

[DOMMCVAP2018/0004]

(Commonwealth of Dominica)

Date:

Monday, 21st November 2022

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

Appearances:

Applicants: Mr. Bernard Wiltshire

Respondent: Mr. Tiyani Behanzin

Issues: Application to strike out appeal - Failure to file skeleton arguments in compliance with rule 62.11(1) of the Civil Procedure Rules 2000 - Whether the statement of case discloses any reasonable ground for bringing the appeal - Want of prosecution - Whether notice of appeal filed within time limit prescribed by Section 144 of the Magistrate's Code of Procedure Chap. 4:20 of the Laws of Dominica - Oral application for adjournment

Type of Order: Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The oral application by the appellant seeking an adjournment with respect to the hearing of the appeal is refused.
2. There being no properly filed notice of appeal before the Court, the appeal is accordingly struck out.
3. Costs are awarded to the applicant in the sum of \$250.00 to be paid on or before 5th December 2022.

Reason: The Court was of the unanimous view that the oral application made by counsel for the appellant seeking an adjournment of the hearing of the application to strike out the appeal ought to be refused. The Court was not satisfied that any of the reasons advanced by counsel bore any merit or provided a proper basis on which the Court should

exercise its discretion to grant an adjournment. Considering the significant vintage of this matter, and in all the circumstances of the case, the Court determined that the adjournment application should be refused.

In the application to strike out the appeal filed on 9th November 2021, the applicants sought to strike out the appeal on a number of grounds, including: failure to comply with CPR 62.11(1), failure to comply with the order of the Chief Registrar dated 2nd November 2020 to file submissions and authorities by the 2nd of December 2020, the statement of case does not disclose any reasonable grounds for filing an appeal, and want of prosecution.

Before the Court could consider that application, it first had to consider its jurisdiction with regard to the substantive appeal. In doing so, the Court noted that the decision which forms the substrata of the appeal is the decision of the learned magistrate dated 8th March 2018. In a document intituled “Notice of Appeal and Memorandum of Reasons of Appeal” filed by the appellant on 9th April 2018, the appellant indicates clearly that the date of the decision from which he purports to appeal is 8th of March 2018. He further indicates at paragraph 1 that he applies for leave to appeal out of time and to appeal the decision above. He stated the following grounds of appeal: (i) the learned magistrate erred and misdirected himself on the law; and (ii) he wished to reserve the right to amend the grounds if necessary after receiving the decision of the honourable magistrate.

The Court noted that under Section 144 of the Magistrate’s Code of Procedure Chap. 4:20 of the Laws of Dominica the appellant had 14 days from the date of the decision to lodge his appeal. That period would have expired on the 23rd of March 2018. It follows, that by the date on which this purported notice of appeal would have been signed, that is, 9th April 2018, the appeal would have already been out of time. The appellant is therefore obliged to file and make the necessary application seeking an extension of time supported by the appropriate evidence, which would form the basis upon which this Court could

exercise its discretion to accede to his application. The appellant failed to do so. No steps were ever taken to regularize the position, seek any order from the court, or seek to have the notice of appeal deemed properly filed, and that has persisted, notwithstanding more than four years having elapsed since the date of the purported notice. There was therefore no valid notice of appeal before the Court.

Moreover, notwithstanding that more than 4 years have elapsed since the date of the notice, the Court noted that no properly articulated grounds were submitted, notwithstanding that the appellant would have been aware of the reasons of the magistrate for some time, and it appears from the magistrate's record that counsel would have been present as of the date of delivery.

As indicated, more than 4 years have elapsed and no steps were taken to duly prosecute the appeal, if there was in fact one which was properly filed (which the Court did not accept). Counsel for the appellant indicated that he was not in possession of a sealed copy of the notice which was purported to have been filed by his client. The Court did not accept this to be a valid contention, bearing in mind that this document was filed by his client and must be assumed to have formed the basis of the purported appeal.

On those premises, the Court was satisfied that the notice of appeal was not properly before the Court and it was accordingly struck out.

Considering Section 156 of the Magistrate's Code of Procedure, which provides that costs in the Court of Appeal should not exceed \$250.00, and in light of Counsel for the applicant's agreement to accept said sum, the Court awarded costs in the sum of \$250.00 to be paid by the appellant to the applicant on or before 5th December 2022.

Case Name:

Joseph Senhouse

v

The State
[DOMHCRAP2015/0009]
(Commonwealth of Dominica)

Date: Tuesday, 22nd November 2022

Coram: The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal

Appearances:

Appellant: Mrs. Dawn Yearwood- Stewart

Respondent: Ms. Daina Matthew

Issues: Application for adjournment

Type of Order Adjournment

Result / Order: [Oral Delivery]
IT IS HEREBY ORDERED THAT:

The hearing of this appeal is adjourned to the next sitting of the Court of Appeal in the Commonwealth of Dominica scheduled for the week commencing on 8th May 2023.

Reason: On the application of the State for an adjournment of the hearing of the appeal due to special circumstances, which the Court accepted to be special, and there being no objection by the appellant, the Court granted the adjournment.

Case Name: Leron Brade
v
The King
[MNIHCRAP2022/0001]
(Montserrat)

Date: Tuesday, 22nd November 2022

Coram: The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal

Appearances:

Appellant/Applicant:	In person
Respondent:	Mr. Oris Sullivan, Director of Public Prosecutions

Issues: Application for bail pending appeal - Application for leave to appeal

Type of Order Oral Decision

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The application for bail pending appeal is dismissed.
2. The applicant, Leron Brade, shall file and serve an affidavit in support of the application for leave to appeal along with exhibits on or before 30th November 2022.
3. The respondent has leave to file an affidavit in response on or before 14th December 2022.

The hearing of the application for leave to appeal is adjourned to a date to be fixed by the Chief Registrar with notice to the parties.

Reason:

The Court having reviewed the submissions made by the appellant/applicant, and having considered the case of *The State v Lynette Scantlebury (1976) 27 WIR 103*, was of the opinion that the appellant/applicant had not advanced any special circumstances warranting the grant of bail pending appeal at that time.

As it relates to the application for leave to appeal, the Court considered that the applicant had made serious allegations which necessitated affidavit evidence for

the Court's consideration. The relevant directions were therefore given and the matter adjourned.

Case Name:

Duane Alonzo

v

The Police

**[DOMMCRAP2021/0001]
(Commonwealth of Dominica)**

Date:

Tuesday, 22nd November 2022

Coram:

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

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

Appearances:

Appellant:

In person

Respondent:

Ms. Daina Matthew

Issues:

**Magisterial criminal appeal - Appeal against sentence
- Sentence in default - Section 105 of the Magistrates
Code of Procedure Act, Cap 4:20 - Whether the
learned magistrate was too harsh in sentencing the
appellant to a fine of \$6,000 in default, one year
imprisonment - Whether the learned magistrate erred
in law when he fined the appellant in default of one
year imprisonment**

Type of Order

Oral Judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

**The appeal is allowed to the extent that the sentence
in default of one year is substituted for a period of six
months.**

Reason:

The Court considered the written submissions of the respondent whereby it was conceded that the sentence imposed on the appellant by the learned magistrate for possession of ammunition, being a fine of \$6,000 to be paid within three weeks and in default a period of one year imprisonment, was wrong in law. The respondent agreed that this Court ought to set aside the judgment insofar as the default provision was stated to be one year since this was contrary to section 105 of the Magistrates Code of Procedure Act, Cap 4:20.

The Court was in agreement that the concession was properly made. Section 105 of the Magistrates Code of Procedure Act, Cap 4:20 specifically states that in relation to fines of \$1,000 and above, the default period of imprisonment cannot exceed six months. The learned magistrate therefore erred when he fixed the default provision at one year. The Court considered also that the fine of \$6,000 was not outside the ambit of the discretion to be exercised by the learned magistrate in terms of the imposition of the fine. The Court noted that the appellant had already served in excess of the period of six months and therefore the Court allowed the appeal only to the extent that the sentence in default of one year was substituted for a period of six months.

Case Name:

[1] Christine Sebastian

[2] Renwar Toussaint

v

Alpheus Robin

[DOMMCVAP2019/0002]

(Commonwealth of Dominica)

Date:

Tuesday, 22nd November 2022

Coram:

The Hon. Mde. Gertel Thom, Justice of Appeal

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

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

Appearances:

Appellants: In person

Respondent: Ms. Carlita Benjamin appearing *amicus curiae*

Issues:

Magisterial civil appeal - Landlord and tenant - Possession and recovery of rent in arrears - Whether the learned judge erred in determining the issue of possession and recovery of rent in favour of the respondent - Whether respondent failed to prove to the court that he was an agent of the landlord

Type of Order

Oral Judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.
2. The decision of the learned magistrate is affirmed.

No order as to costs.

Reason:

Before the Court was a notice of appeal filed in the Magistrates' Court on 18th January 2019 which sought to appeal the decision of the learned magistrate dated 15th November 2018. The Court upon considering the written and oral submissions made by the appellants, determined that the appeal should be dismissed, as the submissions advanced sought to introduce evidence of oral conversations had with third parties, and evidence which had not been properly put before the learned magistrate when he considered the matter. Further, the submissions of the appellants did not disclose any basis upon which the Court could properly interfere with the decision taken by the learned magistrate who would have had the opportunity to observe the witnesses in oral examination and would have made his assessment of their credibility. For those reasons the Court determined that the appeal should be dismissed and the magistrate's decision affirmed. The Court was also of the view that based on the late filings made by the respondent as well as the fact that counsel for the respondent held brief as *amicus curiae*, there should

be no order as to costs.

Case Name:

Levi Maximea

v

[1] The Chief of Police

[2] The Police Service Commission

[3] The Attorney General

[DOMHCVAP2020/0009]

(Commonwealth of Dominica)

Date:

Tuesday, 22nd November 2022

Coram:

The Hon. Mde. Gertel Thom, Justice of Appeal

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

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

Appearances:

Appellant:

In person

Respondents:

Ms. Nadira Lando of the Attorney General's Chambers

Issues:

Interlocutory appeal - Whether learned erred in finding that claims of constructive and wrongful dismissal filed in 2011 and 2012 were estopped and that res judicata applied- Whether claims can be estopped and res judicata applied if there was no judgment given in the claims - Whether judge erred in striking out matter for abuse of process- Application for leave to file supplementary submissions and additional grounds of appeal – Adjournment- Application for leave to file additional authorities - Costs

Type of Order:

Adjournment

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

1. The matter is adjourned to the next sitting of the Court in the Commonwealth of Dominica scheduled for the week commencing 8th May 2023.
2. Costs to the respondent in the sum of \$500.00 to be paid by the appellant on or before 28th February 2023.
3. The respondent is given leave to respond to the supplementary submissions filed by the appellant on 22nd November 2022 on or before 15th February 2023 and serve the submissions in response on or before 15th February 2023.

Reason:

The matter came up for hearing on 22nd November 2022 for the hearing of the substantive appeal. The appellant on the morning of 22nd November 2022, filed additional grounds of appeal or made an application for leave to file additional grounds of appeal and additional arguments. These submissions had not been served on the respondent and the Court had not had sufficient time to consider those additional submissions. The Court therefore adjourned the matter. The appellant in the circumstances would pay costs to the respondent in the sum of \$500.00 such costs to be paid on or before 28th February 2023.

Case Name:

Lunan Pharmaceuticals Group Corporation
v
[1] Zhao Long
[2] Kunlun Newcentury Investment Holdings
Co., Ltd.

and
[1] Endushantum Investment Co. Ltd.
[2] Jade Value Investments Holding Co., Ltd
[3] Zhongzhi Investment Holding Co., Ltd.
[4] Sharon Wei

and

Hengde Co (PTC) Ltd

[BVIHCVAP2021/0007]

[BVIHCMAP2022/0029]

(Territory of the Virgin Islands)

Date: **Wednesday, 23rd November 2022**

Coram: **The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**

Appearances:

Applicant: **Mr. Stephen Rubin, KC with him Ms. Gráinne Hussey
for Lunan Pharmaceuticals Group Corporation**

Respondents: **Mr. Tom Lowe, KC with him Ms. Meenaa Azmayesh,
Mr. John Crook and Ms. Yegâne Güley for Zhao Long**

**Mr. Tom Lowe, KC with him Mr. Christopher Bromilow
and Mr. Robert Nader for Endushantum Investment
Co. Ltd.**

Issues: **Application for stay of execution pending appeal -
Whether Endushantum is fully protected by an
existing freezing order in Hong Kong by which Berpu
and Provision are not at liberty to transfer the PRC
Shares – Whether it would be disruptive to Lunan’s
governance for Ms. Zhao to take control of the PRC
Shares (representing 25.7% of its share capital) while
an appeal was pending – Whether the status quo
should be altered pending appeal – Applications by
Endushantum and Ms Zhao for unless orders -
Whether Lunan’s application for stay should be
refused or stayed and/or its appeals be struck out
until or unless Lunan complies with:**

- (1) The order for re-conveyance of the PRC Shares
as ordered in the ancillary claim judgment;**
- (2) The payment of interim costs in the sum of
2million dollars ordered pursuant to the main
judgment; and**

(3) The final anti-suit injunction (the Final ASI) made against Lunan in respect of the New PRC proceedings - Hadkinson v Hadkinson [1952] P 285 - Applications by Lunan for:

(1) extension of time until 1st June 2023 to make payment of the interim costs; and

(2) extension of time to comply with the Final ASI until the determination of the appeal - Contempt of court - Whether Lunan breached the BVI Court's orders and is in contempt of court - Abuse of process - Whether Lunan's failure to obey court orders is an abuse of process – whether enforcement steps taken in court below.

Type of Order:

N/A

Result / Order:

IT IS HEREBY ORDERED THAT:

The decision is reserved.

Case Name:

AO Alfa Bank

v

Kipford Ventures Limited

[BVIHCMAP2021/0047]

(Territory of the Virgin Islands)

Date:

Thursday 24th and Friday 25th November 2022

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. Paul Lowenstein, KC with him Mr. Jonathan Ketcheson, Mr. Andrew Willins and Ms. Tamara Cameron

Respondent:

Mr. Alain Choo Choy, KC with him Ms. Victoria

Lissack and Mr. Zachary Van Horn

Issues:

Commercial appeal - Fraud - Loan granted by appellant bank in sum of 140 million USD - Appellant granted loan on basis of representations made by Mr. Usanov - Representation by Mr. Usanov that he had available 45 million USD of his own funds - Representation by Mr. Usanov that the coal was “high quality” and that KBY was an active business with potential for returns - Whether representations made by Mr. Usanov were false - Whether bank induced into granting loan on basis of false representations - Breach of trust - Whether over 48 million USD of the loan funds were transferred to the respondent in breach of trust - Knowing Receipt - Whether respondent knowingly received loan funds when it was not entitled to same - Dishonest Assistance - Whether respondent dishonestly assisted in the fraud on the appellant bank - Injunction - Decision by learned judge not to continue injunction - Discharge of injunction by learned judge - Test - Good arguable case - Whether judge erred in finding that the representations relied on by the appellant were too vague to be actionable - Whether the learned judge erred in finding that the appellant did not meet the threshold of good arguable case - Whether the learned judge erred by failing to continue the injunction and by discharging the injunction

Type of Order

N/A

Result / Order:

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name:

Cara Shillingford
v
[1] Stephenson Hyacinth
(in his capacity of
the Chairman of the Integrity Commission)

**[2] Thomas Holmes
(in his capacity of
the Chairman of the Integrity Commission)**

[3] Integrity Commission of Dominica

**[DOMHCVAP2021/1001]
(Commonwealth of Dominica)**

Date: Friday 25th November 2022

Coram: The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal

Appearances:

Appellant: Mr. Wayne B. Marsh

Respondent: Mr. Gilbert Peterson, SC with him Mr. Jerffrey Douglas-Murdock for 1st and 2nd respondents
Mr. Gilbert Peterson, SC with him Ms. Lisa de Freitas for 3rd respondent

Issues: Interlocutory appeal - Extension of time to file supplementary affidavit - Whether the learned judge erred in law and was plainly wrong when she held that the matter before her was ex-parte despite the fact that it was being heard inter-partes - Whether the learned erred by applying to the application before her legal principles which are applicable to ex-parte hearings - Whether the learned judge erred when she ruled that the applicant breached her duty of candour and that the said breach was seriously culpable, when there was no evidence before the court to support such a finding - Whether the learned judge erred when she disallowed the applicant from relying on her supplemental affidavit - Whether the learned judge erred when she held that the applicant breached her duty of candour by explaining to the court her reasons for the perceived delay in a supplemental affidavit - Whether the learned judge erred when she held that there was a time limit to file an application for leave to apply for judicial review

and that the applicant who filed within three months was in breach of this purported time limit - Whether the learned judge erred and misdirected herself when she held that the application had breached rule 56.3(3)(g) by failing to account for the lapse of time between the cause of action and the filing of an application for leave in circumstances where there was no breach of any time limit which needed to be explained - Whether the learned judge erred in her finding of fact when she held that the applicant failed to inform the court of the reason for her dilatory conduct which in the court's view amounted to a lack of candour - Whether the learned judge erred in her finding of fact when she failed to recognise that the issue of delay was not raised in the respondent's affidavit in opposition but rather raised by the respondent in its submissions filed 16th July 2021 for the first time

Type of Order

Oral Judgment with Written Reasons to Follow

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal is allowed.**
- 2. Written reasons to follow.**

Costs to the appellant in the sum of \$2000.00, to be paid within 30 days of this order.

Case Name:

[1] Heritage Plantation Condominiums Ltd.

[2] Heritage Plantation Inc.

[3] Mervin Grant

v

Doche and Doche Inc.

[SKBHCVAP2022/0006]

(Saint Christopher and Nevis)

Date:

Friday, 25th November 2022

Coram:

The Hon. Mde. Gertel Thom, Justice of Appeal

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

Appearances:

Appellant: Dr. Henry Browne, KC

Respondent: Mr. Anthony Astaphan, SC with him Mr. Sylvester Anthony and Ms. Renal Edwards

Issues:

Interlocutory appeal -Preliminary Issue- Whether notice of appeal filed out of time and is a nullity- Whether appeal should be struck out- Time for filing appeal- Whether appeal filed within time- Rule 26.9(4)- Whether Court can grant an extension of time without a formal application if the circumstances of the case justifies- Rule 62.5(3)- Whether rule 62.5(3) is specific to appeals and overrules rule 26.9(4) in appeal matters

Type of Order

Oral Judgment with Written Reasons to follow

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The Notice of Appeal is dismissed.**
- 2. Costs to the respondent being no more than $\frac{2}{3}$ of the costs assessed in the court below.**

Written reasons to follow.

Reason:

The Court was of the unanimous view that the notice of appeal should be dismissed. The Court was of the view that the notice of appeal was filed out of time and no application was made to the Court prior to this hearing for an extension of time and therefore none was granted. The Court was also of the view that there was no merit in the appeal. Even if an application for an extension of time was made in writing, having heard full submissions of counsel on both sides the Court was of the view that the appeal would not have been successful having looked at the grounds of appeal which had no merit. The Court was more persuaded by the submissions of the respondent on this matter. Accordingly the appeal

was dismissed. Costs awarded to the respondent.