

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING
VIDEOCONFERENCE

TERRITORY OF THE VIRGIN ISLANDS
9th to 13th May 2022

JUDGMENTS

Case Name:

JTrust Asia Pte Ltd.
v
[1]Mitsuji Konoshita
[2]A.P.F Group Co. Ltd (In
Receivership)

and

[1]Nicholas James Gronow
[2]David John Ayres

and

Showa Holdings Co. Ltd

[BVIHCMAP2021/0013]
(The Territory of the Virgin Islands)

Date:

Wednesday, 11th May 2022

Coram for
delivery:

The Hon. Dame Janice M. Pereira, DBE, Chief
Justice
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]

Appearances:

Appellant:

Ms. Marcia McFarlane

Respondents:

Mr. Robert Nader

Intervenor

Mr. Adrian Francis, Mr. Scott Thomas and Ms.
Andrea Walters

Issues:

Commercial appeal – Interlocutory appeal – Receivership – Section 24(1) of the Eastern Caribbean Supreme Court (Virgin Islands) Act Cap. 80 – Part 51 of the Civil Procedure Rules 2000 – Whether learned judge erred in finding that the Receivership Order in this case operated as an injunction – Cross-undertaking in damages – Whether standard requirements for a cross-undertaking in damages for an injunction order applies to a receivership order – Whether learned judge erred in finding that receivership order was ancillary to freezing order – Whether learned judge should have required JTrust to offer a cross-undertaking in damages in support of the receivership – Whether learned judge erred in implying a cross undertaking in damages in receivership order

**Result and
Reasons:**

Held: allowing the appeal; setting aside the order of Wallbank J dated 15th April 2021; and making the orders at paragraph 66 of the written judgment, that:

1. Where a receivership order has the effect of interfering with the assets of the respondent, or his control of those assets, such an order can have the effect of an injunction and as such the applicant must offer a cross-undertaking in damages. However, each case must be decided on its own facts as a receivership order does not always have the effect of an injunction and as such does not always attract a cross undertaking in damages. It is not the appointment of the receiver that triggers the need for the undertaking, but the consequences of the appointment. In this case, the learned judge was correct to find that the Receivership Order operated as an injunction and that as a result, the principles relating to cross-undertakings in damages on the grant of an injunction applied.

Masri v Consolidated Contractors International Company SAL & Anor [2007] EWHC 3010 (Comm) applied; Steven Gee, QC: Commercial Injunctions (6th edn.) Sweet & Maxwell (2016) applied; Re

Chime Corporation Limited HCMP No. 4146/2001 (unreported); Akai Holdings Limited (in compulsory liquidation) Wing and others HCCL 37/2005 (unreported) considered.

2. An order is ancillary where it provides necessary support to the primary order. In this case, the Receivers were appointed because the Respondents did not comply with the disclosure obligations in the Freezing Order. The Receivership Order was therefore ancillary to or in support of the Freezing Order and it does not matter that it was made after the Freezing Order. Additionally, the Receivership Order though ancillary to the Freezing Order, is a separate order and there is no reason in principle why it should not be supported by a cross-undertaking to cover losses caused by the appointment of the Receivers for which the Court thinks the Respondents and/or Showa should be compensated.

3. In the Virgin Islands, an applicant for the appointment of a receiver should provide a cross undertaking in damages when the application is being made for the appointment of a protective receiver *ex parte* or *inter partes* before the trial of the action; or at any time, including after judgment, when the appointment will result in losses to the defendant company or a loss of control of the assets or affairs of the company.

National Australia Bank Ltd v Bond Brewing Holdings Limited 169 CLR 271 applied; Steven Gee, QC: Commercial Injunctions (6th edn.) Sweet & Maxwell (2016) applied; Masri v Consolidated Contractors International Company SAL & Anor [2007] EWHC 3010 (Comm) applied.

4. Upon considering that, a cross-undertaking in damages is not required for every receivership order, and that it is in the judge's discretion whether to require such an undertaking based on all the circumstances of the case, Adderley J cannot be faulted for not considering the need for a cross-undertaking, especially where there was

complete silence on the matter by the parties at the hearing.

5. A cross-undertaking in damages is a voluntary promise that an applicant for an interim injunction or freezing order gives the court to abide by any order for damages that the court may make if the respondent to the application suffers loss as a result of the order of the court, and the court is of the opinion that the applicant should compensate the respondent for such loss. A cross-undertaking in damages cannot be imposed by the court. The applicant for an injunction or receivership must offer the undertaking or be willing to submit to it. In this case, where (a) JTrust had not given such an undertaking for the receivership and was not willing to give one, (b) there was an absence of an undertaking in the Receivership Order with no challenge from the Respondents, and (c) there was a delay of three years before asking the Court to impose one, the learned judge erred in implying the cross-undertaking in the Receivership Order. The learned judge should have enquired of counsel at the hearing whether JTrust was offering a cross-undertaking in damages for the Receivership Order.

Birch v Birch [2017] UKSC 53; Hoffmann-la-Roche & Co. AG. and others v Secretary of State for Trade and Industry [1975] AC 295.

6. The Court can, in the exercise of its discretion, require an applicant for a receivership order to offer a cross-undertaking in damages, and if the applicant does not proffer such an undertaking, the Court may not make the appointment. In this case, the receivership was in place and the issue is whether it should continue without a cross-undertaking. This Court is empowered to invite JTrust to offer a cross-undertaking and to make such order as it sees fit including setting aside the receivership. This is an appropriate case for the continued appointment of the Receivers to be supported by a cross-undertaking in damages, as the appointment was made on an interim basis, the Receivers have

taken control of APF and have sanction to take control of Showa, and the Respondents asserted in their evidence that this will have severe consequences for APF.

Hoffmann-la-Roche & Co. AG. and others v Secretary of State for Trade and Industry [1975] AC 295; National Australia Bank Ltd v Bond Brewing Holdings Limited 169 CLR 271 applied.

Orders:

(1) The appeal is allowed and the order of the learned judge dated 15th April 2021 is set aside.

(2) The Appellant may file a written undertaking to comply with any order that the Court may make, if the Court later finds that the Receivership Order has since 5th July 2018 caused loss to any of the Respondents and/or Showa, and decides that the Respondents and/or Showa should be compensated for that loss. If the undertaking is not filed by 4 pm on Tuesday 17th May 2022 the following orders shall take effect automatically:

(a) The Receivers are discharged from office immediately and must resign forthwith as directors of the Second Respondent. The Receivers must give the Respondents all reasonable assistance to reverse all changes caused by the Receivers to the directorships of the Second Respondent and its subsidiaries;

(b) By 4 pm on Tuesday 24th May 2022 the Receivers must deliver up to the

Second Respondent, by service on its legal practitioners, Forbes Hare including by such electronic means of service as Forbes Hare may permit for this purpose, all books and records of the Second Respondent obtained or created by the Receivers and/or their affiliates, agents, employees or legal representatives, in connection with the receivership;

(c) The Appellant must pay the Receivers' remuneration, costs and expenses with no recourse to the Second Respondent's assets, and paragraph 11 of the Receivership Order is varied accordingly. Within 14 days the Appellant must reimburse the Second Respondent for any sums recouped by the Appellant or the Receivers from the Second Respondent's assets pursuant to paragraph 11 of the Receivership Order or otherwise.

(3) The Respondents and Showa shall pay 50% of JTrust's costs of the appeal and JTrust shall pay 50% of the costs of the Respondents and Showa on the counter notices of appeal. The Appellant shall pay 75% of the Respondents' and Showa's costs in the lower court. All costs to be assessed by a judge of the lower court unless agreed within 21 days of the date of this order.

Case Name:

**Glanville Penn
v
The Attorney General
[BVIHCVAP2017/0009]
(Territory of the Virgin Islands)**

Date:

Friday, 13th May 2022

**Coram for
delivery:**

**The Hon. Mde. Louise Esther Blenman, Justice
of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Mr. Sydney Bennett, QC

Respondent:

Mrs. Joanne Williams-Roberts

Issues:

**Commercial appeal — Damages — Notice to quit
— Whether the learned judge erred in
determining that a period of 6 months' notice
was reasonable notice of termination of the
appellant's tenancy of premises at the old
terminal building — Legitimate expectation —
Whether the learned judge erred in failing to find
that the appellant had a legitimate expectation
that his business would be relocated to the new
terminal building, giving rise to an entitlement
for damages — Expert witness — Whether the
learned judge erred in considering the evidence
of the respondent's expert witness — Breach of
contract — Economic duress – Loss of profits —
Whether the learned judge erred in his
determination and calculation of damages to be
awarded to the appellant on his claim**

**Result and
Reasons:**

Held: allowing the appeal in part and ordering the appellant to pay costs to the respondent being 50% of the costs awarded in the court below, that:

1. In the absence of any evidence of there being a specified agreement of tenancy between the parties, the learned judge correctly took into account all the historical circumstances, including the length of time which the appellant had been operating his business at the old terminal building along with the period within which rent was paid, and balanced that with the evidential deficiencies in the appellant's case in proving any obligation on the part of the government to give notice within a specified period. Moreover, there was no error in principle on the part of the judge in determining six months as a reasonable amount of time for the appellant to arrange his affairs and give notice to his employees in anticipation of the closure of his business at the old terminal building.

2. The circumstances based on the evidence before the learned judge do not reveal any legitimate expectation which could have arisen on the part of the appellant. Accordingly, the learned judge did not err in determining this issue as he did.

Council of the Civil Service Unions v Minister of the Civil Service [1984] 3 All ER 935 followed; Rainbow Insurance Company Limited v The Financial Services Commission and others [2015] UKPC 15 followed.

3. When the issue of the respondent's expert witness, Mr. Andrew Bickerton, failing to attend court came up, counsel acting for the appellant in the court below did not take any issue with the non-attendance of Mr. Bickerton to be cross-examined. Therefore, on appeal, it would be unreasonable for the appellant to take issue with this fact. Furthermore, there is nothing on the evidence which suggests that Mr. Bickerton was not credible as an expert witness. In the

circumstances, the learned judge was entitled to consider his evidence and there is no merit to this ground of appeal.

4. It is pellucid that the letter dated 29th October 2002 awarding the appellant the concession did not give an unqualified acceptance of the appellant's tender. At the point of acceptance of the tender it cannot be said that the terms of the concession were certain or that there was a meeting of the minds on the terms of the concession agreement. Accordingly, there could be no breach of contract by the government for failure to deliver the premises in an operational condition to the appellant or for making variations to some of the terms set out in the tender document including the government (i) deciding to completely outfit the passenger catering concession premises, (ii) increasing the annual rent to be paid by the appellant for occupation and use of the said premises, and (iii) imposing other terms on the appellant not provided for in the invitation to tender, since there had been no concluded contract until the Deed of License was signed in April 2005.

Halsbury's Laws of England 5th edition 2018, Volume 6 paragraph 218 considered; Hyde v Wrench (1840) 3 Beav 334 followed; Butler Machine Tool Co Ltd v Ex-Cell-O-Corpn (England) Ltd [1979] 1 All ER 965 followed.

5. The appellant had the alternative of simply choosing not to contract with the government for the concession and operating his business elsewhere. He was also in a position to be advised independently as to his rights in the circumstances. Moreover, with negotiations between the parties spanning a three year period the learned judge was correct to determine that the government had been enormously patient with the appellant's incessant demands. In the circumstances, there is no evidence on which the learned judge could have found that there was economic duress which induced the

appellant to contract and accordingly no compensation is due to the appellant under this sub-head of his claim for damages.

Pao On and others v Lau Yiu and another [1979] 3 All ER 65 followed; DSND Subsea Ltd v Petroleum Geo Services ASA [2000] BLR 530 considered; Kolmar Group AG V Traxpo Enterprises PVT Ltd [2010] EWHC 113 considered.

6. The evidence shows that in November 2008 when the appellant requested that the government extend his license beyond the original expiration date of the first term of the licence on 15th November 2008, the government's representative agreed that the construction of the bar by the government would be discussed by Cabinet. There is however no evidence, that beyond this agreement for the construction of the bar being considered by Cabinet, that any agreement materialised where the government actually re-committed itself to providing a bar for the second three year term of the license. Therefore, the learned judge was correct in his finding that damages awarded to the appellant for the government's failure to provide the drinks bar as agreed under the first term of the license would not extend to the second three year term.

7. One month was too short a time in the circumstances as a reasonable period within which the appellant ought to have taken steps to mitigate his losses regarding the non-functioning washing machine. The appellant would have needed reasonable time to notify the respondent and thereafter reasonable time for the respondent to have arranged replacement of the dishwasher before the appellant took any steps to replace it. In that regard, three months would have been a more reasonable period of time. Accordingly, the damages awarded to the appellant under this sub-head ought to be increased to \$13,180.00, being \$10,000 to replace the dishwasher and twelve week's wages of

\$3,180.00 (\$53,000.00 divided by two hundred multiplied by twelve) for one person to have washed dishes pending delivery and installation of the replacement dishwasher.

8. The evidence does not show that any agreement granting exclusivity was actually formed between the parties. Therefore, it cannot be said that the learned judge erred in his finding that no such exclusivity existed in the concession agreement which ultimately formed between the parties.

9. To say that the court below ought to have found that a lease existed granting the appellant a 10-year term based on the decision of Cabinet falls short of any evidence that there was indeed a meeting of the minds and that a lease agreement was formed. There was no concluded certainty of the terms of the proposed 10-year lease nor was there any document executed to give effect to such a lease.

10. The sum which the Compensation Committee rendered in its report dated 24th May 2011 was a recommendation and not an express promise of a sum to be paid to the appellant. Moreover, there was no agreement reached between the parties that the recommendation of the Compensation Committee would be adopted and that the government would pay the recommended sums as compensation to the appellant. The parties had not arrived at any conclusive agreement as to the amount which the government was prepared to pay the appellant as compensation. Therefore, there was no agreement formed between the parties, nor did the appellant have any legitimate expectation, that the government would pay him the sums recommended by the Compensation Committee.

Council of the Civil Service Unions v Minister of the Civil Service 1984] 3 All ER 935 followed; Rainbow Insurance Company Limited v The

Financial Services Commission and others
[2015] UKPC 15 followed.

APPLICATIONS AND APPEALS

Case Name:

**WWRT Limited
v
[1] Carosan Trading Limited
[2] Boris Kaufman**

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

Date:

Monday, 9th May 2022 to Tuesday, 10th May 2022

Coram:

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

Appearances:

Applicant/Appellant:

Mr. Nathan Pillow QC, with him Ms. Sophia Hurst and Dr. Alecia Johns

Respondents:

**Mr. Brian Lacy for the first respondent
Mr. Richard Morgan QC, with him Mr. Richard Brown and Ms. Rowena Page for the second respondent**

Issues:

Application to adduce fresh evidence – Application to adduce evidence of change of circumstances due to the ongoing armed conflict in Ukraine – Principles in Ladd v Marshall – Whether the evidence which is sought to be adduced at the aal is evidence which could not have been obtained with reasonable diligence for use at the hearing below – Whether the evidence sought to be adduced would probably have an important

influence on the result of the hearing below – Whether the evidence sought to be adduced constitutes credible evidence such as is presumably to be believed and therefore is pertinent information which should be available to this Court for use in the determination of this appeal – Whether the applicant should be permitted to adduce fresh evidence as to the impact of the conflict on the availability of forum – Whether the supervening unavailability of the Ukraine forum due to ongoing conflict is a relevant factor for the Court to consider where the issue of forum non conveniens is a live issue on appeal – Application to amend the notice of appeal and rely on additional ground – Whether the Court, having dismissed the application to adduce fresh evidence, ought to allow an amendment to the grounds of appeal to include an additional ground that, owing to matters occurring since the judgment of the lower court, Ukraine is no longer an available forum for the dispute – Whether the jurisdiction orders ought to be overturned on the additional basis that Ukraine is not an available forum for the trial of the dispute

Type of Order:

Oral decision with written reasons to follow

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The application to adduce fresh evidence of the change of circumstances as asserted by the applicant/appellant is dismissed. Written reasons will be provided at a later date.**
- 2. The application to amend paragraph 11(a) of the notice of appeal and rely on an additional ground is refused.**

Case Name:

**WWRT Limited
v
[1] Carosan Trading Limited**

[2] Boris Kaufman

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

Date: Monday, 9th May 2022 to Tuesday, 10th May 2022

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

Appearances:

Appellant: Mr. Nathan Pillow QC, with him Ms. Sophia Hurst and Dr. Alecia Johns

Respondents: Mr. Brian Lacy for the first respondent
Mr. Richard Morgan QC, with him Mr. Richard Brown and Ms. Rowena Page for the second respondent

Issues: Interlocutory appeal – Jurisdiction – Serious issue to be tried – Whether there were real prospects of success and the claim was not merely fanciful – Whether the judge erred in concluding that there was no serious issue to be tried – Whether the judge erred, in setting aside leave to serve outside the jurisdiction, in finding that there was no real prospect of success of showing that the Star Assignment had been effective to transfer title to sue to the appellant in respect of ‘tortious’ claims under Article 1166 of the Civil Code of Ukraine – Whether the judge, in rejecting the assignment of the tort claims to the Ukrainian courts at the interlocutory stage, found, erroneously, that the case was bound to fail at trial even if the experts on each side had been cross examined – Whether the judge wrongly rejected expert’s evidence on Article 514 of the Civil Code of Ukraine – Forum non conveniens – Whether the judge erred in finding that the Territory of the Virgin Islands was forum non conveniens – Whether the judge erred by failing to consider or by giving too little or too much

weight to a number of relevant factors and considerations – Whether the learned judge considered or was influenced by irrelevant factors and considerations – Failure to plead representation on fraud claim – Whether Ukraine is an available and appropriate forum for the trial of the claims – The rule of double actionability - Whether conduct would be justifiable in Ukraine – Whether the claims before the Court are bad in law because any and all claims against the first respondent are governed by Ukrainian law – Whether a stay should be granted on the ground of forum non conveniens

Type of Order:

N/A

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name:

WWRT Limited
v
[1] Carosan Trading Limited
[2] Boris Kaufman

[BVIHCMAP2022/0003]
(The Territory of the Virgin Islands)

Date:

Monday, 9th May 2022 and Tuesday, 10th May 2022

Coram:

The Hon. Dame Janice M. Pereira, DBE Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant:

Mr. Nathan Pillow, QC with him Dr. Alecia Johns and Ms. Sophia Hurst

Respondents:

Mr. Brian Lacy for the 1st respondent

Mr. Richard Morgan QC, with him Mr. Richard Brown and Ms. Rowena Page for the 2nd respondent

Issues:

Interlocutory appeal – Injunction appeal – Interim worldwide freezing order – Appellate interference with exercise of trial judge’s discretion – Whether the learned judge erred in his discretion by granting a worldwide freezing order – Whether the worldwide freezing order should have continued until trial or further order – Whether the learned judge erred in finding that the BVI Court was forum non conveniens and in so holding he erred by failing to grant the worldwide freezing order until trial or further order – Whether the learned judge erred in the exercise of his discretion by considering an irrelevant factor, namely the purported lack of jurisdiction for the BVI Court – Whether it would be just and convenient to continue the worldwide freezing order pending the decision on the jurisdiction appeal

Type of Order:

Oral judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The injunction appeal is accordingly dismissed.**
- 2. Costs of the appeal and on the application for reimposition of the worldwide freezing order to be paid by the appellant to the second respondent, such costs to be assessed by a judge of the Commercial Court unless agreed within 21 days of the date of this order.**

Reason:

The Court considered the orders made by Jack J [Ag.] on the application for the continuation of the worldwide freezing order dated 12th January 2022. This was refused on 13th January 2022. The Court also considered the application made to the Court of Appeal, which was heard before a single judge, for an extension of the worldwide freezing order

pending the granting of leave to appeal and the hearing of the appeal. This application was also refused. No application was made to the full Court for a review of that order. The Court of Appeal heard the jurisdiction appeal and has reserved judgment. Pending the delivery of that judgment, the Court found that it ought not to reimpose the worldwide freezing order in respect of the second respondent.

Case Name:	Andrey Titarenko V Emmerson International Corp. [BVIHCMAP2021/0019] (Territory of the Virgin Islands)
Date:	Monday, 9th May 2022
Coram:	The Hon. Mde. Louise Esther Blenman, Justice of Appeal The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mr. Godfrey Smith, Justice of Appeal [Ag.]
Appearances:	
Appellant:	In person
Respondent:	Mr. Robert Nader
Issues:	Application for adjournment
Type of Order:	Adjournment
Result / Order:	IT IS HEREBY ORDERED THAT: 1. The hearing of the appeal/application for variations and the procedural application are adjourned and traversed to a sitting of

this Court on a date to be determined by the Chief Registrar in consultation with Mr. Nader and Mr. Titarenko.

2. Emmerson shall have its costs thrown away consequent on the adjournment which are to be reflected by the costs of today and are to be assessed by a judge of the High Court, unless agreed within 14 days of the date of this order.
3. Mr. Titarenko shall file an affidavit which provides proof of payment of the security for costs in compliance with the order of Baptiste JA dated 17th February 2022, no later than 30th May 2022.
4. Mr. Titarenko shall file and serve skeleton arguments, together with authorities, no later than 30th May 2022, failing which, this appeal and the applications to the extent that they may be extant, would stand dismissed.
5. The respondent, if necessary, shall file and serve written submissions with authorities in reply no later than 21st June 2022.

Reason:

The application in relation to the procedural application, strike out application and to vary the order of a single judge, Baptiste JA, having come on for hearing and there being no written submissions filed by Mr. Andrey Titarenko in violation of the Practice Directions and the rules of procedure and having heard from Mr. Titarenko in person as to the circumstances which he indicated occasioned his failure to comply and having listened to learned counsel, Mr. Nader in opposition to an adjournment and indicating matters which the Court should take into account in its determination of these applications. The Court was of the view that based on the failure of Mr. Titarenko to provide the Court with written submissions it was not in a position to hear the appeal since there was no assistance provided in writing by Mr. Titarenko in relation to the applications. Also, the Court notes that Mr. Titarenko has an obligation to satisfy the Court that has complied with the order

of Baptiste JA which was made on 17th February 2022 and which required him to have provided security for cost of the appeal in sum of \$50,000.00 within 14 days from the date of that order. Mr. Titarenko has not provided the Court with any affidavit evidence which indicates that he has complied with Baptiste JA's order and in these circumstances the Court was not in a position to determine whether or not there has been compliance. The Court was of the view that until an affidavit was provided, indicating that there has been compliance with the order of Baptiste JA and evidencing the payments that were made, the Court was not in a position to hear any applications since it must first determine whether or not the appeal is extant. In these circumstances, the Court had no other alternative but to adjourn the appeal and applications and make the following orders and directions.

Case Name:

[1] Andrey Titarenko (in his personal capacity)

[2] Andrey Titarenko (in his capacity as trustee for Romos Limited)

[3] Andrey Titarenko (in his capacity as trustee for Goldfort Limited)

v

[1] OOO Renova Holding Rus

[2] Pao T Plus

[3] Viktor Vekselberg

[4] Renova Industries Ltd

[5] Lamesa Holdings SA

[6] Zapanco Limited

[7] Integrated Systems Limited

(a company incorporated under the laws of Belize)

[8] Wedgwood Management Limited

[9] Odvin Financial Inc

[10] Starlex Company Limited

[11] Sunglet International Inc.
[12] Flopsy Overseas Limited
[13] Integrated Energy Systems Limited (a company incorporated Under the laws of Cyprus)
[14] Vladimir Kuznetsov
[15] Alexander Kolychev
[16] Mikhail Slobodin
[17] Maksim Mayorets
[18] Clern Holdings Limited
[19] Andrey Burenin
[20] Witel AG
[21] Alexei Moskov
[22] Emmerson International Corp.
[23] Mikhail Abyzov
[24] Fresko Financial Limited

[BVIHCMAP2021/0037]
(Territory of the Virgin Islands)

Date:	Monday, 9 th May 2022
Coram:	The Hon. Mde. Louise Esther Blenman, Justice of Appeal The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mr. Godfrey Smith, Justice of Appeal [Ag.]
Appearances:	
Appellants:	In person
Issues:	Application for adjournment
Type of Order:	Adjournment
Result / Order:	IT IS HEREBY ORDERED THAT:

1. The hearing of the leave to appeal application is adjourned and traversed to a sitting of the Court on a date to be determined by the Chief Registrar in consultation with Mr. Titarenko.
2. Mr. Titarenko is granted leave to file and serve written submissions together with authorities on or before 15th June 2022.

Reason: The matter was adjourned in order to allow Mr. Titarenko to file written submissions in support of his application.

Case Name: Andrey Titarenko
V
Appleby (BVI) Limited
[BVIHCMAP2021/0035]
(Territory of the Virgin Islands)

Date: Monday, 9th May 2022

Coram: The Hon. Mde. Justice Louise Esther Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Godfrey Smith, Justice of Appeal [Ag.]

Appearances:
Appellant: In person
Respondent: Mr. Andrew Willins

Issues: Application for adjournment

Type of Order: Adjournment

Result / Order:

Based on the oral application of Mr. Titarenko for an adjournment occasioned by the personal difficulties he has encountered and having taken into account his oral indications to the court and having given deliberate consideration to the oral submissions made by learned counsel Mr. Willins this Court hereby orders and directs as follows:

1. The application for leave to appeal and the application to vary the order of a single judge are both adjourned and traversed to the next sitting of this Court on a date to be determined by the Chief Registrar in consultation with Mr. Titarenko and learned counsel, Mr. Willins.
2. Mr. Titarenko is directed to file and serve his written submissions together with authorities in relation to both the application for leave to appeal and the application to vary the order of a single judge on or before 30th May 2022. Failure to comply with this direction will result in the applications being dismissed.
3. The respondent shall have its costs thrown away, that is the costs occasioned as a consequence of the adjournment at the behest of Mr. Titarenko, in relation only to the application to vary the order of a Single Judge, such costs are to be assessed by a judge of the Commercial Division unless otherwise agreed within 14 days of the date of this order.
4. The payment of the assessed costs as stipulated by the Commercial Division judge shall operate as a condition for Mr. Titarenko's continued prosecution of his application to vary the order of a single judge.
5. The respondent shall have leave, if necessary, to file and serve written submissions together with authorities in reply, on or before the 21st of June 2022.

Case Name:

Andrey Titarenko

V

[1] Emmerson International Corporation

[2] Alexei Moskov

[3] Mikhail Abyzov

[4] Fresko Financial Limited

[BVIHCMAP2021/0033]

(Territory of the Virgin Islands)

Date:

Monday, 9th May 2022

Coram:

The Hon. Mde. Louise Esther Blenman, Justice of Appeal

The Hon. Mde. Gertel Thom, Justice of Appeal

**The Hon. Mr. Godfrey Smith, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

In person

Respondents:

Mr. Robert Weekes, QC with him Ms. Colleen Barrington and Mr. Ajay Ratan for the 1st, 3rd and 4th respondents

Mr. Andrew Willins for the 2nd respondent

Issues:

Application for adjournment

Type of Order:

Adjournment

Result / Order:

IT IS HEREBY ORDERED THAT:

1. In relation to the procedural application and the application to vary the order of a single judge, the Court orders as follows:

i. The hearing of the applications is adjourned to a date to be fixed by the Chief Registrar in

consultation with Mr. Titarenko, Mr. Weekes QC and Mr. Willins.

ii. Mr. Titarenko shall file and serve on the respondents written submissions together with authorities, on or before 15th June 2022.

iii. The respondents are at liberty to file and serve written submissions together with authorities, in reply, without prejudice to their position as it relates to service, on or before 30th June 2022.

iv. Mr. Titarenko has leave to file and serve on the respondents written submissions together with authorities in reply, if necessary, on or before 15th July 2022.

v. Each party shall bear its own costs on the applications.

2. In relation to the stay application, the Court orders as follows:

i. The hearing of the application is adjourned to a date to be fixed by the Chief Registrar in consultation with Mr. Titarenko, Mr. Weekes QC and Mr. Willins.

ii. The respondent, Mr. Titarenko shall file and serve written submissions together with authorities in response, on or before 15th June 2022.

iii. The applicants have leave to file written submissions together with authorities in reply, if necessary, on or before 30th June 2022.

iv. Each party shall bear its own costs.

Reason:

There were three applications before the Court; (i) a procedural application, (ii) an application to vary the order for security for costs by the appellant and an application for a stay by the 1st, 3rd and 4th respondents. This application was made after the case management conference for appeals to be heard at this Sitting of the Court. There are no submissions in relation to the first two applications, there is also no submissions in relation to the stay application by the respondent, Mr. Titarenko. The Court formed the

view, having looked at the various applications and the state of the record and having heard the submissions from Mr. Titarenko, Mr. Weekes, QC and Mr. Willins that these matters should all be adjourned until all relevant submissions have been properly filed.

Case Name:	Inderjit Kaur Chhina V [1] Muhammad Nazir Muhammad Ismail [2] Mohammed Nazim [BVIHCMAP2020/0024] (Territory of the Virgin Islands)
Date:	Tuesday, 10th May 2022
Coram:	The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.] The Hon. Mr. Trevor Ward, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Mr. Adrian Davies
Respondents:	Ms. Sara-Jane Knock
Issues:	Application to strike out notice of appeal for – failure to prosecute appeal – Application for extension of time to file and serve record of appeal and core bundle – Whether appellant has a realistic prospect of success on appeal
Type of Order:	N/A
Result / Order:	IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name: [1] Treehouse Investments Limited
[2] 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 (In Liquidation),
Unicorn Worldwide Holdings Limited (In
Liquidation), Ballaugh Holdings Limited
(In Liquidation), Sulby Investment
Holdings Limited (In Liquidation))

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

Date: Tuesday, 10th May 2022

Coram: The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of
Appeal [Ag.]
The Hon. Mr. Trevor Ward, Justice of Appeal
[Ag.]

Appearances:
Appellants: Mr. John McCarroll, SC
Respondents: Mr. Andrew Willins

Issues: Interlocutory appeal – Joinder – Section 273 of
the Insolvency Act 2003 – Whether learned judge
erred in law, or alternatively mixed fact and law,
in proceeding to seek to determine the merits of
the claim pursuant to section 273 of the

Insolvency Act 2003 on a procedural joinder application – Whether learned judge erred in law, or alternatively in mixed fact and law, in holding, as he appeared to do, that the appellants were making the application under section 273 not as aggrieved persons but in an attempt to prevent the respondents from proceeding with the claim in Isle of Man for an ulterior purpose – Whether learned judge erred in law, or alternatively in mixed fact and law, in holding that the section 273 claim was bound to fail on the basis that the appropriate remedy in the circumstances was for the appellants to bring an application seeking the removal of the respondents from their office as joint liquidators – Whether learned judge erred in law, alternatively in mixed fact and law, in failing to order joinder having heard submissions as to the true effect and scope of the rule in Cherry v. Boulton and the statutory set-off pursuant to section 150 of the Insolvency Act 2003 (the learned judge having fallen into error in giving his judgment on 15 June 2021 in matter number BVIHCOM 120 of 2017) on the question as to whether GAC Holdings Limited was a creditor – Whether learned judge erred in law, or alternatively mixed fact and law, in refusing to join Treehouse Investments Limited on the grounds that it was not a creditor because it had failed to produce a copy of the proof of debt

Type of Order:

N/A

Result / Order:

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name:

**Flavio Maluf
v
[1]Durant International Corp**

**[2]Matthew Richardson (as Liquidator of
Durant International Corp)
[3]Kevin Hellard (as Liquidator of Durant
International Corp)**

**[BVIHCMAP2021/0025]
(Territory of the Virgin Islands)**

Date: Wednesday, 11th May 2022 to Thursday, 12th May 2022

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

Appearances:

Applicant/Appellant:	Mr. John Machell, QC with him Mr. Timothy De Swardt
Respondents:	Mr. Adrian Francis, Mr. Scott Tollis and Mr. Carl Moran

Issues: Motion for conditional leave to appeal to Her Majesty in Council – Section 3(2) of the Virgin Islands (Appeals to the Privy Council) Order 1967 – Whether conditional leave ought to be granted – Whether questions involved in proposed appeal are of great general or public importance – Whether conditional leave should be granted on the basis that there is a degree of doubt as to correctness of decision – Service of claim form outside the jurisdiction to Hague Convention contracting state – Whether service on the appellant in Brazil by sending Letters Rogatory directly to the Brazil courts was contrary to the Reservation by the Federal Republic of Brazil to Article 10 of the Hague Convention – Order of court dispensing with service – Rule 7.8B of the Civil Procedure Rules 2000 – Power of court to dispense with service of the claim form – CPR 26.1(6) – Power of court to dispense with the requirement to comply with any of the rules of the CPR – Court’s power to dispense with service outside the jurisdiction, within a Hague Convention contracting state, that has opted out of Articles 8 and 10 of the Convention (signifying its opposition to service otherwise than through its central authority) where the steps taken to effect service were incompatible with

the Hague Convention and the laws of the state – Claim form delivered directly to Brazilian court – Appellant had access to documents delivered to in Brazilian court – Order dispensing with service under rule 7.8B where service of the claim form was not effected during the period of service and an application to dispense with service made after period of service expired – No application made to extend time for service of claim form – CPR 8.13 – Power of court to extend the time for service of the claim form – CPR 26.1(2)(k) – Power of court to extend or shorten time for compliance with any rule, practice, order or direction of court even if application made after time for compliance has passed – Court’s general case management powers to enlarge time under CPR Part 26 vis-à-vis the specific express restriction in CPR 8.13 against extension of time on application made after the period limited for service of the claim form – Stay of proceedings – Application for stay of proceedings pending determination of the proposed appeal to Her Majesty in Council – Whether stay of proceedings should be granted – Whether proposed appeal would be rendered nugatory if stay not granted

Type of Order:

Oral decision with written reasons to follow

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The application by the proposed appellant for conditional leave to appeal to Her Majesty in Council against the Court of Appeal judgment delivered on 13th January 2022 dismissing the appellant’s appeal against the decision of the Jack J [Ag.] dated 23rd August 2021 is refused.
2. The Court shall provide reasons for its decision at a later date.
3. The applicant/appellant shall bear the respondents’ costs on the motion, such costs to be assessed by the court below unless agreed within 21 days.

Case Name:

Sian Participation Corp. (In Liquidation)

V
Halimeda International Limited
[BVIHCMAP2021/0017]
(Territory of the Virgin Islands)

Date: Wednesday, 11th May 2022 to Thursday, 12th May 2022

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

Appearances:

Applicant/Appellant:	Mr. Tom Smith, QC with him Mr. Paul Fradley, Mr. Phillip Kite and Ms. Francesca Gibbons
Respondents:	Mr. Paul Lowenstein, QC with him Mr. Rupert Hamilton, Mr. Andrew Willins and Ms. Tamara Cameron
Liquidators:	Mr. Stuart Cribb and Ms. Sara Malik appear on watching brief

Issues: Commercial appeal – Appeal against grant of liquidation order – Guiding principles governing Appellate court’s interference with lower court’s exercise of discretion – Abuse of process – Whether the application to appoint liquidator should have been dismissed as an abuse of the court’s process – Re a Company (No. 0089 of 1894) [1894] 2 Ch 349, 351 – Whether the liquidation application was made for an improper purpose – Whether judge applied the incorrect test for the appointment of a liquidator – Whether judge erred in failing to conclude that the liquidation application was not being made for a proper purpose – Cross claim in an amount equal to or greater than the debt – Set off – Arbitration clause – Whether learned judge erred in law in not concluding that the arbitration clause was relevant to the determination of the liquidation application – Whether reliance on an arbitration agreement is conditional on prior commencement of arbitration proceedings – Joint and several liability of co-conspirators in an alleged unlawful means conspiracy – Application to adduce fresh evidence – Principles in Ladd v Marshall

Type of Order: N/A

Result / Order: IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name: Alberto De La Rosa
v
The Queen

[BVIHC RAP2016/0001]
(Territory of the Virgin Islands)

Date: Wednesday, 11th May 2022

Coram: The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]
The Hon. Mr. Godfrey Smith, Justice of Appeal [Ag.]

Appearances:

Appellant/Respondent:	Ms. Reynela Solomon
Respondent/Applicant:	Ms. Kellee-Gai Smith

Issues: Criminal appeal – Application for dismissal of appeal for want of prosecution

Type of Order: Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:

The appeal filed 12th February 2016 stands dismissed for want of prosecution.

Reason:

The Crown informed the Court that, since the filing of the appeal, the appellant has been deported to his country and has not been in the Territory of the Virgin Islands. Counsel also indicated that written submissions have not been filed in the matter.

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)**

**[BVIHCMAP2022/0009]
(Territory of the Virgin Islands)**

Date:

Wednesday, 11th May 2022

Coram:

**The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]
The Hon. Mr. Godfrey Smith, Justice of Appeal [Ag.]**

Appearances:

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

Respondent: Mr. Edward Davies, QC with him Mr. Ben Griffiths and Mr. Nicholas Burkill

Issues: Commercial appeal – Interim injunction – Whether learned judge erred in principle in granting interim injunction – Court’s approach in respect of appeals from ex parte decisions – Abuse of process – Whether appeal constitutes an abuse of process – Whether it is appropriate for the Court to hear and determine an appeal against the grant of interim mandatory and prohibitory orders before the inter partes application has been heard – Whether appeal rendered academic

Type of Order: N/A

Result / Order: IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name: Marcianno Devon Pickering
v
[1] Enid Geraldine Pickering
[2] Dacia Orelita Pickering
[3] Pauline Pickering
(Executors of the Will of Alvin Pickering,
deceased)

[BVIHCVAP2021/0010]
(The Territory of the Virgin Islands)

Date: Friday, 13th May 2022

Coram: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Esco L. Henry, Justice of Appeal [Ag.]
The Hon. Mr. Godfrey Smith, Justice of Appeal [Ag.]

Appearances:
Appellant: Mr. Frederick Gilkes and Mrs. Reynela Rawlins-Solomon

Respondents: Mr. Sydney Bennett, QC with him Ms. Anthea Smith

Issues: Interlocutory appeal – Expert reports – Rule 32.6 (5) of the Civil Procedure Rules 2000 (“CPR”) – Failure to provide experts’ reports by dates specified in court orders – Non-compliance with order for disclosure – Case management powers – Rule 26 of the CPR – Whether, on a proper construction of rule 32.16 of the CPR, the respondents’ failure to comply with the court’s directions to file the expert reports attracted a sanction – Whether sanction took effect before the respondents brought their application for an extension of time, (or at all) necessitating a concurrent application thus requiring the respondents to seek for relief from the said sanctions pursuant to rule 26.8 of the CPR – If relief from the sanction under rule 32.16 of the CPR created by was required, whether the court was justified in granting such relief on the facts of the case at bar – Whether, if relief from sanction was not required, the Court properly exercised its discretion in granting the extension of time sought – Whether the orders granting the experts ‘permission to appear at trial to give oral evidence’ embodied an implicit order to disclose their expert reports

Type of Order: N/A

Result / Order: 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]

(The Territory of the Virgin Islands)

Date: Friday, 13th May 2022

Coram: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Esco L. Henry, Justice of Appeal [Ag.]
The Hon. Mr. Godfrey Smith, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. James Willan, QC with him Mr. Mungo Lowe and Mr. William Hare

Respondent: Mr. Sharif Shivji, QC with him Mr. Guy Oliff-Cooper, Mr. Jonathan Ado and Ms. Victoria Lissack

Issues: Interlocutory appeal – Forum non conveniens – Stay of proceedings on ground of forum non conveniens – Whether judge erred in finding that the claim had no connection with the BVI beyond it being the place of incorporation – Test in *Spiliada Maritime Corporation v Casulex Ltd* [1987] AC 460 – Having identified the correct test for a forum challenge, whether the judge incorrectly applied the principles to the facts of the case – Whether respondent discharged the burden of demonstrating that the courts of Hong Kong were the more appropriate forum – Whether judge failed to consider or put sufficient weight on relevant factors and/or afforded too much weight to factors that were either irrelevant or had little or no relevance to the questions he was determining – Weight to be attached to Hong Kong governing law clause – Whether contract governed by Hong Kong law can be interpreted by BVI court – Whether judge erred in granting stay based on forum non conveniens – Whether judge failed to identify likely issues that might arise – Costs – Whether learned judge erred in the exercise of his discretion by awarding costs on the applications to the respondent – Whether the general principle of ‘costs follow the event’ should be applied considering the respondent’s conduct

Type of Order: N/A

Result / Order: IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name: **Vladimir Niyazov**
v
Messrs. Agon Litigation (a partnership)
[BVIHCMAP2021/0038]
(Territory of the Virgin Islands)

Date: **Friday, 13th May 2022**

Coram: **The Hon. Mde. Louise Esther Blenman, Justice of Appeal**
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal [Ag.]

Appearances:
Appellant: **In person**
Respondents: **Mr. Shane Quinn and Ms. Jodi-Ann Stephenson**

Issues: **Application to vary the order of single judge**

Type of Order: **Directions**

Result / Order: **IT IS HEREBY ORDERED THAT:**

- 1. The Registrar of the High Court shall file and serve an affidavit together with exhibits outlining the time and the circumstances including the payment of the requisite fees with the Chief Registrar's Office in relation to the filing of the application for leave to appeal on or before 30th May 2022.**
- 2. The applicant has leave to file and serve an affidavit together with exhibits in reply or before 7th June 2022.**
- 3. The parties shall file and serve written submissions on or before 21st June 2022.**

4. Thereafter the continuation of the hearing of this application will be done on paper and the Court reserves its decision.

Case Name:

**The Attorney General
v
Partnerselskabet Parcifal**

**[BVIHCVAP2018/0001]
(Territory of the Virgin Islands)**

Date:

Friday, 13th May 2022

Coram:

**The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Trevor Ward, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Ms. Maya Barry

Respondent:

Mrs. Hazelann Hannaway Boreland with her Mr. Rupert Steer

Issues:

Cross appeal – Costs – Assessment of costs – Rule 64.6 of the Civil Procedure Rules 2000 – Exercise of judicial discretion – Appellate court's interference with judge's discretion in relation to the award of costs – Whether or not judge erred in exercise of discretion in refusal of costs – Whether judge erred as a matter of principle in depriving the cross-appellant of its costs despite its claim being successful – Costs follow the event – Whether circumstances of the case justify a departure from the general rule that costs follow the event

Type of Order:

N/A

Result / Order:

IT IS HEREBY ORDERED THAT:

Judgment is reserved.