

THE EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

SAINT CHRISTOPHER AND NEVIS
VIDEOCONFERENCE

Monday 20th June 2022 – Thursday 23rd June 2022

JUDGMENTS

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:

Tuesday 21st June 2022

Coram for
delivery of
judgment:

The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mr. Gerard St. C Farara, Justice of Appeal
[Ag.]

Appearances:

Appellant: **Mr. John Carrington and Mr. Andrew Emery**

Respondents: **Mr. Edward Davies, QC with him, Mr. Nicholas Burkill**

Issues: Interlocutory appeal — Interim injunctions – Court’s approach in respect of appeals from *ex parte* decisions – Abuse of process – Whether appeal 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 – Academic appeal

Result / Order: IT IS HEREBY ORDERED THAT:
The appeal is dismissed with costs to the respondents to be assessed by a High Court judge if not agreed within 21 days.

Reason: Held: dismissing the appeal; and ordering costs to the respondents to be assessed by a High Court judge if not agreed within 21 days, that:

1. An appellant who seeks to challenge the grant of an *ex parte* interim injunction must first give the learned judge an opportunity to review it in the light of full evidence and full submissions and reach a decision at a scheduled *inter partes* hearing. To do otherwise could seriously undermine the structure for dealing with interim applications and open the floodgates for leapfrogging over *inter partes* hearings directly to the Court of Appeal. In this case, Greater Sail did not apply to the learned judge below to discharge the injunction. It instead asked this Court to hear and determine an appeal against the grant of interim mandatory and prohibitory orders before the *inter partes* application has been heard. It is therefore improper to permit Greater Sail to appeal to this Court against the *ex parte* order in these circumstances.

WEA Records Ltd. V Visions Channel 4 Ltd and Others [1983] 1 WLR 721 applied; Hunter & Partners Limited v Wellings & Partners [1987]

FSR 83 applied; Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1 distinguished.

2. Greater Sail's compliance with the mandatory and prohibitory orders renders the appeal academic, serving no practical purpose.

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:

Thursday 23rd June 2022

**Coram for
delivery of
judgment:**

**The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard St. C Farara, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Mr. Romain Duncan

Respondent:

Mr. Andrew Willins

Issues:

**Interlocutory appeal – Joinder of parties – Section 273
of the Insolvency Act, 2003 – Whether the court had**

jurisdiction to make an order for joinder of parties in insolvency proceedings – Whether the judge erred on the hearing of the joinder application in proceeding to consider and to determine the merits of the section 273 application – Whether the judge erred in holding that the appellants were making the application to join in the section 273 Application not as aggrieved persons but for the ulterior motive and improper purpose of attempting to prevent the respondents from proceeding with the claim in the Isle of Man against Mr. Simon McNally – Whether the judge erred in holding that the section 273 application faces an uphill battle and was bound to fail on the basis that the joint liquidators were exercising their commercial assessment in bring the Isle of Man proceedings and the Court will only interfere if a high degree of unreasonability can be shown in their decision – Whether the judge erred in concluding that the more appropriate remedy in the circumstances was for the appellants to bring an application seeking the removal of the respondents as joint liquidators – Whether the judge erred in failing to order joinder having heard submissions as to the effect and scope of the rule in Cherry v. Boulton – Whether the judge erred in refusing to join Treehouse Investments Limited on the ground that it was not a creditor because it had failed to produce a copy of its proof of debt in the liquidation

Result/Order:

IT IS HEREBY ORDERED THAT:

The appellants' appeal fails and is accordingly dismissed, with costs to the respondents of no more than two-thirds of the costs in the court below, to be assessed by a judge of the Commercial Court if not agreed by the parties within 21 days. The respondents' counter notice is dismissed with no order as to costs.

Reason:

Held: dismissing the appeal, with costs to the respondents of no more than two-thirds of the costs in the court below, to be assessed by a judge of the Commercial Court if not agreed by the parties within 21 days, and dismissing the respondents' counter notice with no order as to costs, that:

1. Insolvency proceedings are a not 'civil proceedings'. They are a specific type of legal

proceedings governed by a discrete statutory regime under the Insolvency Act and the Insolvency Rules, 2005 in the BVI. There is no specific provision in the Insolvency Act or in the Insolvency Rules which addresses, concerns or confers on the court, whether substantively or procedurally, jurisdiction to order a joinder of parties in existing insolvency proceedings. Further, while by Rule 1 of the Insolvency Rules the provisions of the Civil Procedure Rules 2000 (“CPR”) are generally made applicable to insolvency proceedings, Part 19 of the CPR enabling the court to add or substitute parties in civil proceedings, has been expressly disapplied to insolvency proceedings by the provisions of Rule 4(2) and Schedule 1 to the Insolvency Rules, 2005. While by the provisions of Rule 4(1) and Schedule 1 to the Insolvency Rules only certain parts of the court’s case management powers under Part 26 of the CPR, namely, rule 26(1)(a) and (b), are disapplied in insolvency proceedings, the express disapplication of Part 19 of CPR dealing with joinder to insolvency proceedings, means that no reliance can be placed on the court’s general case management powers under Part 26 of CPR, including rule 26.1(2)(w), in order to ground jurisdiction to join parties to existing insolvency proceedings. That leaves the question as to whether the court has under its inherent jurisdiction the power to make an order for joinder of parties in insolvency proceedings. However, this issue has not been fully argued before this Court, including what effect, if any, would the provisions of sections 6, 7 and 11 of the Eastern Caribbean Supreme Court (Virgin Islands) Act Cap. 68 have to its determination. Accordingly, without deciding this preliminary issue, the Court will proceed on the assumption that the power to join third parties, in certain circumstances, to existing applications in insolvency proceedings may exist and, if so, is vested in the Commercial Division of the High Court.

Part 19 and rule 26 of the Civil Procedure Rules 2000 considered; Rule 4 and Schedule 1 of the Insolvency Rules 2005 considered.

- 2. The general principles is that a judge must, in deciding a joinder application, consider whether the joinder is necessary or desirable in the interest of justice, and the efficient and proper determination of an existing application or claim. It follows that where the court is called upon to determine whether the appellants ought properly to be joined in the existing section 273 Application, as co-claimant, the judge was required to conduct an evaluative exercise to be satisfied, on a prima facie basis, whether the appellants, as applicants for joinder, have a legitimate interest in the relief being sought. If the evidence before the court in the joinder application is clear one way or the other, then the judge must reach the appropriate conclusion, either that the parties have standing to bring a section 273 application, or they do not. If they do not, then that is the end of the matter, and the application for joinder must be dismissed. Where the judge hearing the joinder application is satisfied, on a prima facie basis, that the interest of the applicants for joinder is aligned with that of the general body of creditors, he ought to grant joinder, unless there is some other good and compelling reason why he ought not to do so in the particular circumstances of the matter before him. It follows therefore that the learned judge was entitled to assess whether the appellants had standing to make, and hence to join in the making, of the section 273 Application.**

Molavi v Hibbert and others [2020] EWHC 121 (Ch) considered; In re Pablo Star Ltd [2018] 1 WLR 738 at [47] considered; Deloitte & Touche AG v Johnson [2000] 1 BCLC 485 applied; ABM AMRO Fund Services (Isle of Man) Nominees Limited (formerly Fortis (Isle of Man) Nominees Limited) and others v Kenneth Krys and others BVIHCMAP2016/0011–BVIHCMAP2016/0015, BVIHCMAP2016/0023–BVIHCMAP2016/0028

(delivered 20th November 2017, unreported) considered.

3. A person cannot be recognised as a creditor in the liquidation of a company unless and until that person makes a claim in the liquidation by submitting a proof of debt in Form R184 to the Insolvency Rules. It follows that, a person who may have a good case or solid proof of a debt owed to them by a company in liquidation, who fails to submit a written claim in the liquidation, is not a creditor in the liquidation entitled to share in the distribution of surplus. In this case, no proof of debt or evidence of having submitted or sent in a proof of debt to the JLS, has been provided by Treehouse, despite written requests from the JLS themselves, the several opportunities afforded by the court for it to do so, and the consequences of a failure to comply timeously having been stipulated in an order of the court. Accordingly, there is no basis on which this Court can or ought to set aside the declaration and order made by the learned judge on 15th June 2021 (confirmed on 6th July 2021), that Treehouse has no standing to bring a section 273 application or to be joined in the section 273 Application. The learned judge therefore committed no discernable error of law or fact in reaching that conclusion.

Rule 184 of the Insolvency Rules, 2005 considered; Sections 209(1) and 273 of the Insolvency Act, 2003 No.5 of 2003, Laws of the Virgin Islands considered.

4. The application of the rule in *Cherry v Boulton* was not a basis or reason for the learned judge's dismissal of the Joinder Application. It is clear that there is no decision or ruling by the judge below on this issue in his 6th July 2021 judgment, such as would inform a consideration by this Court of it in the appeal. The only apparent conclusion reached by the judge with regard to the application of the rule in *Cherry v Boulton* is in the 15th June 2021 judgment, which is not the subject of an appeal to this

Court, and which decision concerned the judge's refusal to permit the appellants to be heard in opposition to a part of the fees and disbursements claimed by the JLs in the Remuneration Application. It follows therefore that the appellant's challenge, by its appeal of the 6th July 2021 judgment, to the decision to dismiss the Joinder Application on the basis of the judge's conclusion in his 15th June 2021 judgment on the application of the rule in *Cherry v Boulton*, fails.

Cherry v Boulton [1839] 41 ER 171 considered.

5. It was open to the appellants to file their own section 273 application. However, by taking the route of applying to be joined to the existing section 273 Application, the appellants opened themselves to the additional argument that they do not and cannot add anything to the existing section 273 challenge, having expressly stated that the grounds upon which they intend to rely are the same as the grounds being relied on by Messrs. McNally and Cooper in the section 273 Application. It follows therefore, that the judge was entitled to consider the underlying merits of the section 273 Application in determining which way to exercise the court's discretion on the Joinder Application. The learned judge rightly considered that anyone applying under section 273 for an order that the court set aside the decision of the JLs to commence proceedings before a court of competent jurisdiction in the Isle of Man, against two former directors of the Manx Claimants, in circumstances where the underlying claims had been foreshadowed in a letter before action some 2 years before, and where a default judgment has been obtained against one of the defendants, subject to an application to set it aside, and where a forum challenge brought by both defendants have subsequently been dismissed by the Manx Court, faces 'an uphill battle'.

6. In exercise of the court's discretion whether to permit the joinder of Treehouse and/or GACH, the judge was entitled to consider and to be satisfied that they both had standing not only in the technical sense, but whether, based on the evidence before him, they had a sufficient interest in the reliefs being sought by the creditors. This led necessarily to a consideration also of their perceived motive for making the Joinder Application to join the section 273 Application, especially in circumstances where they do not seek to rely on any new or additional grounds. The judge was therefore entitled to consider whether Treehouse and/or GACH's interest were aligned with that of the creditors or were adverse to those interests in seeking to join in the section 273 Application. There was sufficient evidence before the learned judge for him to reach the findings of illegitimate purpose and ulterior motive on the part of GACH in seeking to join the section 273 Application. It follows that the judge was therefore entitled to conclude, having found that Treehouse had no standing as a creditor of Unicorn, that GACH's interest were not aligned with that of the creditors or were adverse to those interests in seeking to join in the section 273 Application. Accordingly, the learned judge adopted the correct approach to the Joinder Application in rendering his decision.

Ming Siu Hung and others v J F Ming Inc and another [2021] UKPC 1 considered; Deripaska v Cherney [2009] EWCA Civ 849; [2009] 2 CLC 408 considered.

7. It is not the function of the Court of Appeal to conduct its own evaluation of the evidence and in a spurt of appellate activism to come to its own conclusions. While the judge stated in strong terms his views on the merits of the section 273 Application, he was entitled to do so in deciding whether it was necessary or desirable to join Treehouse and/or GACH in that application as co-applicants. The judge's views expressed as to the merits of the section 273

Application were and remain preliminary views. They do not rise to the level of conclusive findings or a disposition of the said application without a full hearing on its merits and all that may entail. There was sufficient evidence before the learned judge for him to reach the findings of illegitimate purpose and ulterior motive on the part of GACH in seeking to join the section 273 Application. It follows that the learned judge's conclusion on the issues going to the merits of the section 273 Application and to the motives, purpose and interest of the appellants in seeking the joinder, ought not be disturbed.

8. It cannot be said that the learned judge erred in concluding that the section 273 Application was bound to fail as not being an appropriate remedy because, having regard to the kind of allegations of lack of bona fides made therein against the JLs, it would be more appropriate to bring an application pursuant to section 187 of the Insolvency Act to remove the JLs. Section 273 applications ought to be confined to the unreasonableness or perversity of the act, omission or decision of liquidators. It is clear that while a court's review of an act or decision or omission by a liquidator may properly involve an allegation of bad faith in relation to the act, decision or omission sought to be impugned. In this case, the allegations made against the JLs in the section 273 Application go beyond bad faith or the reasonableness of the decision sought to be impugned. They are very serious and weighty allegations of impropriety and wrongdoing, made against officers of the court and the purpose for the liquidation itself. These allegations are wholly unsuitable to be canvassed and dealt with in a section 273 application. Accordingly, the allegations made in the section 273 Application against the JLs ought, more properly, to be the subject of an application for the removal of the JLs pursuant to section 187 of the Insolvency Act. It follows that the judge did not incorrectly interpret section 273 of the Insolvency Act or placed an inappropriate limit on the section 273

jurisdiction. Accordingly, there is no merit in this ground of appeal given that judge was within his power to reach the preliminary conclusion which he did, as a matter of principle and prudent case management.

Sections 187 and 273 of the Insolvency Act, 2003, No.5 of 2003, Laws of the Virgin Islands considered.

APPLICATIONS AND APPEALS

Case Name:

Applewaite Lake

v

[1]Barbara Hardtman

[2]Laughton Browne

[3] Kirtley Hardtman

[NEVHCVAP2020/0005]

(Saint Christopher and Nevis)

Date:

Monday 20th June 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: Mr. John Jeremie, SC with Mr. Ricaldo Caines

Respondents: Ms. Angela Cozier

Issues:

Motion for conditional leave to appeal to Her Majesty in Council - Section 99(1)(a) of the Constitution of Saint Christopher and Nevis - Appeal as of right to Her Majesty in Council - Application by appellant to set aside consent order - Refusal of application - Whether decision was a final decision in a civil proceeding

where the matter in dispute on appeal to Her Majesty was of the prescribed value or upwards - Test for determining whether a decision is final or interlocutory - Application test - Rule 62.1(3) of the Civil Procedure Rules 2000 - Applicability of the application test in the Eastern Caribbean - Order test - Whether the order test applies in the circumstances

Type of Order:

Oral decision

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The application for conditional leave to appeal to Her Majesty in Council is dismissed.**
- 2. No leave to appeal having been granted, the application for a stay of execution pending the determination of the appeal falls away.**
- 3. Costs fixed in the sum of \$1,500.00 to be paid by the applicant/appellant to the respondents on or before the 5th July 2022.**

Reason:

This was an application by notice of motion for conditional leave to appeal to the Privy Council against the decision of the Court of Appeal dated 22nd March 2022, by which the Court of Appeal dismissed an appeal by the applicant/appellant seeking to overturn an order of Moise J, in which the learned judge declined to set aside the consent order dated 24th February 2020.

The applicant made his application for conditional leave pursuant to section 99(1)(a) of the Constitution of Saint Christopher and Nevis, which provides for appeals as of right to the Privy Council from final decisions of the Court of Appeal in any civil proceedings where the matter in dispute is of the prescribed value or upwards.

The applicant contended that the decision of the Court of Appeal, which he sought leave to appeal from, was a final decision in accordance with a book titled *The Doctrine of Res Judicata* by Spencer Bower and Turner. At paragraph 164 of the book the learned authors state that:

“A judicial decision is deemed final when it leaves nothing to be judicially determined or ascertained thereafter in order to render it effective and capable of execution and is absolute complete and certain and when it is not subject to subsequent rescission, review or modification by the tribunal which pronounced it.”

The applicant contended that in the matter before the Court, there was nothing left to be judicially determined or ascertained by the Court of Appeal after its decision, in order to render it effective and capable of execution. The decision was absolute, complete and certain and the decision was not lawfully subject to subsequent rescission or modification by the Court of Appeal. He contended too, that the matter in dispute was upwards of the prescribed value and that the proposed appeal raised a genuinely disputable issue.

In the leave application, the only debatable question was whether the decision of the Court of Appeal made on 22nd March 2022 was final. If one were to apply the order test, which is the test set out in the book by Simon Bower and Turner, it may well be concluded that the decision of the Court of Appeal which the applicant sought to appeal was a final decision. However, the test which is applied in the Eastern Caribbean jurisdiction, to determine whether or not an order is final, is the application test which establishes that an order is final if it would finally determine the case no matter which way the court decided the matter, in this case, the appeal.

Rule 62.1(3) of the Civil Procedure Rules 2000 (the “CPR”) of the Eastern Caribbean clearly states what the position is in relation to the test to be applied in determining whether an order is final. Rule 62.1(3) says:

“(3) In this Part -

- (a) a determination whether an order or judgment is final or interlocutory is made on the “application test”;**
- (b) an order or judgment is final if it would be determinative of the issues that arise on a claim, whichever way the application could have been decided; and”**
- (c) an order on an application for disclosure against a person who is not a party is a final order.”**

This clear statement in the CPR has been applied by the Court of Appeal consistently and in fact, the application test was the test used by the Court even before the CPR came into effect. In the case of Othniel R. Sylvester v Satrohan Singh SVGHCVAP1992/0010 (delivered 18th September 1995, unreported), Byron JA (as he then was) traced the evolution of the two tests and concluded that the application test was the preferred test in this jurisdiction and he stated as follows:

“Under the application test, an order would be final if it was made on an application which would have determined the matter in litigation for whichever side the decision was given.”

Although this case was decided in 1995 under the old rules of procedure, in Pirate Cove Resorts Limited et al v Euphemia Stephens et al SVGHCVAP2002/0011 (delivered 4th and 5th March 2003, unreported), which was decided in 2003 under the existing CPR, the Court of Appeal followed and applied the dicta of Byron JA in Sylvester v Singh. The preference of the Court of Appeal for the application test over the order test was reaffirmed by Rawlins JA (as he then was) in the case of Nevis Island Administration v LA Copproprete Du Navire J31 et al SKBHCVAP2005/0007 (delivered 29th December 2005, unreported) where he stated:

“This Court stated a preference for the “application test” in order to determine whether an appeal is from an interlocutory

or procedural order or from a final order. In Othniel Sylvester, Byron JA, distinguished the “application test” from the “order test” ...”

It was clear from all of this, that the Court of Appeal, in this case decided the matter how they did, that is, dismissing the appeal against Moise J’s order, then the matter would be at an end. If however, the Court had decided the matter the other way, that is, allowing the appeal against Moise J’s order, then the consent order would be set aside and the case would be continued.

It was plain therefore that the order of the Court, which the applicant sought to appeal against was not a final order because it would not have concluded the matter whichever way the Court of Appeal had ruled. The applicant/appellant therefore did not meet the most critical requirement for the grant of leave to appeal as of right to the Privy Council against the Court of Appeal order dated 22nd March 2022. The application for conditional leave to appeal to the Privy Council therefore failed. No leave to appeal being granted, the application for a stay of execution pending the determination of the appeal accordingly fell away.

Case Name:

**Miguel Baptiste Aneville
aka
Miguel Onerville**

v

The Honourable Attorney General

**[SLUHCVP2020/0013]
(Saint Lucia)**

Date:

Monday, 20th June 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: Mrs. Andra Gokool-Foster
Appellant: In person
Respondent: Ms. Kozel Creese in substantive appeal

Issues:

Application to remove solicitor from record -
Application to strike out notice of appeal for want of
prosecution - Failure to comply with CPR 62.11(1) -
Failure to comply with CPR 62.12(3) - Application for
adjournment

Type of Order:

Directions

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED THAT:

1. Mrs. Andra Gokool-Foster be removed as the legal practitioner on the record in respect of Miguel Baptiste Aneville also known as Miguel Onerville and further that the order granting removal from the record be prepared by counsel and filed with the Court as well as served on the appellant personally and also the Attorney General in accordance with rule 63.6(4) of the Civil Procedure Rules 2000 and that the applicant files a certificate of service of the order in accordance with CPR 63.6(5).
2. The hearing of the application to strike out the notice of appeal is adjourned to the sitting of the Court for the state of Saint Lucia during the week commencing 5th December 2022.

Reason:

The applicant, Mrs. Gokool-Foster, made an application to the Court to be removed as the legal practitioner on record for Mr. Miguel Baptiste Aneville

also known as Miguel Onerville, the appellant in this matter. Mrs. Gokool-Foster intimated that Mr. Aneville had unequivocally expressed that he was no longer interested in retaining her as counsel in this matter and that he had frustrated the attorney/client relationship, making several threats to her and defamatory claims against her. Mr. Aneville, appearing before the Court, acknowledged and extended his thanks to Mrs. Gokool-Foster for her work done on the matter, however, he confirmed that he no longer wished to retain Mrs. Gokool-Foster. The Court upon considering the circumstances described by Mrs. Gokool-Foster and that the application to be removed as legal practitioner had been properly filed and served in accordance with the rules of court, granted the application and gave further directions.

The Court also heard an application by the Attorney General's Chambers to strike out the appeal for want of prosecution. Mr. Aneville, now unrepresented, requested that the Court adjourn the matter so as to allow him sufficient time to retain another counsel to assist in the prosecution of his appeal. Counsel for the Attorney General's Chambers did not resist this application and as such, the Court adjourned the matter to the sitting of the Court for the state of Saint Lucia during the week commencing 5th December 2022.

Case Name:

**St.Kitts Nevis Anguilla Trading
Development Company**

v

Diane Musgrave Hobson

[SKBMCVAP2018/0009]

(Saint Christopher and Nevis)

Date:

Monday, 20th June 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. Benjamin Henry

Respondent: Mr. Victor Elliott-Hamilton

Issues:

Civil appeal - Magisterial appeal - Whether the learned magistrate erred in finding negligence on the part of the appellant - Whether the learned magistrate erred in finding that the appellant's door malfunctioned - Whether the learned magistrate considered irrelevant factors in finding negligence on the part of the appellant - Whether the learned magistrate properly considered all the evidence led at trial - Whether the learned magistrate arbitrarily arrived at an award for general damages - Whether the learned magistrate erred in awarding costs to the respondent

Type of Order:

Oral judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.
2. The orders of the learned magistrate are affirmed.
3. Costs of the appeal to the respondent in the sum of \$333.33 to be paid on or before 5th July 2022.

Reason:

On 20th February 2009, the respondent was injured at the appellant's place of business. She walked into an automatic sliding door that she was accustomed to using. On the day in question when she approached the door, it did not open automatically as she expected and she collided into it. She admitted that she was looking elsewhere when she collided into the door.

The appellant's case is that the door is in two parts: one is stationary and the other opens and closes

automatically when a person approaches the door. Further, that the respondent walked into the fixed part of the door. This is supported by the evidence of Shirley Abbott who testified that the respondent was on the floor in front of the fixed door immediately after the accident. However, Ms. Abbott did not see how the accident happened.

The magistrate accepted the version of the facts given in evidence by the respondent, that the door did not open, and inferred that it must have malfunctioned. The evidence of Ms. Abbott did not assist the court in determining that the respondent collided into the fixed portion of the door. The learned magistrate found that the appellant was negligent and that the respondent was contributorily negligent to the extent of 20%.

The appellant's case involves an attempt to overturn the magistrate's findings of fact that the sliding door malfunctioned and did not open. The magistrate's finding that it must have malfunctioned is simple. The evidence of the appellant's witness, Mr. Leon Bass, as found by the magistrate, is that the door opens automatically once a person is within the proximity of the door. The magistrate accepted the respondent's evidence that the door did not open, and the inference that it did not open because it malfunctioned was one that was entirely open to the magistrate based on her evaluation of the evidence. The general rule about upsetting findings of fact by the magistrate who heard the witnesses and observed their demeanor in giving their evidence is that the Court of Appeal will not interfere with the trial magistrate's finding unless the finding could not be justified on the evidence and was blatantly wrong. This is trite law.

On the first ground of appeal, challenging the finding that the appellant was negligent, the appellant is essentially asking this court to find that the respondent walked into the fixed part of the door, based on the evidence of a person who did not see how the accident happened and to reject the evidence of the respondent who said that the door did not slide open. The magistrate accepted her evidence. There is no basis for this court to interfere with the magistrate's finding of fact that the sliding door did not open when

the respondent approached and that the failure to open was due to a malfunction. The magistrate also took into account the respondent's negligence in not looking after her own safety by not paying attention when she was approaching the door. She found that the respondent contributed to the accident and reduced the award of damages by 20%. Ground 1 on the notice of appeal is dismissed and the findings of negligence and the reduction of the appellant's responsibility by 20% on account of the respondent's contributory negligence are affirmed.

In relation to ground 2 on general damages, the magistrate ordered general damages of \$5000.00, reduced by \$1,000.00 on account of a finding of contributory negligence. The magistrate took into account the respondent's evidence on the nature and extent of her injuries following the accident, which included pain in her buttocks, bleeding from her forehead, as well as pain she felt up to one year after the accident. The magistrate also took into account the medical evidence of Dr. Thelma Liburd-Browne, who examined the respondent the day after the accident, and stated in her report dated 25th June 2014, that the respondent suffered swelling and tenderness of the left side of her forehead and tenderness in her left shoulder and buttocks. The report also states that on a subsequent examination on 17th June 2010, the respondent complained of recurring headaches. The magistrate was directed to the case of Peter Cherry et al v Trevor Trim et al SLUHCV2011/0073 (delivered 8th October 2013 and 31st October 2013, unreported), a decision of the High Court of Saint Lucia, where the amount of \$2,000.00 was awarded for similar injuries. The appellant submitted that the award in this case should be in the region of \$2,000.00 - \$2,500.00 for general damages.

The decision of the court in Saint Lucia does not bind this Court and in any case, the injuries are not identical in both cases. The magistrate was entitled to consider the injuries in the context of her experience in dealing with cases in Saint Kitts and Nevis and to award the sum of \$5,000.00 for general damages. It is a trite principle that this Court will not interfere with an award of damages unless it is found to be so inordinately

high as to be a wholly erroneous estimate of the damage the injured person suffered. Reliance is placed on the cases of Martin Alphonso et al v Deodat Ramnath [1996] 56 WIR 183 and Ruth Dubois et al v Francis Maurice SLUHCVAP2013/0007(delivered 18th May 2018, unreported) for this principle. Ground 2 against the award of general damages is dismissed.

On ground 3, the appellant submitted that the award of costs to the respondent should be set aside because: (i) the amount in the claim of \$25,000.00 was so grossly excessive as to be unreasonable and to rule out any real possibility of a settlement and (ii) counsel for the respondent stated in court that an award of \$2,000.00 would be reasonable.

As to the first reason, this submission is entirely without merit. The claim is for general damages which, in the absence of agreement, the court fixes the amount. The amount claimed is virtually irrelevant. Further, the practice in Saint Kitts and Nevis is to include this figure in a claim for general damages to show that the claim is within the magistrate's court's jurisdiction of \$25,000.00. The second reason is also without merit. The court is not bound by any submission by counsel as to the level of damages. This is a matter which is entirely for the court based on the evidence and the consideration of the precedent cases.

In the circumstances the order of the Court is that the appeal is dismissed, the decision of the learned magistrate is affirmed and costs of the appeal are awarded to the respondent.

Case Name:

Anderson Carty

v

**Althea James,
Attorney for Sylvia Francis**

**[ANUHCVAP2022/0004]
(Antigua and Barbuda)**

Date: Tuesday, 21st June 2022

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

Appearances:

Applicant: Ms. Asheen Joseph

Respondent: Mr. Wendel Alexander

Issues: Application to strike out notice of appeal - Whether the appeal breaches section 170(2) of the Magistrate's Code of Procedure Act Cap. 255 – Whether the appeal amounts to an abuse of the court's process

Type of Order: Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The application to strike out the notice of appeal filed on 4th February 2022 is granted.
2. The appellant shall file an affidavit of means in the proceedings in the magistrate's court, No. ANUMCV2021/0570, on or before 5th July 2022.
3. The applicant has leave to file an affidavit in reply on or before 19th July 2022.
4. The matter is to be fixed for hearing before a different magistrate.
5. Costs shall be paid by the appellant to the respondent in the sum of \$750.00 on or before 21st July 2022.

Reason: The court heard an application to strike out the notice of appeal filed by the appellant against the order of the

learned magistrate. The notice of appeal contained two grounds: (i) that the learned magistrate failed to conduct a means test or an examination of the appellant's means before ordering him to pay the stated sum by 28th February 2022; and (ii) that the learned magistrate erred when he breached the rules of natural justice by not giving the appellant the opportunity to be properly heard on his ability to pay the stated sum of \$24,200.00 by 28th February 2022.

The applicant sets out four grounds in its application to strike out the notice of appeal: (i) the appeal filed breaches section 170(2) of the Magistrate's Code of Procedure Act Cap. 255 as it does not list any of the reasons outlined in the said provision; (ii) the Court of Appeal only has jurisdiction on appeals from the magistrate's court which conform with section 170(1) of the Magistrate's Code of Procedure Act; (iii) the appellant's appeal, which was filed on 4th February 2022, is based on the allegation that the learned magistrate failed to conduct a means test examination, however the magistrate did order the appellant to file an affidavit of means for a further hearing; and (iv) the appeal is vexatious, frivolous, an abuse of process, and without merit.

Upon hearing submissions from both parties, the court was of the view that the submissions made by counsel for the applicant to strike out the appeal insofar as it relates to the grounds not being in conformity with section 170(2) of the Magistrate's Code of Procedure Act, were unmeritorious. When the provisions of section 170(2) and the grounds contained in the notice of appeal were examined, the Court was of the view that the appellant was in conformity with the provisions of section 170(2), more specifically in relation to paragraph (k) of section 170(2). Therefore, there was no merit in these submissions.

However, after considering the order of the magistrate and the contentions of the appellant that the learned magistrate breached the principles of natural justice, in that he was not given an opportunity to be heard in relation to his means to liquidate the debt, the Court was of the view that the appeal would amount to an abuse of the process of the court in view of the clear

orders contained in the order of the magistrate which counsel for the appellant concurred were made on 21st January 2022, and which included provision for the appellant to file an affidavit of means on or before the 4th February 2022 and which also provided for the applicant to file an affidavit in reply to his affidavit on 18th February 2022. Further the learned magistrate had fixed the 23rd February 2022 for a hearing in relation to the matter. While the order did contain provisions that the sum should be paid on or before the 28th of February 2022, the magistrate noted that this was subject to the further hearing and subject to the appellant having the opportunity to file his affidavit of means.

In those circumstances, the Court found the appeal filed on 4th February 2022 to be an abuse of process and the application to strike out the appeal was granted.

Case Name:

Jerome Kelvin Williams

v

The Director of Public Prosecutions

[SKBHCRAP2016/0001]

(Saint Christopher and Nevis)

Date:

Tuesday, 21st June 2022

Coram:

**The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mr. Gerard St. C Farara, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. Elhan St. Ville Hector

Respondent:

**Mr. Valston Graham, Director of Public Prosecutions
with him Ms. Terrilyn Hunte**

Issues:

Application for abandonment of appeal

Type of Order: Oral decision

Result / Order: IT IS HEREBY ORDERED THAT:

The appeal against conviction for the offence of murder is deemed to be abandoned.

Reason: The appellant wished to abandon his appeal against conviction and sentence of murder.

Case Name:

[1] Tenielle Percival
[2] Kenrick Simmonds
V
The Chief of Police

[SKBMCRAP2017/0004]
[SKBMCRAP2017/0005]
(Saint Christopher and Nevis)

Date: Tuesday, 21st June 2022

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

Appearances:

Appellants: Dr. Henry Browne, QC with him Ms. Lorissa Hobson-Newman and Mr. O’Grenville Browne

Respondent: Mr. Valston Graham, Director of Public Prosecutions with him Ms. Terrilyn Hunte

Issues: Magisterial criminal appeal - Appeal against conviction and sentence - Section 6(2) of the Dangerous Drugs Act, Cap 9.08 - Possession - Constructive possession-Importation - Whether the appellants were actually in

possession of the cargo or possession of the drugs - Whether the conviction can be supported having regard to the evidence - Whether there is any sufficient admissible evidence to connect the defendant to the charges proffered - Section 146 of the Evidence Act - Whether the evidence which came from the seizure and search of the cell phones was inadmissible - Joint enterprise - Whether there is sufficient evidence of any agreement among the parties to found joint enterprise- Whether the sentence imposed was unduly severe

Type of Order:

Directions

Result/Order:

IT IS HEREBY ORDERED THAT:

1. The respondent shall file and serve further submissions in relation to the application of Part 16 of the Evidence Act, No. 30 of 2011 and the jurisdiction of the court to substitute or impose a fresh sentence, within 14 days of the date of this order.
2. The appellant shall file and serve submissions with authorities in reply on or before 19th July 2022.

Reason:

The Court was of the view that further submissions and authorities were needed in relation to the application of Part 16 of the Evidence Act, No. 30 of 2011 and the jurisdiction of the court to substitute or impose a fresh sentence on convictions for offences for which no punishment was ordered by the learned magistrate. The Court therefore gave the relevant directions.

Case Name:

**RBTT Bank (SKN) Limited (Now called
Bon Bank Ltd.)**

v

General Business Company Limited

**[NEVHCVAP2019/0001]
(Saint Christopher and Nevis)**

Date: Wednesday 22nd June 2022

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Gerard St. C Farara, Justice of Appeal
[Ag.]

Appearances:

Applicant:: Ms. Jenise Carty

Respondent: Ms. Dahlia Joseph Rowe with Ms. Edisha Greene and
Ms. Asha Joseph

Issues: Application to amend appellant's name

Type of Order: Oral decision

Result / Order: IT IS HEREBY ORDERED THAT:

The application to amend the appellant's name
is granted and the appellant will be styled Bon
Bank Ltd.

Reason: The Court noted that there was no objection to the
application by the respondent. Accordingly, the
application to change the appellant's name was
granted.

Case Name: Bon Bank Ltd

v

General Business Company Limited

**[NEVHCVAP2019/0001]
(Saint Christopher and Nevis)**

Date: Wednesday 22nd June 2022

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Gerard St. C Farara, Justice of Appeal
[Ag.]

Appearances:

Appellant: Ms. Jenise Carty

Respondent: Ms. Dahlia Joseph Rowe and Ms. Edisha Greene and
Ms. Asha Joseph

Issues: Civil Appeal- Contract law- Whether letters dated 9th January 2015 and 23rd January 2015 culminated in a contract- Whether letter dated 9th January 2015 amounts to an offer capable of acceptance- Uncertainty of maturity dates- Assuming that the 9th January letter is an offer, whether conflicting maturity dates resulted in lack of certainty and incapability of acceptance- Whether respondent acted knowingly or recklessly when it purported to accept the purported offer without having read the schedule enclosed in the letter

Type of Order: N/A

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

Case Name: The Nevis Island Administration

v

Ocean Reef Resorts Ltd

**[SKBHCVAP2018/0006]
(Saint Christopher and Nevis)**

Date: Wednesday 22nd June 2022

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Gerard St. C Farara, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. Terence Byron and Ms. Rhonda Nisbett-Browne

Respondent: Dr. Henry Browne, QC

Mrs.Simone Bullen-Thompson for the Attorney General appearing amicus curiae

Issues: Civil appeal - Preliminary point - Breach of contract - Request for entry of default judgment - Service of proceedings - Juridical status of the Nevis Island Administration - The Constitution of the Federation of St. Christopher & Nevis - The Crown Proceedings Act - Whether the Nevis Island Administration is a juridical person separate and apart from the Crown for the purposes of the Crown Proceedings Act or is part of or an emanation of the Crown- - Whether the appeal concerns a claim in private law or public law for damages for breach of contract - Whether the Nevis Island Administration is the proper party to the claim or to be served with the claim in the circumstances for the purpose of the request for entry of the default judgment - Private law claims versus public law claims Whether the Constitution of St. Kitts and Nevis provide for the disapplication of the Crown Proceedings Act in relation to the institution of proceedings by or against the Nevis Island Administration in respect of private law claims

Type of Order: N/A

Result / Order: IT IS HEREBY ORDERED THAT:

Judgment is reserved

Case Name:

**[1] Raphael Charlemagne
[2] Marilyn Martin aka Marilyn
Charlemagne**

v

**[1] The Attorney General
[2] Saint Lucia National Housing
Corporation formerly St.Lucia Housing
Authority**

**[SLUHCVAP2019/0025]
(Saint Lucia)**

Date:

Thursday, 23rd June 2022

Coram:

**The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard St. C Farara, Justice of Appeal
[Ag.]**

Appearances:

Appellants/Respondents: **Ms. Natalia Da Breo**

Respondents/Applicants: **Ms. Antonia Charlemagne for the 1st respondent**

**Mr. Sahleem B.K. Charles holding papers for Mrs. Petra
Nelson for the 2nd respondent**

Issues:

**Application to be removed from the record -
Application to strike out notice of appeal - Rule 62.10
of the Civil Procedure Rules 2000 - Part 26 of the Civil
Procedure Rules 2000 - Whether the appellants have
failed to comply with rule 62.10 of the Civil Procedure
Rules 2000**

Type of Order:

Oral Decision

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The application by Ms. Natalie Da Breo to be removed from the record as counsel for the appellants/respondents is granted.**
- 2. The appellants/respondents shall file an affidavit in response to the application to strike out the notice of appeal and are given leave to file submissions in response, on or before 19th September 2022.**
- 3. The hearing of the application to strike out the notice of appeal is adjourned to a date to be fixed by the Chief Registrar and notified to the parties.**

Reason:

The appellants/respondents appeared before the Court and indicated their acquiescence to Ms. Natalie Da Breo's application to be removed from the record as their counsel. Accordingly, the Court granted the application for Ms. Natalie Da Breo to be removed from the record as counsel for the appellants/respondents.

The Court also considered the application by the respondents/applicants to strike out the notice of appeal. The appellants/respondents indicated that they would require time to engage new counsel to respond to the respondents/applicants' strike out application and to prosecute the appeal. Counsel for the respondents/applicants indicated that in light of Ms. Natalie Da Breo's application to be removed as counsel being granted, they would not be opposed to an adjournment of the matter to give the appellants/respondents time to engage new counsel to represent them in the matter. Therefore, the Court gave directions for the appellants/respondents to file an affidavit and submissions in response to the application to strike out the notice of appeal. The matter was adjourned to a date to be fixed by the Chief Registrar.

Case Name: **St. Christopher Air & Sea Ports Authority**

v

Eurick Dorsett

**[SKBHCVAP2021/0016]
[formerly SKBHCVAP2018/0015]
(Saint Christopher and Nevis)**

Date: **Thursday, 23rd June 2022**

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

Appearances:

Appellant: **Mr. Terence Byron**

Respondent: **Ms. Angelina Gracy Sookoo-Bobb and Ms. Renal Edwards**

Issues: **Civil appeal - Contract law - Employment contract - Effluxion of time - Whether contract came to an end by effluxion of time - Findings of fact - Appellate court's review of trial judge's findings of facts - Construction of contracts - Whether judge erred in her construction of the term "completion of the pier construction project" - Assessment of evidence - Whether the judge properly and fairly assessed the evidence - Whether judge failed to consider the conduct of the parties in determining her approach to construction of the contract**

Type of Order: **N/A**

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

Judgment is reserved.