

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

TERRITORY OF THE VIRGIN ISLANDS
Monday 6th February 2023 to Friday 19th February 2023

JUDGMENTS

Case Name:

Emmerson International Corporation

v

Renova Holding Limited

[BVIHCMAP2019/0018]

Emmerson International Corporation

v

Viktor Vekselberg

[BVIHCMAP2019/0020]

(Territory of the Virgin Islands)

Date:

Tuesday 7th February 2023

**Coram for
delivery:**

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

Appearances:

Appellants:	Mr. Robert Weekes KC with him Mr. Iain Tucker and Mr. Ajay Rattan
Respondent:	Ms. Arabella di Iorio

Issues:

Interlocutory appeal – Commercial Appeal – Grounds on which appellate court will upset decision of trial judge - Real risk of unjustifiable dissipation of assets – Allegations of dishonesty in proving risk of unjustifiable dissipation – Disclosure – Delay in applying for freezing order – Delay in proving risk of unjustifiable dissipation of assets – Disclosure – Duty to make full disclosure in ex parte application – Rules

**7.3 (2) (a) and 7.3(4) of the Civil Procedure Rules 2000
- Service of claim out of jurisdiction**

**Reason &
Result:**

Held: dismissing the Discharge Appeal and the Adjournment Appeal and awarding costs to the respondents to be assessed by a judge of the Commercial Court, if not agreed within 21 days, that:

- 1. The key principles applicable to the question of risk of dissipation are well established. A claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified risk of dissipation. The risk of dissipation must be established by solid evidence; mere inferences or generalized assertions are insufficient. Further, the risk of dissipation must be established separately against each respondent. It is not enough to establish sufficient risk of dissipation merely to establish a good arguable case that a defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets may be dissipated. The respondent's former use of offshore structures is relevant but does not itself equate to a risk of dissipation. Indeed, businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their assets. Each case is fact specific and relevant factors must be looked at cumulatively.**

Fundo Soberano de Angola v dos Santos [2018] EWHC 2199 (Comm) applied.

- 2. In this case, Jack J did not disregard the allegations of dishonesty against Mr. Vekselberg. Jack J noted that there are many allegations of dishonesty against Mr. Vekselberg and recognised that all of them are disputed and will need to be determined at the trial of the action. He also accepted that they had some weight in assessing the risk of dissipation but stated that the weight to be attributed to them was negligible. Weight being a contextual**

evaluation for the judge, this Court would not interfere with the judge's attribution of weight unless it is perverse. This standard has not been met in this case. Jack J did not apply a summary judgment test. Further, it is not established that Mr. Vekselberg controls any of the companies in the Renova Group and even if such control is established, it only proves the existence of such control which itself is not indicative of how that control is likely to be exercised.

Fundo Soberano de Angola v dos Santos [2018] EWHC 2199 (Comm). applied; Jarvis Field Press Ltd v Chelton [2003] EWHC 2674 (Ch) applied; Thane Investment Ltd v Tomlinson (No 1 [2003] EWCA Civ 1272 applied; VTB Capital plc v Nutritek International Corp [2012] EWCA Civ 808 applied.

3. In the absence of cross-examination, the court is not entitled to reject any written evidence as being untrue, unless on the basis of all the evidence before the court it considers that that written evidence is incredible. This is a strict standard. Jack J was entitled to conclude that that strict standard was not satisfied on the evidence before him; consequently, there was no basis to conclude that any documents falling within the scope of the Asset Disclosure Judgment had been withheld. Jack J also indicated that the lack of documentation concerning the LTI Scheme remained relevant to his assessment of whether there was a real risk of unjustifiable dissipation, but nevertheless concluded that the evidence indicated that the Liwet Transfers were legitimate transactions intended to mitigate against the effect of United States sanctions. Similarly, there was no basis to conclude that the Cypriot trusts to which the Liwet shares had been transferred were shams, as that would have required a finding of dishonesty on the part of all those involved, for which there was no evidence. In the circumstances, Jack J's conclusion that the Liwet Transfers do not provide any evidence, still less solid evidence, of a real risk of

unjustifiable dissipation cannot be said to be plainly wrong and does not therefore attract appellate interference.

Wards Solicitors v Hendawi [2018] EWHC 1907 (Ch.) applied.

4. While Jack J did not think it was necessary to rule on the admissibility of the expert accountancy report produced by Paul Doxey (“the Doxey Report”) in relation to the LTI, he had nevertheless read the report *de bene esse* and concluded that it had little relevance to Emmerson’s argument. Indeed, Mr. Doxey concluded in his report that the absence of documents relating to the terms of the LTI Scheme would not have prevented liabilities relating to that scheme being recorded in Renova’s audited consolidated financial statements for 2017 (“the 2017 Audited Accounts”). The learned judge’s approach was therefore sensible and there was nothing procedurally unfair or irrational about it.
5. Paragraph 1 of the Asset Disclosure Order simply stated that Mr. Vekselberg and Renova must produce documents relating to the Liwet Transfers (or procure Renova Innovation Technologies Ltd (“RITL”) or Liwet to produce those documents). The purpose of the Asset Disclosure Order was to ensure that documents relating to the Liwet Transfers were produced. Renova’s confirmation that all documents within its control falling within the scope of the Order had been disclosed by Mr. Vekselberg, meant that the purpose of the order was achieved. That being the case, it did not matter who, as between Renova and Mr. Vekselberg, provided those documents to Emmerson. Even assuming that Renova has somehow submitted to the jurisdiction of the BVI Court, that manifestly provided no basis from which to infer a real risk of dissipation. Nor would it provide a basis on which to strike out the discharge application.

**Sans Souci Limited v VRL Services Limited
[2012] UKPC 6 applied.**

- 6. The mere fact of delay in bringing an application for a freezing injunction does not, without more, mean there is no risk of dissipation. If the court is satisfied on other evidence that there is a risk of dissipation, the court should grant the order, despite the delay. The delay in Emmerson seeking a freezing order after 16 th May 2018 was a relevant factor which Jack J was entitled to take into account. Jack J noted that there was no evidence that any of the respondents had sought unjustifiably to dissipate assets after they had received notice of Emmerson's application for an Asset Disclosure Order, which expressly stated that Emmerson was considering applying for freezing relief. Jack J was clearly entitled to take the view that the absence of any unjustifiable dissipation of assets since May 2018 indicated that there was no real risk of any unjustifiable dissipation of assets in the future and that the delay rendered freezing relief inappropriate in the circumstances. In the circumstances, there is no basis for appellate intervention.**

JSC M P Bank v Pugachev [2015] EWCA Civ 906 applied; Candy v Holyoake [2017] EWCA Civ 92 considered; Madoff Securities International Ltd v Raven [2011] EWHC 3102 (Comm) applied.

- 7. A party making an ex parte application has a duty to make full and frank disclosure of all the material facts and matters. The test of materiality of a matter not disclosed is whether it would be relevant to the exercise of the court's discretion. Materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers. Material matters include arguments which might be raised by the respondents and any relevant defences. In this case, Emmerson had a duty to disclose the argument raised by the respondent at the hearing of the Asset Disclosure Application, that**

any application for a freezing order should be heard inter partes. In the circumstances, Jack J was entitled to reach the conclusion that this was a serious non-disclosure. Similarly, Jack J was correct in his conclusion that Emmerson breached its duty of full and frank disclosure by failing to indicate that Renova may wish to rely on an alternative interpretation of the Asset Disclosure Order, namely, it imposed a joint obligation and did not require Renova to duplicate Mr. Vekselberg's disclosure.

Alliance Bank JSC v Zhunus [2015] EWHC 714 Comm applied; National Bank Trust v Yurov [2016] EWHC 1913 applied; Millhouse Ltd v Sibir Energy Plc [2008] EWHC 2614 (Ch) applied.

8. The duty to make full disclosure also includes specifically identifying all relevant documents for a judge and taking the judge to particular passages which are material and taking appropriate steps to ensure that the judge appreciates the significance of what he is being asked to read. Jack J was accordingly right in concluding that Emmerson committed a serious non-disclosure at the ex parte hearing of 19 th November 2018, by failing to explain to the judge the content of the 714 documents disclosed by Mr. Vekselberg pursuant to the Asset Disclosure Order. Jack J was also correct in his finding that Emmerson had committed a “middling breach” of its duty of full and frank disclosure in failing to draw Wallbank J's attention to the absence of a provision for legal expenses in the draft of the freezing order sought against Mr. Vekselberg. By failing to take Jack J to Mr. Michaelides' evidence, Emmerson failed in its duty to make a fair representation of the issues.

Siporex Trade v Comdel [1986] 2 Lloyd's Rep 428 applied; Petroceltic Resources Ltd v Archer [2018] EWHC 671 (Comm) applied.

9. A claim form may be served out of the jurisdiction if a claim is made (a) against someone on whom the claim form has been or will be served, and (i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and (ii) the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is a necessary or proper party to claim. In this case, the declaratory claims sought against Berdwick or Tiwel involve no substantive cause of action and were essentially an attempt to obtain declarations merely in order to assist enforcement of any judgment that may ultimately be obtained against Mr. Vekselberg and or Renova in these proceedings. In the circumstances, Jack J was correct to take the view that this was fatal for Emmerson's attempt to rely on the 'necessary or proper' party gateway in CPR 7.3(2)(a), which is only applicable if a substantive claim is brought against the proposed additional defendant(s) (i.e. Berdwick and Tiwel) in addition to the substantive claim against the anchor defendants (Mr. Vekselberg and Renova). Further, the declaratory claims against Berdwick and Tiwel related solely to assets held outside the jurisdiction of the BVI, and which had no connection with the subject matter of any of the existing claims in these proceedings (ie the IES joint venture). Therefore, there is no basis to suggest that the declaratory claims against Berdwick and Tiwel are somehow "closely bound up" with the existing claims in these proceedings.

Rule 7.3(2)(a) of the Civil Procedure Rules 2000 applied; C v L [2001] 2 All ER 446 considered.

10. The claimant in an application for permission to serve a foreign defendant out of the jurisdiction must satisfy the court that, in relation to the foreign defendant to be served with the proceedings, there is a serious issue to be tried on the merits of the claim. Secondly, the

claimant must satisfy the court that there is a good arguable case that the claim against the foreign defendant falls within one or more of the classes of case for which leave to serve out of the jurisdiction may be given (often referred to as “the gateways”. Thirdly, the claimant must satisfy the court that in all the circumstances the ‘BVI’ is clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction. The claimant must supply a plausible evidential basis for the application of a relevant gateway; if there is an issue of fact about it, or some other reason for doubting whether it applies, the Court must take a view on the material available, if it can reliably do so. In circumstances where Emmerson conceded that its notice of application and supporting evidence made no reference to the tort gateway in CPR 7.3(4), the consequence is that the tort gateway was unavailable. This ground of appeal must accordingly fail. Further, there is no evidence that Emmerson has suffered any damage as a result of the Liwet Transfers, let alone damage within the jurisdiction of the BVI. Emmerson’s reliance on the tort gateway cannot be sustained. Further, Emmerson has failed to establish that the BVI is clearly and distinctly the most appropriate forum for the determination of any tort claims against Berdwick.

Rule 7.3(4) of the Civil Procedure Rules 2000; AK Investment CJSC v Kyrgyz Mobile Tel Ltd [2011] UKPC 7 applied; Four Seasons Holdings Incorporated v Brownlie [2017] UKSC 80 at [71] applied.

Case Name:

Emmerson International Corporation
v
Renova Holding Limited

[BVIHCMAP2019/0001]

(Territory of the Virgin Islands)

Date: Tuesday 7th February 2023

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

Appearances:

Appellants: Mr. Robert Weekes KC with him Mr. Iain Tucker and Mr. Ajay Rattan

Respondent: Ms. Arabella di Iorio

Issues: Interlocutory appeal – Commercial appeal – Grounds on which appellate court will upset decision of trial judge – Exercise of discretion by trial judge to impose a confidentiality club – Whether learned judge erred in imposing a confidentiality club - Case management – Disclosure – Court’s discretion to order disclosure

Reason & Result: Held: dismissing the appeal and awarding costs to Renova, to be assessed by a judge of the Commercial Court if not agreed within 21 days, that:

1. Case management decisions are discretionary decisions in which the discretion is entrusted to the first instance judge. An appellate court does not exercise the discretion itself but can interfere with the discretion of the first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors, or has come to a decision that is plainly wrong in the sense of being outside the ambit where reasonable decision makers may disagree.

Broughton v Kop Football Ltd [2012] EWCA Civ 1743 applied.

2. The provision of protection by the use of confidentiality clubs in appropriate cases, including confidentiality clubs to which the parties' lawyers alone are admitted at least during the interlocutory stage of litigation is part of the court's inherent jurisdiction to regulate its own procedure in the interest of justice. In this case, by imposing the confidentiality club, the learned judge was exercising a case management decision which this Court ought only to interfere with if it was plainly wrong. In circumstances where Renova raised serious concerns as to confidentiality, and where Emmerson maintained that it needed the information to police the Freezing Order, the learned judge conducted the balancing exercise required by the authorities and struck a compromise in the exercise of his discretion. In all the circumstances, it was a sensible case management decision by an experienced judge seeking to balance the interests of justice between the parties and there is no basis for the appellate court to interfere with the judge's exercise of discretion.

Raja v Hoogstraten [2004] EWCA Civ 968 applied; Libyan Investment Authority and Societe Generale S.A. [2015] EWHC 550 (Comm) applied.

Case Name:

[1] Charles Peterson
[2] Global Water Associates Limited
v
[1] Douglas Riegels
[2] Trefor Grant

[BVIHCVAP2021/0006]
(Territory of the Virgin Islands)

Date:

Thursday 9th February 2023

**Coram for
delivery:**

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

Appearances:

Appellants: Ms. Kesha Adonis

Respondent: Ms. Marcia McFarlane and Ms. Olga Osadchaya

Issues:

Interlocutory appeal – Appellate interference with learned judge’s exercise of discretion –Interim freezing injunction – Risk of dissipation of assets – Whether learned judge erred in finding that there was a real risk of dissipation - First appellant’s refusal to give undertaking – Whether first appellant’s behaviour was a relevant factor for the judge’s consideration – Grant of freezing injunction when award to second appellant yet to be determined - Whether a freezing injunction may be granted before a right to payment of a debt has accrued - Delay in applying for interim relief – Whether learned judge failed to give due weight to respondents’ delay in applying for interim relief

**Result &
Reason:**

HELD: dismissing the appeal; affirming the order of the learned judge; and ordering that the appellants pay the respondents’ costs on the appeal to be assessed by the court below at no more than two-thirds of the costs awarded in the court below, that:

1. An appellate court will be slow to overturn the exercise of discretion by a lower court judge unless it can be shown that the judge failed to consider relevant factors or took into account irrelevant ones. Essentially, the judge’s decision must be one outside the generous ambit within which reasonable disagreement is possible and thus plainly wrong. An appellate court should therefore avoid an over-zealous dissection of the language of a judgment in seeking to

establish that a judge failed to take some factor into account.

Dufour and others v Helenair Corporation Ltd and others (1996) 52 WIR 188 followed; Ming Siu Hung and others v J. F. Ming Inc and another [2021] UKPC 1 followed.

2. A defendant's behaviour in respect of the claim is a factor for consideration by a judge when deciding whether or not to grant a freezing order. This behaviour includes the refusal to give an undertaking as possibly being indicative of a real risk of dissipation. On the facts, the first appellant's refusal to give the requested undertaking was a relevant factor to which the learned judge was entitled to have regard. He therefore did not err by considering this factor as important to there being a real risk of dissipation of assets.

Gee on Commercial Injunctions (5th Edition Sweet and Maxwell 2004) considered.

3. To determine whether there is a real risk of dissipation of assets, the court must have regard to the evidence adduced. Such evidence must objectively demonstrate a risk of unjustified dissipation. A risk which is theoretical, fanciful, or insignificant will not meet this threshold. Furthermore, there must be a danger of default if the assets are removed. Intention on the defendant's part is unnecessary and it would be enough for the evidence adduced to raise the inference of a real and current risk. Factors which may not individually justify the inference of a real risk, may do so cumulatively. On the facts, the evidence before the judge was that the first appellant refused to give

the requested undertaking and was not ordinarily resident in the BVI. The second appellant was not an actively trading company and neither appellant had sufficient assets in the jurisdiction to meet any future judgment. These factors were all relevant and the judge did not err in considering the assets of both appellants. Considered cumulatively, the factors provided a sufficient evidential basis upon which the learned judge could find that there was a real risk of dissipation. He therefore did not err in his finding.

Les Ambassadeurs Club Ltd v Yu [2021] EWCA Civ 1310 applied; Barclay-Johnson v Yuill [1980] 1 WLR 1259 considered; Third Chandris Shipping Corporation v Unimarine S.A.; Aggelikai Ptera Compania Maritima S.A. v SAME; Western Sealanes Corporation v SAME [1979] Q.B. 645 considered; Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft m.b.H. UND Co. K.G.; The Niedersachsen [1983] 1 WLR 1412 applied; Mobil Cerro Negro Ltd v Petroleos de Venezuela SA [2008] EWHC 532 (Comm) considered; Mediterranean Feeders L P v Bernd Meyering Schiffahrts [1997] Lexis Citation 1111 applied; Holyoake and another v Candy and others [2017] EWCA Civ 92 applied.

4. A court with jurisdiction to grant injunctions may grant a freezing order even before a right to payment of a debt has accrued. This is so, provided that the applicant has already been granted or has a good arguable case for being granted an order for the payment of money that will be enforceable through the court's process and the respondent holds assets against which such an order could be enforced. The second appellant's right to an award of damages from the Government, which was confirmed by the Privy Council, is a chose in action and therefore an existing

asset against which a judgment can be enforced. The learned judge therefore did not err in granting the freezing order against the as yet unascertained award to which the second appellant was entitled.

Convoy Collateral Ltd v Broad Idea International Ltd [2021] UKPC 24 followed.

5. The mere fact of a delay in bringing an application for a freezing injunction does not, without more, mean that there is no risk of dissipation. If a court is satisfied on other evidence that there is a real risk, the injunction should be granted. On the facts, the judge, having adverted to the live issue of delay at paragraph 22 of his judgment, evidently placed no weight on this factor. Despite the delay, the judge was satisfied on the evidence before him that there was a real risk of dissipation. He therefore did not err in the exercise of his direction in granting the injunction.

Madoff Securities International Ltd v Raven [2011] EWHC 3102 (Comm) considered; JSC Mezhdunarodniy Promyshlenniy Bank and another v Pugachev and others [2015] EWCA Civ 906 applied; Correia v University Hospital of North Staffordshire NHS Trust [2017] EWCA Civ 356 applied; Watt (or Thomas) v Watt [1947] UKHL J0325-2 applied.

APPLICATIONS AND APPEALS

Case Name:

Morden Finance Ltd.

v

Benono Holdings Ltd.

[BVIHCMAP2022/0027]

(Territory of the Virgin Islands)

Date:

Monday, 6th 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. Robert Nader and Mr. Ben Giblin

Respondent: Mr. Andrew Emery

Issues: Commercial appeal - Appeal against refusal to set aside statutory demand - Sections 156 and 157 of the Insolvency Act 2003 - Whether the learned judge erred in law or in fact in finding that there was no substantial dispute as to whether the alleged debt was due or owing - Whether the learned judge erred in applying the Sparkasse Bregenz test by placing an excessive burden on the appellant to make out its substantive case at the hearing of the set aside application - Whether the learned judge erred in law or in fact in concluding that the appellant was estopped from arguing that the alleged debt was due and payable on the basis of a wrongly construed share pledge agreement - Whether the learned judge erred in finding that the appellant's evidence was defective as compared to that of the respondent - Whether the learned judge erred in his approach to the hearing by not affording the appellant the opportunity to answer the contention that the terms of the share pledge agreement gave rise to an estoppel by deed

Type of Order: N/A

Result / Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name: Inderjit Kaur Chhina

v
Muhammad Nazir Muhammad Ismail

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

Date: Monday 6th February 2023

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

Appearances:

Applicant: Mr. Adrian Davies

Respondent: No appearance

Issues: Notice of Motion for leave to appeal to His Majesty in Council - Whether appeal is as of right - The “application test” - Article 3(2)(a) of the Virgin Islands (Appeals to Privy Council) Order 1967

Type of Order Adjournment

Result / Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:

1. The appellant shall file an affidavit in support of the application by 3 pm on Tuesday 7th February 2023.
2. The hearing of the application is adjourned to Thursday 9th February 2023.

Reason: No affidavit evidence was filed in support of the application for leave to appeal to His Majesty in Council. Therefore the Court made the above order.

Case Name:

WWRT Limited
v
[1] Carosan Trading Limited

[2] Boris Kaufman

**[BVIHCMAP2022/0002]
(Territory of the Virgin Islands)**

Date: Monday 6th February 2023

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

Appearances:

Applicant: Mr. Andrew Ayres, KC with him Dr. Alecia Johns

Respondent: Mr. Brian Lacy for the 1st Respondent
Mr. Richard Morgan, KC with him Mr. Richard Brown
for the 2nd Respondent

Issues: Leave to appeal to His Majesty in Council - Section 3(2)
of the Virgin Islands (Appeals to the Privy Council)
Order 1967 - Whether appellate court has jurisdiction
to deal with fresh evidence that was not in existence at
the time of the first-instance hearing - Whether it is of
great general or public importance that the Privy
Council consider the impact of armed conflict on the
question of *forum conveniens*

Type of Order Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:

The decision of the Court is reserved.

Case Name: Steven Goran Stevanovich
v
Marcus Wide et al

**[BVIHCMAP2019/0004]
(Territory of the Virgin Islands)**

Date: Tuesday 7th February 2023

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

Appearances:

Applicant: Mr. Stephen Moverley Smith KC with him Ms. Laure-Astrid Wigglesworth

Respondent: Mr. Tom Smith KC with him Mr. Ciaran Moore

Issues: Motion for conditional leave to appeal to His Majesty in Council - Section 3(2) of the Virgin Islands (Appeals to Privy Council) Order 1967 - Whether the questions raised on appeal, by reason of their great general or public importance, ought to be submitted to His Majesty in Council - Section 273 of the Insolvency Act 2003 - Test for “person aggrieved” under Section 273 of the Insolvency Act

Type of Order: Oral Decision

Result / Order:

IT IS HEREBY ORDERED THAT:

1. (a) The applicant is granted conditional leave to appeal to the Privy Council against the judgment whereby the appellant’s appeal against the order of Wallbank J [Ag.] made on 5th December 2018 was dismissed with costs.
- (b) The applicant shall within 90 days of the date of this order enter into good and sufficient security to the satisfaction of the court by paying into court the sum of £500 or its US equivalent for the due prosecution of the appeal and the payment of all such costs as may become payable in the event that it does not obtain an order granting it final leave to appeal

or the appeal being dismissed for want of prosecution or the Privy Council ordering it to pay the costs of the appeal as the case may be.

(c)The applicant shall apply for final leave to appeal to the Privy Council supported by the certificate of the Registrar that the condition of payment of the security for costs and prosecution of the appeal referred to at paragraph 1(b) above has been given within the time prescribed to the satisfaction of the Registrar.

2. The record of appeal shall be prepared in accordance with rule 20 of the Judicial Committee Appellate Jurisdiction Rules Order 2009 and its Practice Direction 4.2(1) - 4.3(2) and will be transmitted to the Registrar of the Privy Council without delay when final permission to appeal has been granted.

The costs of and occasioned by the notice of motion for conditional leave to appeal shall be costs in the appeal to the Privy Council.

Reason:

The Court was of the view that the issues raised in the application were of great general and public importance in accordance with Section 3(2)(a) of the Virgin Islands (Appeals to Privy Council) Order 1967 and accordingly conditional leave to appeal to His Majesty in Council was granted.

Case Name:

Kaverne Richards
v
The Commissioner of Police
[BVIMCRAP2021/0002]
(Territory of the Virgin Islands)

Date:

Tuesday 7th February 2023

Coram:

The Hon. Mde. Gertel Thom, Justice of Appeal

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

Appearances:

Appellant: Mr. Sherfield Bowen

Respondent: Mr. Kael London

Issues:

Criminal appeal - Appeal against conviction- Necessity - Whether the learned magistrate misdirected herself when she analysed the defence of necessity - Whether the sentence imposed is excessive - Suspended sentence - Section 29(1) of the Criminal Code - Whether the learned magistrate has jurisdiction to suspend sentence

Type of Order:

Oral Judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal against conviction is dismissed.**
- 2. The appeal against sentence is allowed to the extent that, the sentence of 7 years with the final year of sentence suspended, is varied to a sentence of 6 years imprisonment.**

Reason:

The appellant appealed against his conviction and sentence in respect of the offence of carrying a firearm without a license contrary to section 11(2)(a) of the Firearms Act Cap 126 as amended of the Laws of the Virgin Islands. Eleven grounds of appeal were filed but at the hearing of the appeal, counsel for the appellant pursued only 2 grounds, namely, (i), challenging the learned magistrate's treatment of the defence of necessity and (ii) sentence. The Court having considered the arguments and submissions of counsels for the appellant and respondent, was satisfied that the ground against conviction possessed no merit and accordingly dismissed the appeal against conviction.

In relation to the appeal against sentence, the magistrate imposed the sentence of 7 years with the

last year of sentence suspended. Having considered the provisions of the Criminal Code, in particular section 29(1), it was clear to the Court that the magistrate lacked jurisdiction to suspend a sentence save where a sentence imposed was in respect to a term of imprisonment of not more than 2 years. In this case, the term of imprisonment was 7 years and there was no jurisdiction to suspend the sentence or any part thereof. Accordingly, the appeal against sentence was allowed and a sentence of 6 years was substituted for that imposed by the magistrate.

Case Name:

[1] Lau Man Sang, James
[2] Lung Hung Cheuk
[3] Cheung Wing Sum, Albert
[4] Ngai Hin Kwan, Albert
[5] Yeung Yiu Chong
[6] Zhang Guo Wei
v
[1] King Bun Limited
[2] Kency Ltd
[3] Kar Kwong Development Limited
(Trading As Kai Kwong Trading Company)
[4] Khi Capital Limited
[5] Kentrue Company Limited
[6] Hui Pak Kong
(Suing in the name and on behalf of
themselves and all other shareholders
in Vanway International Group Limited, except
the first and second respondents)
[7] Chau Cheuk Wah, Angus
[8] Vanway International Group Limited

[BVIHCMAP2021/0034]
(Territory of the Virgin Islands)

Date:

Tuesday 7th - Wednesday 8th 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:

Appellants: Mr. Richard Hacker KC, Mr. John Carrington KC with them Mr. Olivier Kalfon and Ms. Reisa Singh

Respondents: Mr. Jern-Fei Ng KC with him Mr. James Bailey, Mr. Jerry Samuel and Dr. Alecia Johns

Issues:

Interlocutory appeal - Substantive appeal - Company law - Director's duty to act honestly and in good faith in the best interests of the company - Directors' breach of fiduciary duty - Sale by directors of subsidiaries and assets of company at undervalue to 1st appellant - Whether sale orchestrated by 1st appellant for his benefit - Whether directors exercised their powers for an improper purpose - Fraud on the minority shareholders - Derivative action brought by minority shareholders of company - Whether the judge erred in finding the appellants liable for fraud on the minority shareholders of the company - Whether the learned judge erred in finding the appellants liable for breaching their fiduciary duties - Appellate review of trial judge's findings of fact - Whether the learned judge erred in finding that there was no crisis at the Board meeting on 20th August 2015 - Whether learned judge erred in finding that the reregistration of the Target Group's drug negated any suggestion that the company was no longer a going concern - Whether the judge erred in finding that the appellants schemed to transfer the Target Group to the 1st appellant at gross undervalue - Whether the judge erred in finding that each director knew the crisis did not exist - Whether the judge erred in finding that the appellants knew the Alfred Sund Report was not a true report and so their reliance on it was not in good faith - Whether the judge erred in finding that the capitalization of receivables was a deliberate set up by the appellants - Whether the judge erred in finding that the 2nd appellant held his shares in the company as nominee for the 1st appellant

Type of Order:

N/A

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved in the substantive appeal.

Case Name:

**[1] Lau Man Sang, James
[2] Lung Hung Cheuk
[3] Cheung Wing Sum, Albert
[4] Ngai Hin Kwan, Albert
[5] Yeung Yiu Chong
[6] Zhang Guo Wei
v
[1] King Bun Limited
[2] Kency Ltd
[3] Kar Kwong Development Limited
(Trading As Kai Kwong Trading Company)
[4] Khi Capital Limited
[5] Kentrue Company Limited
[6] Hui Pak Kong
(Suing in the name and on behalf of
themselves and all other shareholders
in Vanway International Group Limited, except
the first and second respondents)
[7] Chau Cheuk Wah, Angus
[8] Vanway International Group Limited**

**[BVIHCMAP2022/0006]
[BVIHCMAP2022/0028]
[BVIHCMAP2022/0019]
(Territory of the Virgin Islands)**

Date:

Tuesday 7th - Wednesday 8th 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:

Appellants: Mr. Richard Hacker KC, Mr. John Carrington KC with them Mr. Olivier Kalfon and Ms. Reisa Singh

Respondents: Mr. Jern-Fei Ng KC with Mr. James Bailey, Mr. Jerry Samuel and Dr. Alecia Johns

Issues: Interlocutory appeal - Company law - Director's duty to act honestly and in good faith in the best interests of the company - Directors' breach of fiduciary duty - Sale by directors of subsidiaries and assets of company at undervalue to 1st appellant - Fraud on the minority shareholders - Derivative action brought by minority shareholders of company - Finding by learned judge that appellants liable for breach of their fiduciary duties - Split trial case - Orders made by learned judge after finding of liability - Consequential order by learned judge for transfer of Target Group to company at fair value - Consequential appeal - Whether the judge misapplied the principles of election and avoidance of double recovery - Whether the judge's consequential order irrational in all the circumstances - Consequential order made by learned judge as to directions - Directions appeal - Whether the judge erred in making orders for disclosure - Whether the judge erred in giving consequential directions as to witness statements and expert evidence - Whether learned judge in making the directions order was blatantly wrong - Costs - Consequential costs order made by learned judge - Whether judge was wrong to make costs order at this stage - Whether costs order made by learned judge liable to be set aside

Type of Order N/A

Result / Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name: Oscar Trustee Limited

(as trustee of the Chloe Trust)
v
MBS Software Solutions Limited

[BVIHCMAP2021/0024]
(Territory of the Virgin Islands)

Date: Wednesday, 8th 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:

Applicant: Mr. Sharif Shivji, KC with him Mr. Guy Olliff-Cooper and Mr. Jonathan Addo

Respondent: Mr. Mungo Lowe

Issues: Application for stay of motion for leave to appeal to His Majesty in council until payment of costs orders- - whether the proposed Appellant should be debarred from participating in further proceedings before the court or any other proceedings until the cost orders are met - Security for costs on the motion for leave

Type of Order: Oral Decision with reasons to follow

Result / Order: IT IS HEREBY ORDERED THAT:

1. The application for conditional leave to appeal to His Majesty in Council is stayed until:
 - (a) the Proposed Appellant has paid all outstanding costs due to the Proposed Respondent, as have been ordered and assessed by the Court in accordance with the Schedule of the costs orders annexed to this order; and
 - (b) the Proposed Appellant provides security for costs in the sum of \$100,000.00 on the leave application where the Proposed Appellant seeks to lift the stay granted in paragraph (a) hereof.
2. Unless the

Proposed Appellant fully complies with paragraph 2(a) of this order within 21 days of the date of this order, the Proposed Appellant be debarred from being heard, making representations in, or otherwise participating in these proceedings in the Court of Appeal and any other proceedings arising out of the costs assessment proceedings.

3. The Proposed Appellant shall pay the Proposed Respondent's costs of this application, to be assessed unless agreed within 21 days.

2. 4. The Court shall provide written reasons for its decision at a later date.

Reason:

The Court, having read the submissions along with the affidavits filed by both sides and having considered the oral submissions before the Court, was of the view that it was just in all the circumstances to make an order staying the application for conditional leave and to grant the debarring order sought by the applicant.

Case Name:

Geminis Investors Limited

V

**[1] Goods Technology Starting International
Limited**

[2] G-Force Int'l Co Ltd

[BVIHCMAP2022/0020]

[BVIHCMAP2022/0043]

(Territory of the Virgin Islands)

Date:

Thursday 9th February 2023

Coram:

The Hon. Mde. Gertel Thom, Justice of Appeal

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

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

Appearances:

Appellant:

Mr. John McCarroll, SC with him Mr. Zac Van Horn

Respondent: Ms. Angeline Welsh, Ms. Sophia Hurst and Ms. Sara-Jane Knock

Issues: Application to adduce fresh evidence - Ladd v Marshall [1954] 1 W.L.R. 1489 - Whether the court should apply the principles set down in Ladd v Marshall to the instant application - Whether the evidence could have been obtained with reasonable diligence for use at the hearing below - Whether the evidence is likely to have an important influence on the result of the appeal - Whether the evidence is credible- Application for security for costs - Whether the appellant should provide security for the respondents' costs – Whether the Appellant should pay into Court the Default Judgment Sums, the Statutory Demand Costs Order and Claim Costs Order as a condition of the further prosecuting the Appeals -

Type of Order: N/A

Result / Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:

The decision is reserved.

Case Name: Inderjit Kaur Chhina
v
Muhammad Nazir Muhammad Ismail

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

Date: Thursday 8th February 2023

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

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

Appearances:

Appellant: Mr. Adrian Davies

Respondent: No appearance

Issues:

Motion for conditional leave to appeal to His Majesty in Council - Article 3(1)(a) of the Virgin Islands (Appeals to Privy Council) Order 1967 - Lopes v Chettiar [1968] A. C. 887 - Ratnam v Cumaraswamy [1965] 1 WLR 8 - Whether an appeal to the Privy Council from an order of the Court of Appeal striking out an appeal for want of prosecution is as of right - Whether an order striking out an appeal for want of prosecution is a final order - Rule 62.1(3) of the Civil Procedure Rules 2000 - The “application test” - Article 3(2)(a) of the Virgin Islands (Appeals to Privy Council) Order 1967

Type of Order:

N/A

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

The decision is reserved.

Case Name:

**Nam Tai Property Inc. Limited
(a company incorporated in the British Virgin Islands)**

v

**Westridge Investment Limited
(a company incorporated in Hong Kong)**

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

Date:

Friday, 10th February 2023

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice,
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant:	Mr. David Chivers KC with him Mr. Jack Rivett, Ms. Arabella di Iorio and Ms. Jodi-Ann Stephenson
Respondent:	Mr. John Machell KC with him Ms. Kimberly Crabbe-Adams and Ms. Jhneil Stewart

Issues: Interlocutory appeal - Appeal against judgment granted pursuant to a Tomlin Order - Dishonest assistance - Whether the judge erred in concluding that the appellant's claim against the respondent in dishonest assistance had no realistic prospect of success - Unlawful means conspiracy - Whether the judge erred in concluding that the appellant's claim against the respondent in unlawful means conspiracy had no realistic prospect of success - Whether the judge erred in law and fact in concluding that respondent provided no assistance to the appellant's former directors in making the investment in the Greensill Fund - Whether the judge erred in failing to address the other grounds of the appellant's defence to the ancillary claim and to the respondent's application for judgment

Type of Order: N/A

Result / Order:

IT IS HEREBY ORDERED THAT:

Judgment is reserved.