

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING
TERRITORY OF THE VIRGIN ISLANDS
VIDEOCONFERENCE

Monday, 3rd October 2022 to Friday, 7th October 2022

APPEALS/APPLICATIONS

Case Name:

Chu Kong

v

[1] Ocean Sino Limited (In Liquidation)

[2] David Yen

[3] Chan Pui Sze (Nichole)

[4] Roy Bailey

[5] John Greenwood

[6] Lau Wing Yan

[BVIHCMAP2021/0048]

(Territory of the Virgin Islands)

Date:

Monday, 3rd October 2022

Before:

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

The Hon. Mr. Trevor Ward, Justice of Appeal

The Hon. Mr. Gerard St. C. Farara, Justice of Appeal

[Ag.]

Appearances:

Appellant:

**Mr. Richard Hacker, KC, with him Mr. John Carrington,
KC and Ms. Reisa Singh**

Respondents:

**Mr. Mark Phillips, KC, with him Ms. Hilary Stonefrost
and Mr. Peter Ferrer for the first, fourth and fifth
respondents**

**Mr. Philip Jones, KC, with him Ms. Rosalind Nicholson
and Mr. Renell Benjamin for the sixth respondent**

Issues:

**Interlocutory appeal – Appellate court approach to
factual findings of trial judge – Removal of liquidators
– Section 187 of Insolvency Act, 2003 – Jurisdiction of
court to remove liquidator – Whether judge sufficiently
considered the evidence in determining whether the
court could exercise its power to remove liquidators –
Whether judge erred in law in his assessment of the
duties and powers of the liquidators of a solvent
holding company – Whether judge erred in holding that
no distinction was to be drawn between affairs of the
company over which the liquidators are appointed and
those of its subsidiaries – Whether judge erred in
finding that appellant had not made out a case of due
cause in order to engage the court’s jurisdiction to
remove the liquidators – Whether judge erred in law in
dismissing application to remove liquidators on the
basis that due cause had not been established – Bias
– Test in determining bias – Whether judge erred in
finding that no case of apparent bias was made out on
part of liquidators**

Type of Order:

N/A

Result/Order:

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

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:

Monday, 3rd October 2022

Before: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Godfrey Smith, Justice of Appeal [Ag.]
The Hon. Mr. Anthony Gonsalves, Justice of Appeal [Ag.]

Appearances:

Applicant: Mr. John Russell, KC with him Mr. Jerry D. Samuel and Ms. Allana-J Joseph

Respondents: Mr. Matthew Reeves and Mr. Joseph England and Ms. Olga Osadchaya

Issues:

Commercial appeal – Pre-judgment interest – International Convention on Limitation of Liability for Maritime Claims 1976 – Merchant Shipping Act, 2001 – Whether judge erred in awarding pre-judgment interest at the rate of 5% – Whether judge erred as a matter of statutory interpretation by failing to hold that he was obliged to award interest at 1% over the Bank of England Base Rate (which was 0.1% at the material times) – Whether judge erred in the exercise of his discretion in relation to interest – Part 35 of the Civil Procedure Rules 2000 – Offer to settle – Whether the no penalty interest rate should have been awarded and the costs order made by the judge should be set aside – Pre-action costs – Section 18(3) of the Legal Profession Act, 2015 – Rule 64.3 of the Civil Procedure Rules 2000 – Whether judge erred as a matter of law in permitting the respondents to recover pre-commencement costs in respect of legal fees on the ground that their advocate was not qualified and/or admitted to practice as a solicitor or barrister in the British Virgin Islands – Whether judge erred as a matter of principle in exercising his discretion in relation to pre-action costs

Type of Order: N/A

Result/Order: IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name:

**Greater Sail Limited
(a company incorporated in the British
Virgin Islands)**

v

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

**[2] Nam Tai Group Limited
(a company incorporated in the Cayman
Islands)**

**[3] Nam Tai Investment Shenzhen Co. Ltd.
(a company incorporated in the People's
Republic of China)**

**[BVIHCMAP2022/0025]
(Territory of the Virgin Islands)**

Date:

Tuesday, 4th October 2022

Before:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal
[Ag.]**

Appearances:

Appellant: Mr. John Carrington, KC with him Mr. Andrew Emery

Respondents: Mr. Edward Davies, KC with him Mr. Ben Griffiths

Issues:

**Interlocutory appeal – Appeal against dismissal of
recusal application – Apparent bias – Whether judge
failed to consider objectively whether the matters
complained of by the appellant gave rise to a real
possibility of actual or apparent bias – Whether judge
erred by failing to conclude that a real possibility of
actual or apparent bias and of improper judicial
conduct had been made out – Whether a fair minded**

and informed observer would have concluded that there was a real risk of bias

Type of Order: Oral judgment

Result/Order: IT IS HEREBY ORDERED THAT:

1. The appeal is allowed.
2. Paragraph 2 of the order of the learned judge dated 11th March 2022 in which he dismissed the recusal application made on 1st March 2022 is hereby set aside.
3. It is further ordered that the learned judge Jack J, is recused from presiding or adjudicating over any further applications and/or further hearing in the proceedings below in this claim, namely Claim No. BVIHCOM2022/0016.
4. In relation to paragraph 3 of the order, in so far as it relates to costs in the recusal application, that order is set aside.
5. The appellant shall have its costs on this appeal and in respect of the recusal application below to be assessed unless agreed within 21 days.
6. Written reasons for this decision will be given at a later date.

Case Name:

**The King
v
[1] Yan Edwards
[2] Allen Baptiste**

**[BVIHCRAP2020/0002]
(Territory of the Virgin Islands)**

Date: Tuesday, 4th October 2022

Before: The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal

Appearances:

Appellant: Ms. Kellee-Gai Smith

Respondents: Mr. Sherfield Bowen for the 1st respondent
Mr. Israel Bruce for the 2nd respondent

Issues: Criminal appeal – Disclosure – Principles of disclosure – Section 23 of the Justice Protection Act – Exercise of judicial discretion – Public Interest Immunity – Whether judge erred in ordering disclosure of information protected by public interest immunity under the provisions of the Justice Protection Act to the Court

Type of Order: N/A

Result/Order: IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name: Starcy Huggins
v
The Commissioner of Police
[BVIMCRAP2021/0004]
[formerly BVIMCRAP2019/0001]
(Territory of the Virgin Islands)

Date: Tuesday, 4th October 2022

Before: The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal

Appearances:
Appellant: Mr. Michael Lashley, KC with him Ms. Akilah Anderson
Respondent: Mrs. Tiffany R. Scatliffe-Esprit, Director of Public Prosecutions

Issues: Application for adjournment

Type of Order: Adjournment

Result/Order: IT IS HEREBY ORDERED THAT:

The hearing of this appeal is stood down to Friday, 7th October 2022 at 11:30 a.m.

Reason: The appellant sought an adjournment in order to settle the filing of the record of appeal. There was no opposition from the Crown.

Case Name: [1] Sheikha Amena Ahmed A.H. Al-Thani
[2] Sara Saoud M.A Al-Thani
v
[1] Sheikha Aisha Mohammed Ali Abdullah Al Thani
[2] Sheikha Al-Anoud Abdul Rahman Ali Al Abdullah Al Thani
[3] Sa'ad Al-Dehaimi

**[BVIHCVAP2021/0001]
(Territory of the Virgin Islands)**

Date: Wednesday, 5th October 2022

Before: The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, KC, Justice of Appeal [Ag.]

Appearances:

Applicants: Mr. Stephen Moverley Smith, KC with him Mr. Greg O'Keefe-Davis

Respondents: Mr. Nicholas Brookes

Issues: Conditional leave to appeal to His Majesty in Council – Section 3(2)(a) of the Virgin Islands (Appeals to Privy Council) Order 1967 – Whether questions involved in proposed appeal are of great general or public importance

Type of Order: Oral decision

Result/Order: IT IS HEREBY ORDERED THAT:

1. The applicants are granted conditional leave to appeal to His Majesty in Council against the order of the Court of Appeal dated 23rd March 2022.
2. The applicants shall within ninety days of the date of this order lodge with the Registrar of the High Court the US dollar equivalent of £500 pounds sterling as security for the prosecution of the appeal to His Majesty in Council and the payment of all such costs as may become payable by them in the event of the applicants not obtaining an order granting final leave to appeal or the appeal being dismissed for non-

prosecution or the Judicial Committee ordering the applicants to pay the costs of the appeal as the case may be.

3. The Record of appeal shall be prepared by the applicants in accordance with rules 18-20 of the Judicial Committee Appellate Jurisdiction Rules 2009 and Practice Directions 4.2.1 - 4.3.2 and 4.3.5, the same to be transmitted to the Registrar of the Judicial Committee of the Privy Council without delay where final permission to appeal has been granted.
4. The applicant shall make an application for final leave to appeal to His Majesty in Council supported by the certificate of the Registrar of the High Court that the security for costs of the prosecution of the appeal ordered herein has been given to the satisfaction of the Registrar within the time prescribed by this order.
5. The costs of and occasioned by this application be costs in the appeal to His Majesty in Council.

Reason:

The Court noted, as reflected in the certificate of result dated 23rd March 2022, that the applicants' appeal was dismissed. Consequently, the applicants made an application for leave to appeal was made pursuant to section 3(2)(a) of the Virgin Islands (Appeals to Privy Council) Order 1967. The applicants contended that the intended appeal raises an issue of great general or public importance and therefore ought to be submitted to His Majesty in Council.

The Court read the application and the supporting documents which had been filed and also considered the written and oral submissions of counsel for the applicants. The Court noted that the proposed respondents filed no submissions in response to the application and merely made an appearance in an observational capacity. Applying the principles in Martinus Francois v The Attorney General SLUHC VAP2003/0037 (delivered 7th June 2004, unreported) the Court was satisfied that the issue raised in the application was one of great general importance and the Court would benefit from the guidance of His Majesty in Council on the issue of whether by virtue of section 245 of the Business Companies Act shares in companies incorporated in

the Virgin Islands should be treated as immovable property for the purpose of determining the validity of a testamentary disposition of shares.

Case Name: [1] Fang Ankong
[2] HWH Holdings Limited
v
Green Elite Limited (in Liquidation)
[BVIHCMAP2022/0013]
(Territory of the Virgin Islands)

Date: Wednesday, 5th October 2022 – Thursday, 6th October 2022

Before: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mr. Godfrey Smith, Justice of Appeal [Ag.]

Appearances:

Appellants:	Mr. Andrew Ayres, KC with him Mr. John Carrington, KC, Mr. Matthew Chan and Ms. Reisa Singh
Respondent:	Mr. John Machell, KC with him Mr. Peter Ferrer, Mr. Christopher Pease and Mr. Zachary Van-Horn

Issues: Commercial appeal – The Duomatic principle – Re Duomatic [1969] 2 Ch 365 – Whether judge wrongly applied principles applicable to the formation and enforceability of a contract to the question of whether there was a Duomatic assent – Whether judge applied the wrong legal test in ascertaining whether there was an assent to what would otherwise have been a breach of duty by the directors – Whether the judge erred in requiring a particularised and comprehensive agreement between the shareholders in 2010 as a

condition for there to be a Duomatic assent – Section 175 of the Business Companies Act 2004 – Whether judge erred in holding that section 175 can in principle apply to the payments made to or for the benefit of the three employees, even though each received only one-third (33%) of the asset base of Green Elite, which is less than the 50 per cent in value of the assets of the company needed to trigger the application of section 175 – Whether the judge erred in declining to find that the distributions of Green Elite’s entire asset base were made in the usual or regular course of the business carried on by Green Elite, which would have brought such distributions outside of the provisions of section 175 – Whether the judge erred in holding that the Second, Third and Fourth Defendants did not approve the payments to themselves in their capacity as directors of Green Elite, such that there was no relevant approval within the meaning of section 175(a) of the BCA – Whether the judge erred in holding that section 175 could in principle entitle, and on the facts did entitle, Green Elite to personal remedies against its directors, the First to Fourth Defendants

Type of Order:

N/A

Result/Order:

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name:

Sergey Taruta

v

JSC VTB Bank

[BVIHCMAP2021/0043]

(Territory of the Virgin Islands)

Date: Thursday, 6th October 2022

Before: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. Adrian Francis and Mr. Scott Thomas

Respondent: No appearance

Issue: Application of adjournment

Type of Order: Adjournment

Result/Order: IT IS HEREBY ORDERED THAT:

1. The Court will not proceed in light of the fact that the respondent bank is a corporate entity and its former legal practitioners have been removed from the record by order of the court dated 8th September 2022.
2. The Court considers that, in the interest of procedural fairness, a notice is to be sent to the respondent bank requesting that the bank indicate, on or before 20th October 2022, its interest in participating in this appeal, and further to notify the respondent bank that the hearing of the appeal is listed for hearing during the week commencing 7th November 2022.
3. In the event that no response is received from the respondent bank, the court will assume that it has no interest in participating in the appeal.
4. The orders made by the court below appointing receivers over the shares of Enard Investments Limited and all other orders made in respect thereof are hereby stayed pending the hearing and determination of the appeal.
5. The costs of today's hearing are reserved to the hearing and determination of the appeal.

6. The appeal shall come up for further case management before the court on 24th October 2022 at 9:00 am.
7. The Registrar shall serve a copy of this order on the respondent bank.

Reason:

The Court was of the view that it would not proceed to hear the appeal in light of the fact that the respondent, JSC VTB Bank, is a corporate entity and its former legal practitioners had been removed from the record by order of the Court. The Court considered in the interest of procedural fairness that a notice be sent to JSC VTB Bank requesting that the bank indicate its interest in participating in the appeal on or before 20th October 2022 and further to notify JSC VTB Bank that the hearing of the appeal shall take place during the week commencing 7th November 2022. In the event that no response is received from the respondent bank, the Court was of the view that it shall assume that the respondent has no interest in participating in the appeal. The orders made by the court below appointing receivers over the shares of Enard Investment Limited and all other orders made in respect thereof were thereby stayed pending the hearing and determination of the appeal. Furthermore, costs of the hearing were reserved to the hearing and determination of the appeal. The Court also considered that the appeal should have further case management before the Court on 24th October 2022.

Case Name:

Arrowcrest Ltd.

v

[1] JSC VTB Bank

[2] Sergey Taruta

[BVIHCMAP2022/0034]

(Territory of the Virgin Islands)

Date:

Thursday, 6th October 2022

Before: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. Stephen Moverley-Smith, KC with him Mr. Richard Brown and Mr. Paul Griffiths

Respondents: No appearance for the 1st respondent
Mr. Adrian Francis and Mr. Scott Thomas for the 2nd respondent

Issues: Application for adjournment

Type of Order: Adjournment

Result/Order: IT IS HEREBY ORDERED THAT:

1. The Court will not proceed in light of the fact that the respondent bank is a corporate entity and its former legal practitioners have been removed from the record by order of the court dated 8th September 2022.
2. The Court considers that, in the interest of procedural fairness, a notice is to be sent to the respondent bank requesting that the bank indicate, on or before 20th October 2022, its interest in participating in this appeal, and further to notify the respondent bank that the hearing of the appeal is listed for hearing during the week commencing 7th November 2022.
3. In the event that no response is received from the respondent bank, the court will assume that it has no interest in participating in the appeal.
4. The orders made by the court below appointing receivers over the shares of Enard Investments Limited and all other orders made in respect thereof are hereby stayed pending the hearing and determination of the appeal.
5. The costs of today's hearing are reserved to the hearing and determination of the appeal.

6. The appeal shall come up for further case management before the court on 24th October 2022 at 9:00 am.
7. The Registrar shall serve a copy of this order on the respondent bank.

Reason:

The Court was of the view that it would not proceed to hear the appeal in light of the fact that the 1st respondent, JSC VTB Bank, is a corporate entity and its former legal practitioners had been removed from the record by order of the Court. The Court considered in the interest of procedural fairness that a notice be sent to JSC VTB Bank requesting that the bank indicate its interest in participating in the appeal on or before 20th October 2022 and further to notify JSC VTB Bank that the hearing of the appeal is listed for hearing during the week commencing 7th November 2022. In the event that no response is received from the 1st respondent bank, the Court was of the view that it shall assume that the 1st respondent has no interest in participating in the appeals. The orders made by the court below appointing receivers over the shares of Enard Investment Limited and all other orders made in respect thereof were thereby stayed pending the hearing and determination of the appeal. Furthermore, costs of the hearing were reserved to the hearing and determination of the appeal. The Court also considered that the appeal should have further case management before the Court on 24th October 2022.

Case Name:

GAC Holdings Limited

v

[1] Carl Stuart Jackson

[2] Andrew Hosking

[3] Simon Bonney

[4] Greig Mitchell

(In their capacity as Joint Liquidators of Glen Moar Properties Limited (In Liquidation), Unicorn Worldwide Holdings Limited (In Liquidation), Ballaugh Holdings Limited (In Liquidation) and Sulby Investment Holdings Limited (In Liquidation))

**[BVIHCMAP2021/0020]
(Territory of the Virgin Islands)**

Date: Friday, 7th October 2022

Before: The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, Justice of Appeal
[Ag.]

Appearances:

Applicant: Mr. John McCarroll, SC with him Ms. Megan Elms

Respondent: Mr. Andrew Willins

Issues: Application for leave to appeal to His Majesty in Council – Application for extension of time – Section 4 of The Virgin Islands (Appeals to the Privy Council) Order 1967 – Whether Court has jurisdiction to extend time for filing leave to appeal to her His Majesty in Council

Type of Order: Oral decision

Result/Order: IT IS HEREBY ORDERED THAT:

1. The application for leave to appeal to His Majesty in Council is dismissed
2. The costs of this application to the respondents to be assessed by a judge of the Commercial Court, if not agreed within 21 days.

Reason: The Court was of the view that the application for leave to appeal to His Majesty in Council filed by the applicant was made out of time, the decision of the Court having been made on 24th June 2022. Pursuant to section 4 of the Virgin Islands (Appeals to the Privy Council) Order 1967, the application should have been made within 21 days. This Court having no jurisdiction to extend time as was clearly stated by this Court in Fairfield Sentry Limited (In Liquidation) v Alfredo Migani & 22 others et al HCVAP2011/041-052; HCVAP2011/054-056; HCVAP2011/058-062 (delivered 4th October 2012, unreported), the application was dismissed as being a nullity.

Case Name: Kenneth M. Kryz
(as Liquidator of Fairfield Sentry Limited (in Liquidation))
v
Farnum Place LLC
[BVIHCVAP2013/0014]
(Territory of the Virgin Islands)

Date: Friday, 7th October 2022

Before: The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, Justice of Appeal
[Ag.]

Appearances:
Appellant: Mr. Andrew Westwood, KC
Respondent: Mr. Ben Woolgar with him Mr. Richard Evans and Ms. Allana-J Joseph

Issues: Leave to appeal to His Majesty in Council – Whether the decision of this Court dismissing the appeal is a final decision within the meaning of section 3 (1)(a) of the

1967 Order – Appeal as of right – Whether the appeal lies as of right within the meaning of Section 3 (1)(a) of the 1967 Order – Whether this is an appropriate case for the grant of leave to appeal to His Majesty in Council because proposed appeal involves question of great general or public importance pursuant to section 3 (2)(a) of the 1967 Order

Type of Order:

N/A

Result/Order:

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name:

**Starcy Huggins
v
The Commissioner of Police**

**[BVIMCRAP2021/0004]
[formerly BVIMCRAP2019/0001]
(Territory of the Virgin Islands)**

Date:

Friday, 7th October 2022

Before:

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

Appearances:

Appellant: Mr. Michael Lashley, KC with him Ms. Akilah Anderson and Ms. Tracy Francis-Smith

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

Issues:

Magisterial criminal appeal – Breach of trust by a public officer – Whether magistrate erred in finding of guilt – Whether there was sufficient evidence to support the elements of the offence of breach of trust by a public officer – Section 25.9(2)(e) of the Criminal Procedure Rules – Admissibility of evidence – Whether the admission of the audio-visual material into evidence was improper for want of the proper laying of the evidential foundation for its admission and in particular in relation to the editing of the material – Whether the conviction was unsafe because of unreliability of audio-visual evidence – Section 16 (2) (e) of the Virgin Islands Constitution Order 2007 – Right to a fair trial – Miscarriage of justice – Whether the nature of the evidence and the manner in which the evidence was adduced was unfair and/or resulted in an unfair trial or alternatively a miscarriage of justice

Type of Order:

N/A

Result/Order:

IT IS HEREBY ORDERED THAT:

Judgment is reserved.