

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

VIDEOCONFERENCE
COMMONWEALTH OF DOMINICA
Monday 26th – Friday 30th April 2021

JUDGMENT

Case Name:

SHAISTA TRADING COMPANY LIMITED
d.b.a.DIAMOND REPUBLIC

v

FIRSTCARIBBEAN INTERNATIONAL
BANK (BARBADOS) LTD.

[ANUHCVP2018/0021]
(Antigua and Barbuda)

Date:

Monday, 26th April 2021

**Coram for
delivery:**

The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste, Justice of
Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Hugh Marshall

Respondent: Ms. Eleanor Solomon

Issues:

**Civil appeal — Approach of appellate court to
factual findings of a trial judge —Whether
chargeback to appellant properly effected for
amount representing purchase price of diamond ring
in accordance with Merchant Services Agreement—
Whether respondent had justification for effecting
chargeback on the basis of misdescription of ring**

—Whether respondent on the evidence had satisfied the prerequisites for effecting charge back under Merchant Services Agreement—Whether Court of Appeal ought properly to consider allegations of unjust enrichment and fraud not pleaded in the court below

Result:

Held: allowing the appeal and setting aside the judgment of the learned judge; dismissing the counter appeal; and making the orders set out at paragraph 57 of the judgment.

Reasons:

- 1. The purpose of pleadings is to make clear the general nature of the case. Pleadings need not be extensive as much of the specific detail of a party's case will be set out in the witness statements. In this case, Shaista's pleadings were sufficient to make the general nature of its case obvious to FirstCaribbean. The inclusion of the words 'for pick up' has not transformed the general nature of Shaista's pleaded case - which is that, FirstCaribbean breached the Merchant Agreement by effecting a chargeback in circumstances where the ring was neither returned by Mr. Chenoy nor made available to be returned to Shaista. There is no material or qualitative difference between 'whether the goods were made available' and whether the goods were made available 'for pick up'. In any event, both expressions are used in the Merchant Agreement under its section 3.24 and in a witness statement filed on behalf of Shaista. There is therefore no basis for contending that Shaista deviated from its pleaded case.**

Eastern Caribbean Flour Mills Limited v Ormiston Ken Boyea St. Vincent and the Grenadines Civil Appeal No. 12 of 2006 (delivered 16th July 2007, unreported) followed; Saint Lucia Motor and General Insurance Co. Ltd v Peterson Modeste Saint Lucia HCVAP2009/008 (delivered 11th January 2010,

unreported) followed; *McPhilemy v Times Newspapers Ltd.* [1993] 3 All ER 775 applied.

2. Based on the Merchant Agreement, for FirstCaribbean to have justification for effecting the chargeback, it ought to have been satisfied that the ring did not conform to Diamond Republic's description. On the evidence, FirstCaribbean did in fact have justification for issuing the chargeback as the ring did not conform to the description. This evidence, which included the style code inscription on the ring and the style code reflected on the invoice as well as the First Appraisal and the independent appraisal, raised discrepancies as to the description of the ring and its estimated appraised value. These in turn raise the question as to what ring, in terms of quality, Mr. Chenoy had in fact purchased. Whether this misdescription was material or minor is immaterial as no qualification of the expression is provided in the Merchant Agreement.
3. Notwithstanding that FirstCaribbean had justification for effecting the chargeback, the Bank was required to go further. It ought to have also satisfied itself that the prerequisites for effecting the chargeback listed in reason code 4853 had been met, including that Mr. Chenoy returned the goods or made the goods available to Shaista for pick up. There is no doubt, given the clear and unequivocal evidence, that the ring had not been made available by Mr. Chenoy for pick up. The email correspondence between Mr. Chenoy and Diamond Republic, the Dispute Form and the oral evidence of the witnesses do not demonstrate that information was provided by Mr. Chenoy as to any dates or location for making the ring available for pick up, or otherwise. It was not open to the learned judge to infer that because the reason for the chargeback had been made out that the Bank had followed the prescribed procedures, without further determining whether the Bank

had satisfied the prerequisites for effecting the chargeback. The learned judge's conclusion that FirstCaribbean had properly effected the chargeback to Shaista is therefore 'plainly wrong'. Accordingly, FirstCaribbean breached the Merchant Agreement in effecting the chargeback to Shaista.

Watt (or Thomas) v Thomas[1947] 1 All ER 582 applied; Ming Siu Hung and others v J F Ming Inc and another [2021] UKPC 1applied; Piglowska v Piglowski [1999] 1 WLR 1360applied; Biogen Inc v Medeva Plc[1997] R.P.C. 1 applied; Beacon Insurance Company Limited v Maharaj Bookstore Limited[2014] UKPC 21 applied; Kathryn Ma Wai Fong v Wong Kie Yik et alBVIHCMAP2018/0001 and BVIHCMAP2018/0002 (delivered 27thMarch 2019, unreported) followed;YatesAssociates Construction Company Ltd v Blue Sand Investments Limited BVIHCVAP2015/0004 (delivered 5th October 2018, unreported)followed.

4. As a general rule, allegations which were not pleaded or canvassed in the court below cannot be raised for the first time before the Court of Appeal. This is particularly so where the allegations sought to be raised concern misconduct as there is a greater need for particulars to be given which explain the basis for these allegations. In this case, the allegations of fraud and unjust enrichment were neither raised in Shaista's pleadings in the court below nor canvassed before the learned judge. Therefore, these allegations cannot properly be considered by this Court.

Saint Lucia Motor and General Insurance Co. Ltd v Peterson Modeste Saint Lucia HCVAP2009/008 (delivered 11thJanuary 2010, unreported) followed.

APPLICATIONS

Case Name:

1. Glouster Pierre

2. Eudora Pierre

v

1. Cecil James

2. Nathalie James

[DOMCVAP2012/0010]

(Commonwealth of Dominica)

Date:

Monday 26th April 2021

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste, Justice of
Appeal**

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

Appearances:

Applicants/Respondents: Ms. Noelize Knight-Didier

Respondents/Appellants: Mr. John Elue Charles

Issues:

Application to strike out appeal – Consent order

Type of Order:

Oral decision

Result / Order:

IT IS HEREBY ORDERED BY CONSENT THAT:

- 1. The appellants' appeal against the judgment of Justice Brian Cottle dated 12th June 2012 is hereby discontinued by the appellants.**
- 2. Pursuant to section 143 of the Title by Registration Act Chap. 56:50, the Registrar of Titles is hereby directed to correct the certificate of title in the names of the Appellants, Glouster Pierre and Eudora Pierre, registered in Vol. N17 fol. 93 of the Register of Titles, by having**

licensed surveyor Mr. Gaetan Seaman correct the survey plan attached to the said certificate of title to include over the Appellants' land a right of way forming a road leading to the Respondents' adjoining property, so as to align with the survey plan attached to the Respondents' certificate of title to their said adjoining property registered in Vol.G14 fol. 32 of the Register of Titles. Such correction shall carry into effect the said judgment of Justice Brian Cottle, to wit that a right of way exists over the Appellants' said land.

3. The Appellants shall submit their said certificate of title to the Registrar of Titles accordingly to carry out the correction, and shall do so no later than the 31st of May, 2021.
4. Licensed surveyor Mr. Gaetan Seaman shall make the ordered correction, and shall do so no later than the 30th of June, 2021. The Appellants shall retain and instruct Mr. Gaetan Seaman accordingly.
5. The Appellants shall, through their counsel, promptly send to the Respondents, through their counsel, a copy of the corrected certificate of title once complete.
6. The Appellants shall pay the Respondents' costs in the agreed sum of \$7750 representing the Respondents' costs in the High Court and the Court of Appeal, and the Appellants shall pay the said costs no later than the 31st of May, 2021.
7. The Respondents' counter-appeal is hereby stayed upon the terms of this Order.

Reason:

The matter was settled by the parties by way of consent order.

Case Name:

**1. Mathias Peltier
2. West Indies Communication Enterprises
Ltd.**

v

Matthew LeBlanc

**[DOMHCVAP2020/0006]
(Commonwealth of Dominica)**

Date: Monday 26th April 2021

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

Appearances:

Applicant/Respondent:	Mr. Jeffery Douglas Murdock
Respondents/Appellants:	Ms. Cara Shillingford and Mr. Wayne Marsh

Issues: Application to set aside order of single judge

Type of Order: Adjournment

Result / Order: IT IS HEREBY ORDERED THAT:

The matter is stood over to Thursday 29th April 2021.

Reason: The Court was of the view that the matter should be stood over to a later date to allow both counsel for the appellants and respondent an opportunity to better organise their hearing bundles filed before the Court.

Case Name: Levi Maximea
v
1. The Chief of Police
2. The Police Service Commission
3. The Attorney General

**[DOMHCVAP2020/0013]
(Commonwealth of Dominica)**

Date: Monday 26th April 2021

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

Appearances:

Applicant:	In Person
Respondents:	No appearance

Issues: Application for leave to appeal – Tort of misfeasance in public office – Whether the learned judge erred in finding that the claim was res judicata

Type of Order: Oral decision

Result / Order: IT IS HEREBY ORDERED THAT:

The application for leave to appeal is refused.

Reason: This was an application for leave to appeal against the order of the learned judge made on 18th December 2020 in which she struck out the applicant’s claim for the tort of misfeasance in public office brought against the Commissioner of Police, the Police Service Commission and the Attorney General on the basis that the claim was res judicata having been previously litigated in various proceedings before the Court, up to the highest level, and therefore could not be further pursued or relitigated and also that in any event, the claim in tort, was statute barred. Having heard the applicant and reviewed the judge’s order, the Court was satisfied that leave to appeal should be refused as the proposed appeal had no realistic prospect of success.

Case Name:

Annette P Leorner
v

**1. Colin A Lees
2. Cecile Yvette Lees
[DOMHCVAP2020/0010]
(Commonwealth of Dominica)**

Date: Monday 26th April 2021

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

Appearances:

Applicant/Respondents:	Ms. Lisa de Freitas
Respondents/Appellants:	Ms. Jodie Luke

Issues: Application to strike out appeal – Whether notice of appeal filed and served out of time is a nullity – Whether a judgment without reasons amounts to the delivery of a judgment – Extension of time

Type of Order: Oral decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The application for the extension of time to appeal is refused and the Notice of Appeal is hereby struck out.
2. The appellant shall pay to the respondents costs in the sum of \$3000 on or before Monday 28th June 2021.

Reason: This was an application to strike out the notice of appeal filed by the appellant on 24th June 2020 against the decision of the learned judge delivered on 24th January 2020 on the basis that the respondents had acquired possessory title to a portion of land measuring approximately 10,075 sq ft in respect of a

parcel of land sold to the appellant by the paper title owner Mr. Winston (deceased) represented by his Estate in 2011. The learned trial judge found that by the time the appellant purchased the land in 2011 that the appellant's predecessor in title namely Mr. Winston's title to the said portion of land had already been extinguished by the year 2009 by the adverse possession of the respondents. When the notice of appeal was filed on 24th June 2020, it would in normal circumstances been out of time by some 4 ½ months. At the time of filing the notice of appeal no application for extension of time was sought. In fact, no application for extension of time was sought until 1st April 2021, some 7 months or more after the respondents' filed their application to strike out their notice of appeal.

The appellant stated that when the learned judge delivered her judgment on 24th January 2020 that it was by way of an oral decision and that when she did so she gave no reasons for her decision and the full written decision was not received until 16th May 2020 and on that basis, the delivery of the decision, ought to be treated in effect as being as from the 16th of May 2020 when the full written decision was received by her. The appellant accordingly argued that the decision of the court delivered on the 24th of January 2020 was not in an appealable form as the appellant was not able to appeal without knowing the reasons or having the reasons for the decision. The Court has no hesitation in rejecting this argument. What is clear from the affidavits filed by both sides in their applications, as well as the notice of appeal itself, is that, as from 24th of January 2020 the appellant and her counsel were present at the hearing of the delivery of the judgment was aware, that the learned judge had ruled in favour of the respondents and against the appellant who indicated from her affidavit that from that moment, she intended to appeal the decision. There was no suggestion that counsel for the appellant sought to have the judge direct that time to appeal should only run once the written reasons or the written judgment had been received. Also, the appellant took no step to file a notice of appeal or to preserve her position while seeking to preserve in that appeal or to state a note that she would wish to make

amendments to that notice of appeal as filed once the written decision had been received. The Civil Procedure Rules are clear as to the date when time runs repealing from the rendering of a decision by the Court. In this case, it would be 42 days from the date or judgment was delivered.

It was the Court's view, that this case was distinguishable from the case of Charles De Barbier and Karl Bibblen v Roland Leduc HCVAP 10 of 2008 relied on by the appellant. There in De Barbier the rule relating to the time for appealing was different in that time was set to run as from the time when the judgment was served on the party. Secondly, in De Barbier, that was a case where there was not even a single reason given for the decision. The Court was not satisfied, based on the affidavits of both sides that the same was the case here, it was clear that the learned trial judge read out reasons later to be found in the written decision albeit that that written decision was received some time later by counsel for the appellant.

This in the Court's view afforded a sufficient basis for holding that the notice of appeal file on the 24th of June 2020 against the decision delivered on the 24th of January 2020 was filed out of time and was liable to be struck out. In considering the extension of time sought by the appellant, the Court in the case of Carleen Pemberton v Mark Brantley [2011] ECSCJ No. 229 set out the factors, to which the Court would have regard in exercising its discretion whether to grant an extension of time for appealing.

There was no doubt that the delay in this case was inordinate; no good explanation has been proffered for the delay, to the contrary, the appellant's posture was that they need not sought an extension as the judgment was as they said not in appealable form until 16th of May 2020 and that taking into account the Covid-19 emergency measures they were only out of time by some three weeks.

This clearly showed, in the Court's view that the delay far from being justifiable was deliberate on the part of the appellant. It demonstrated a lack of any intention to file or make application for an extension or to do so

in a timely manner because in their view they need not have done so, having regard to their view of the judgment as to whether or not it was a judgment in appealable form or not.

These factors did not weigh in favour of the appellant. But even if the Court was minded to excuse the delay, and a lack of a good explanation and grant the extension then the appellant would have to demonstrate that the appeal, notwithstanding the delay should be allowed to go forward as there are good prospects of success.

There was nothing in the appellant's application for an extension which sought to persuade the Court in respect of this factor but the Court has reviewed the grounds of appeal contained in the Notice of Appeal and the court considers that the grounds seek in the main to overturn findings of fact without actually setting out the basis on which the court should consider overturning the findings of fact made by the trial judge. It is now trite law that an appellate court will not likely overturn findings of fact made by a trial judge who has had the advantage of seeing and hearing the witnesses in regard to a matter unless it can be shown that the judge did not take account of that advantage which the trial judge would have had and where she made findings that are not supported by any facts at all. The Court referred to the decision of the court, which was recent in First Domestic Insurance Co. Ltd v Industrial Enterprises Ltd DOMHCVAP2014/0024 (delivered 27th May 2020, unreported) in which the Court intimated that there is a high hurdle to be crossed when one is appealing against findings of fact of a trial judge.

The Court was not persuaded that the appeal had any realistic prospects of success or that the learned trial judge misapplied the law, to the facts that she found, let alone that it's an appeal which demonstrated good prospects of success. The Court was not of the view that the learned judge misapplied the decision of the case of J A Pye (Oxford) and Others v Graham and another UKHL 30 2002 referred to in her judgment to the facts of this case. When the respondents made an offer to purchase the portion of land from the appellant's predecessor in title. As was said in

paragraph 46 of J A Pye an admission of title by the squatter is not inconsistent with the squatter being in possession in the meantime. In fact, on the judge's finding in this case and borne out in her written decision, her finding was that by the time that the offer to purchase from the paper title owner or his estate was made the title to the appellant's predecessor in title had already been extinguished in respect of that portion of land, which is the subject of this matter. And so the Court could see no realistic prospects of success in relation to any of the grounds of appeal put forward in the Notice of Appeal. Accordingly, the Court was of the unanimous view that it in its discretion ought not to grant an extension of time and that the Notice of Appeal should accordingly be stuck out.

The Court upon considering the matter in regard to costs was of the view that costs should be paid by the appellant to the respondents in the sum of \$3000 in respect of both applications, on or before Monday the 28th of June 2021.

APPEAL

Case Name:

**Peter Winston
v**

**[DOMHCVAP2020/0006]
(Commonwealth of Dominica)**

Date:

Monday 26th April 2021

Coram:

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

Appearances:

Appellant: Mrs. Gina Dyer-Munro

Respondent: Unrepresented

Issues:	Civil appeal – Deficient affidavit of service
Type of Order:	Directions
Result / Order:	UPON NOTING the absence of the respondent; UPON NOTING that the respondent did not appear at the case management conference held on 18th March 2021; UPON FURTHER NOTING the affidavit of service of the bailiff of the Supreme Court sworn on 31st November 2020 is deficient in several particulars that is: (a) not detailing the precise place of service, or time of service; (b) whether the respondent known to the him or if not known how the respondent was identified; (c) how service was actually effected UPON ALSO NOTING also noting that the certificate of result did not specify a place at which the hearing of the appeal would be conducted so that the respondent may physically appear at such place it is ordered and directed that: 1. That the appellant shall use his best endeavours to serve personally, the respondent with a notice stating the date of hearing of this appeal as Monday 22nd November 2021 at 9am along with a copy of the record of appeal and the appellant's written submissions in support of the appeal by 31st May 2021. 2. The notice of hearing shall also state that the respondent may attend physically at the Court Office in Roseau, Dominica for the purpose of the hearing of the appeal. 3. The appeal shall file with the Court an affidavit of service of the notice, record of appeal and the written submissions which affidavit shall satisfy those concerns of the Court as set out in the recitals.

APPEALS

Case Name:

**Davidson Paul
v
The Police**

**[DOMMCRAP2020/0002]
(Commonwealth of Dominica)**

Date:

Tuesday 27th April 2021

Coram:

**The Hon. Mde. Louise Esther Blenman, 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. Davidson Paul

Respondent:

Ms. Sherma Dalrymple, The Director of Public Prosecutions (Ag.) and Ms. Daina Matthew

Issues:

Appeal against sentence – Theft – Sentence of learned magistrate excessive

Type of Order:

Oral judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal is allowed.**
- 2. The sentence of 3 years, 6 months is set aside and a sentence of 2 years, 6 months is substituted.**

Reason:

This was an appeal against sentence in which the learned magistrate imposed a sentence of 3 years, 6 months on the appellant for the offence of theft. The appellant was aggrieved by the sentence imposed by

the magistrate and appealed on the basis that the sentence was harsh and excessive in all of the circumstances. The learned prosecutor filed written submissions conceding that the sentence imposed by the learned magistrate was excessive and suggested that a sentence of 2 years, 6 months be substituted. The Court was of the unanimous view that the appeal should be allowed and that the sentence of 3 years, 6 months should be set aside and a sentence of 2 years, 6 months be substituted.

Case Name:

**Clarenton Andrew
v
Cassandra Lewis**

**[DOMMCVAP2018/0009]
(Commonwealth of Dominica)**

Date: Tuesday 27th April 2021

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

Appearances:

Appellant: Ms. Hazel Johnson

Respondent: Mr. Peter Alleyne

Issues: Civil appeal – Maintenance Act Chapter 35:61 – Whether the magistrate erred as a matter of law by failing to comply with section 9(4) of the Maintenance Act in seeking to determine whether or not the appellant was guilty of culpable neglect and whether or not the appellant’s refusal to pay was willful

Type of Order: Oral judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal is allowed.**
- 2. The order of the learned magistrate made on 2nd October 2018 is set aside in its entirety.**
- 3. The matter to be remitted to the Magistrates' Court to be heard before a different magistrate.**
- 4. Each party to bear its own costs.**

Reason:

This was an appeal against the decision of the learned magistrate made on 2nd October 2018 against the appellant. The appellant was aggrieved by certain orders made by the magistrate and complained that the magistrate in arriving at his decision failed to comply with section 9(4) of the Maintenance Act Chapter 35:61 of the Laws of the Commonwealth of Dominica.

The Court upon taking into consideration of the written and oral submissions of both counsel for the appellant and respondent, were of the unanimous view that the magistrate erred as a matter of law by failing to comply with section 9(4) of the Maintenance Act in seeking to determine whether or not the appellant was guilty of culpable neglect and whether or not the appellant's refusal to pay was willful. The Court was also of the view that the learned magistrate had no basis to arrive at the conclusions at which he did. The Court accordingly made the above orders.

Case Name:

The Bank of Nova Scotia

v

[1] Joyce Erin Rabess

[2] Anison Rabess

DOMHCVAP2016/0010

(Commonwealth of Dominica)

Date:

Tuesday 27th April 2021

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

Appearances:
Appellant: Ms. Joelle Harris
Respondents: No appearance

Issues: Civil appeal – Appointment of amicus curiae

Type of Order: Directions

Result / Order: IT IS HEREBY ORDERED THAT:

1. The President of the Dominica Bar Association, Mrs. Heather Felix-Evans, shall provide the Court with the names of senior members of the Bar on or before 14th May 2021 in order for these members to furnish the Court with written submissions on the following two issues:

(i) Where there is a default judgment for money, is it a prerequisite that there be service of the default judgment on the judgment debtor in order for the judgment creditor to be able to convert an equitable mortgage into a legal mortgage under the Title By Registration Act, Cap. 56:50, Laws of the Commonwealth of Dominica? In answering the above question, regard should be had to the following:

a) the judgment of Mitchell JA [Ag.] in Anison Rabess and Joyce Rabess v National Bank of Dominica DOMHCV2011/0030 (delivered 13th July 2012, unreported);

b) the judgment of Master Corbin-Lincoln in The Bank of Nova Scotia v Joyce Erin Rabess and Anison Rabees DOMHCV2002/0340 (delivered 29th June 2016, unreported); and

c) the relevant provisions of the Civil Procedure Rules

2000 in relation to the service of orders of the court.

(ii) Whether the proceedings set out in Part 5 of the Title By Registration Act, specifically from sections 74 to 97 thereof, are enforcement proceedings or new proceedings on a judgment, that is, foreclosure proceedings.

2. The Chief Registrar shall provide the electronic bundle and written submissions filed by the appellant to the amicus curiae on or before 21st May 2021.

3. The amicus curiae shall file and serve written submissions together with authorities on the appellant on or before Friday, 30th June 2021.

4. The appellant is granted leave, if necessary, to file and serve written submissions together with authorities on or before Thursday, 30th September 2021.

5. The application filed by the appellant on 1st October 2019 for the written submissions filed in support of the appeal to be deemed properly filed and served is granted and the said written submissions filed on 28th March 2019 are deemed properly filed and served.

6. The hearing of the appeal is adjourned and traversed to the next sitting of the Court of Appeal for the Commonwealth of Dominica during the week commencing 22nd November 2021.

Reason:

The Court upon noting that there was no appearance by or on behalf of the respondents, and no written submissions filed on behalf of the respondents and upon being cognisant of the fact that the appeal raises matters of importance which would benefit from the assistance of senior members of the Bar of the Commonwealth of Dominica to appear amicus curiae in order to assist the Court, the Court made the above order.

Case Name:

Annette Sanford

v
Cozier Frederick et al

Daria Eugene

v
Chakira Lockheart- Hippolyte et al

Ernie Lawrence Jno Finn

v
Octavia Alfred et al

Ezekiel Bazil

v
Fidel Niel Grant et al

Felix Thomas

v
Rayburn Blackmore et al

Francisca Joseph

v
Kent Edwards et al

Glenroy Cuffy et al

v
Melissa Skerrit et al

Monelle Williams Jno Baptiste

v
Adis King et al

Pharo Cuffy

v
Gretta Bernadette Roberts et al

Ronald Charles
v
Irvin McIntyre et al

[DOMHCVAP2020/0012A-J]
(Commonwealth of Dominica)

Date: **Wednesday 28th April 2021**

Coram: **The Hon. Dame Janice M. Pereira, DBE, Chief Justice**
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard St. C Farara , Justice of Appeal
[Ag.]

Appearances:

Applicants/Respondents **Mr. Anthony Astaphan, SC with him Mr. Lennox Lawrence and Ms. Jodie Luke for the 1st Applicant/Respondent**

Mrs. Heather Felix-Evans for the 2nd, 3rd, 4th , 5th , 8th , 9th Applicants/Respondents

Mr. Anthony Astaphan, SC with him Ms. Ernette Kangal holding papers Mr. Stephen Isidore for the 10th Applicant/Respondent

Mr. Levi A. Peter and Ms. Nadira Lando for the 11th , 12th and 13th Applicants/Respondents

No appearance for the 6th and 7th Respondents

Respondents/Appellants: **Ms. Zahida James**

Issues: **Civil appeal — Election petitions — Sections 40(1)(a), 40(6) and 40(7) of the Constitution of the Commonwealth of Dominica — Right of appeal from decisions in election petition proceedings — Whether decision to strike out election petitions a final decision – Whether Court of Appeal has jurisdiction to entertain appeals against decision to strike out election**

petitions for failure to disclose cause of action and
lack of specificity

Type of Order: N/A

Result / Order: IT IS HEREBY ORDERED THAT:

The decision is reserved.

JUDGMENT

Case Name: [1] JOHN MUSSINGTON
[2] JACKLYN FRANK

v

[1] DEVELOPMENT CONTROL AUTHORITY

[2] THE ANTIGUA AND BARBUDA
AIRPORT AUTHORITY

[3] THE ATTORNEY GENERAL

[ANUHCVP2020/0005]

(Antigua and Barbuda)

Date: Thursday, 29th April 2021

**Coram for
delivery:**

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Louise Esther Blenman, Justice of
Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. Leslie Thomas and Ms. Michelle Sterling

Respondents:

**Ms. Kema Benjamin for the Second Respondent
Ms. Carla Brookes Harris for the Third Respondent**

Issues:

**Civil appeal – Judicial Review – Civil Procedure Rules
2000 – Part 56.2 – Locus standi - Whether appellants
had standing to apply for judicial review – Sufficient
interest –Applicant for judicial review must show
sufficient interest in the subject matter of the decision
challenged – Interim Injunction – Refusal to grant
interim injunction – American Cyanamid principles –
Considerations to be taken into account when
application for an interim injunction involves a public
law element – Adequacy of damage – Balance of
convenience**

Result

**Held: allowing the counter appeal; dismissing the
appeal and the claim in the High Court; and making no
order as to costs.**

Reasons:

1. In order to have standing to apply for judicial review under Part 56.2 of the Civil Procedure Rules 2000 an applicant must have a “sufficient interest” in the subject matter of the application. The court should adopt a liberal and relaxed approach as to what constitutes a “sufficient interest” under CPR 56.2. However, not every interest will qualify under the rule. Part 56.2 is qualified by the word “sufficient”. Therefore, a person who applies “simply as a citizen” who has a grievance cannot use the judicial review process to question the decisions of a public body.

Part 56.2 of the Civil Procedure Rules 2000 applied; Walton v Scottish Ministers [2012] UKSC 44 considered; Attorney General v Martinus Francois [2004] ECSCJ No. 46, (delivered 29th March 2004) considered; Treasure Bay (St Lucia) Limited v The Gaming Authority et al [SLUHCV2011/0456] (delivered 25th September 2014, unreported) considered; Neville Pole v Licensing Magistrate [2018] ECSCJ No. 80, (delivered 27th March 2018) considered.

2. At the leave stage, if it is clear that the applicant does not have even a prima facie case that he has a sufficient interest in the subject matter of the application, permission should not be granted for the matter to proceed to trial. However, if there is a prima facie case that the applicant has a sufficient interest, or if the evidence on standing is unclear, the matter should go forward and be determined at trial. From the evidence presented in this case the appellants do not have sufficient interest in the subject matter of the application within the meaning of Part 56.2. As such, the respondents

are not obliged to disclose the EIAs to them and they cannot rely on the absence of those documents as a way to bolster their claim for standing in this matter. The claim must therefore be dismissed.

Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd. [1982] AC 617 applied.

3. In considering an application for an interim injunction in which there is a public law element, the court should follow the guidelines in the American Cyanamid case, with the necessary modifications appropriate to the public law element. As it relates to the issue of the adequacy of damages, this is rarely featured in a judge's decision whether to grant or refuse an interim injunction. This is also true in this case. In considering the balance of convenience, the public law element is a special factor and the court has a wide discretion to take the course which seems most likely to minimise the risk of an unjust result. The learned judge in the court below carried out the balancing exercise as required by American Cyanamid and although she found that there were serious issues to be tried and that the adequacy of damages did not arise, she concluded that the balance of convenience weighed in favour of refusing the application for the injunction, thereby allowing the airport project to continue. The learned judge's decision to refuse the injunction did not exceed the generous ambit within which reasonable disagreement is possible.

Beryl Isaac and others v The Grenadian Hotel Limited [2017] ECSCJ No. 299, (delivered 15th December 2017) applied; Belize Alliance for

Conservation Non-Governmental Organisation
v Department of the Environment of Belize
(BACONGO) [2003] 1 WLR 2839 applied; Michel
Dufour and others v Helenair Corporation Ltd
and others [1996] ECSCJ No. 11, (delivered 12th
February 1996) applied.

Case Name:

[1] MERVIN GRANT

[2] HERITAGE PLANTATION INC.

v

**[1] HERITAGE PLANTATION
CONDOMINIUMS LTD.**

[2] DOCHE & DOCHE INC.

**SKBHCVAP2020/0006
(Saint Christopher and Nevis)**

Date:

Thursday, 29th April 2021

**Coram for
delivery:**

**The Hon. Dame Janice M. Pereira, DBE, Chief
Justice
The Hon. Mde. Louise Esther Blenman, Justice of
Appeal
The Hon. Mr. Paul Webster, Justice of Appeal
[Ag.]**

Appearances:

Appellants:

**Mr. Henry Browne, QC with him Mr. Ogrenville
Browne**

Respondents:

Ms. Angelina Sookoo-Bobb

Issues:

Civil appeal – Approach of appellate court to findings of facts – Unfair prejudice – Sections 142 and 144 of the Companies Act – Whether 2nd respondent had committed numerous breaches of agreements resulting in the loss of its entitlement to some or all of the benefits under agreements – Whether 2nd respondent's conduct in managing the affairs of 1st respondent was unfairly prejudicial to 2nd appellant – Whether the judge, having dismissed the unfair prejudice claim, had power under section 144(2) or otherwise to make the orders that he did regarding the affairs 1st respondent – Creation of mortgages – Section 44 of Title by Registration Act – Whether mortgage created in relation to money advanced by 2nd respondent to 2nd appellant by discharge of the mortgage in favour of the Bank – Memorandum of Acknowledgement of Debt – Conversion of equitable mortgage into legal mortgage – Section 63 of the Title by Registration Act – Whether the Memorandum of Acknowledgement of Debt complies with section 63 of the TRA to allow 2nd respondent to acknowledge the amount due under the equitable mortgage for converting the equitable mortgage into a legal mortgage – Whether the mortgage is valid

Result:

Held: dismissing the appeal; and making the orders set out at paragraph 79 of this Judgment.

Reason:

1. An appellate court should exercise extreme caution in considering the findings of fact by the trial judge and should only interfere when it is satisfied that there is no or no sufficient evidence to support the trial judge's findings, or that his conclusions on the facts are plainly wrong. This is because a trial judge has the distinct advantage of seeing the witnesses give their evidence and observing their demeanour, and he or she is in the best position to assess their credibility. The appellate court is deprived of this advantage and carries out its role of

reviewing the evidence on the basis of the printed record. However, an appellate court is more inclined to interfere with the trial judge's findings of fact where those findings are based on documentary evidence or undisputed facts.

Ming Siu Hung and others v J F Ming Inc and another [2021] UKPC 1 considered.

2. In order to sustain a claim of unfair prejudice under section 142 of the Companies Act, the court must be satisfied that the challenged conduct relates to the affairs of the company, the conduct caused prejudice to the interests of a member of the company, and the prejudice was unfair. In this case, the allegations relied on by HPI to ground its claim for unfairly prejudicial conduct by D& D consists of either allegations that D& D breached the terms of the Agreements and/or it failed to comply with the rules for holding meetings of HPC and providing information about the Company's affairs in accordance with the articles of association and the Companies Act. The learned judge reviewed the pleadings, the evidence in the case and the relevant law and made findings of fact that D&D did not breach the terms of the Agreements, did not exclude Mr. Grant from meetings of the Company and the operation of the Company's bank account, and from participating in management decisions. There is no basis for the appellate court to disturb the findings of the learned judge and the decision to dismiss the claim that D&D conducted affairs of HPC in a manner that was unfairly prejudicial to the HPI.

Section 142 of the Companies Act, Cap. 21.03, Revised Laws of Saint Christopher and Nevis, 2002 considered.

3. **Section 144 of the Companies Act empowers the court to grant wide and flexible remedies where the affairs of the company have been or are being conducted in a manner that is unfairly prejudicial to the interests of one or more of its members. The jurisdiction of the court to make orders under section 144(2) is triggered by a finding of unfair prejudice under section 142. It follows that the learned judge, having dismissed the unfair prejudice claim, should not have proceeded to make the several orders that he did regarding the corporate and business affairs of HPC. Accordingly, the orders made by the learned judge in subparagraphs (3) to (6), of paragraph 58 of the judgment cannot stand.**

Sections 142 and 144 of the Companies Act, Cap. 21.03, Revised Laws of Saint Christopher and Nevis, 2002 considered; Re a Company (No 007623 of 1986) [1986] BCLC 362 considered; O'Neil and another v Phillips and others [1999] 1 WLR 1092 applied; Grace v Biagioli and others [2006] BCLC 70 applied.

4. **The \$1,540,175.58 that was paid by the Dochess to the Bank on behalf of D&D was used to discharge the HPI mortgage debt. There is no other reason why the Dochess would have paid over \$1.5 million to the Bank, and none has been suggested. The fact that the \$1,540,175.58 was paid to the Bank by the Dochess on behalf of D&D is of no significance in this case. It follows that the contention made by the appellants that a valid mortgage was not created because no money was actually advanced to HPI by D&D is without merit and was correctly rejected by the learned judge, as it is by this Court.**

Section 44 of Title by Registration Act, Cap. 10.19 of the Revised Laws of Saint Christopher and Nevis, 2009 applied.

5. The creation of an equitable mortgage by deposit of title deeds is permitted by section 51 of the Title by Registration Act. In this case, the equitable mortgage was created when HPI executed the Memorandum of Deposit of Certificate of Title and left the certificate of title for the Scotch Bonnet Property with D&D. The Memorandum granted agency powers to D&D to acknowledge the mortgage debt and convert the equitable mortgage into a legal mortgage. In the exercise of these powers D&D executed an Acknowledgement of Debt and sought to convert the equitable mortgage into a legal mortgage. The learned judge correctly found that the Acknowledgment of Debt had complied with the provisions of the TRA and therefore the mortgage was valid. Accordingly, the judge's orders made at paragraph 58 subparagraphs (8) to (12) of the judgment cannot be impugned.

Section 51 of Title by Registration Act, Cap. 10.19 of the Revised Laws of Saint Christopher and Nevis, 2009 applied.

APPLICATIONS AND APPEALS

Case Name:

Glenda Bertrand

v

The Police

[DOMMCRAP2013/0018]

(The Commonwealth of Dominica)

Date:

Thursday, 29th April 2021

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

Appearances:
Appellant Mr. Darius Jones
Respondent: Ms. Sherma Dalrymple and Ms. Daina Matthew

Issues: Appeal against sentence – Possession of cannabis

Type of Order Oral Judgment

Result / Order: IT IS HEREBY ORDERED THAT:

1. The appeal against sentence is allowed.
2. The sentences are quashed.
3. The Court sentences the appellant on all three offences to a term of imprisonment for one year suspended for the set period of one year, pursuant to section 6(1) of the Criminal Justice Reform Act of the Laws of the Commonwealth of Dominica.

Case Name:

**Ena Vidal
v
The State**

**[DOMMCRAP2017/0017]
(The Commonwealth of Dominica)**

Date: Thursday, 29th April 2021

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

Appearances:
Applicant: Mrs. Zena Moore-Dyer
Respondent: Ms. Sherma Dalrymple and Ms. Daina Matthew

Issues: Application to amend grounds of appeal – Handling of goods

Type of Order Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The application to amend the grounds of appeal filed 27th April 2021 is granted.
2. The respondent shall and serve affidavit evidence if necessary and written submissions no later than 31st May 2021.
3. The hearing is accordingly adjourned to the next sitting of The Commonwealth of Dominica during the week commencing 22nd November 2021.

Case Name:

Matthew Leblanc
v
[1] Mathias Peltier
[2] West Indies Communication Enterprises Ltd.

[DOMHCVAP2020/0006]
(The Commonwealth of Dominica)

Date: Thursday, 29th April 2021

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

Appearances:

Applicant: Mr. Jefferey Douglas- Murdock

Respondents: Ms. Cara Shillingford and Mr. Wayne Benjamin Marsh

Issues: Application to discharge order of single judge – Stay of proceedings

Type of Order Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The application to discharge the order of the single judge for a stay of proceedings is allowed and the stay granted is set aside.
2. The Respondents to the application shall pay costs to the Applicant of \$2500.00 on or before June 15th 2021.

Reason: This was an application by Matthew LeBlanc to discharge or set aside an order made by a single judge of the Court, who granted an application for a stay of proceedings and a stay of execution of the judgment and order of Moise J on an assessment of damages award. The application before the single judge was accompanied by the affidavit evidence of the CEO of the West Indies Communication Enterprises Ltd (“WICE”), Mr. Sheridan Gregoire. There was no evidence submitted by the other applicant, Mr. Mathias Peltier. In granting the stay the learned judge

stated that the Respondents had met the threshold for the grant of the stay and reliance was placed on the case of C-Mobile Services Limited v Huawei Technologies Co. Limited [BVIHCMAP2014/0017] (delivered 2nd October, 2014, unreported).

The applicant Mr. Le Blanc contended in his grounds in support of the application to discharge, that the single judge erred in taking into account all the circumstances and facts and the law that justified not granting the stay requested and that the learned judge did not give due consideration to the submissions and that she should have dismissed the application. The applicant submitted that the five principles for the grant of the stay as stated in C-Mobile, were not met.

It is well known that an application for a stay engages the exercise of the Court's discretion and accordingly the grant or refusal of a stay can only be impeached in accordance with the well-established principles governing a challenge to the exercise of the Court's discretion. The applicant would have to satisfy this Court that the single judge erred in the exercise of her discretion in granting the stay. The principles regarding the Court's power of discretion to grant a stay of appeal and a stay pending appeal, are well established. Whether a Court should exercise its discretion to grant the stay depends on all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or both parties if it grants or refuses the stay. When a judge considers an application of stay of proceedings, the Court has a broad discretion which it must use in a manner which best accords with the interest of justice. While the general rule is that a stay will not be granted, the Court has a discretion. The Court has to balance the alternatives to decide which is less likely to cause injustice. Further, there is need for frank and cogent evidence in support of the application for a stay. This evidence should

go to the risk of injustice to see whether the stay should be granted or refused.

The Respondents in their submissions claimed that they would be prejudiced if the stay was removed. As indicated by the Court, there was no evidence submitted by Mathias Peltier in support of the application for a stay of the judgment below. He however sought to remedy this great omission by filing a late affidavit of evidence before this Court. The Court strongly frowned upon this very late attempt to remedy the situation and was not of the view that it should entertain that evidence. The Court noted that no proper explanation, basis or reason was advanced for such a late filing of the evidence. The Court therefore decided to look at the matter in the context of what evidence was before the Court. As the matter stood, there no evidential foundation in support of the application for the stay. Mr. Peltier failed therefore to provide any evidence upon which the single judge could have put in exercise of her discretion to grant him a stay of proceedings. In the absence of evidence and when one considers the nature of the evidence that is required in support of the stay, the Court was of the view that the single judge erred in the exercise of her discretion by granting the stay to Mathias Peltier.

The other applicant, WICE, provided evidence in the affidavit of Mr. Sheridan Gregoire, its CEO. Essentially he deposed that WICE was unable to pay its debts. Mr. Murdock, counsel for Mr. Le Blanc contended that the evidence presented by Mr. Gregoire, essentially contained self-serving and bald assertions and notably that his affidavit was absent of full and frank evidence of WICE's income, assets and liabilities. The evidence provided by WICE in its affidavit in support included a letter alluding possible financial difficulties due to Covid-19. There was also a reference to staff members having been terminated. The other exhibits comprised letters from utility companies and two financial institutions showing pending bills and

requesting overdraft facilities. Ms. Shillingford contended that the affidavit provided the requisite evidence in support of the financial position of WICE. Mr. Murdock however, contended the contrary, stating that the affidavit lacked the cogency needed for the grant of a stay.

The Court considered the submissions of both parties and looked at the evidence relied on by the single judge in support of the stay application. The Court highlighted that it was important to note that the law does not only require evidence, it requires cogent evidence and like Mr. Murdock, the Court was of the view that the evidence presented, lacked cogency that was necessary for the success for such an application. There was no indication of the assets and liabilities of WICE and the evidence produced was essentially self-serving. On that basis, the Court was of the view that a critical aspect to support the application was missing; this was clear cogent evidence that was necessary for the success of such an application. The Court asserted that bald assertions were not adequate. Further, the law requires cogent evidence and in the case where they applicant provides no indication of its assets or liabilities, where a stay is granted, the Court concluded that this was a fatal omission for the success of the application. Consequently, having looked at evidence and heard the submissions the Court was of the view that the necessary cogent evidence was not presented by the Respondents. That being the case, the Court was of the view that the single judge erred in the exercise of her discretion granting the stay sought by the Respondents.

In the circumstances the parties also considered the issue of the chances of success on the appeal. In that regard the issue of Mr. Le Blanc's reputation was addressed but it was clear that these were just allegations against Mr. Le Blanc. There was no evidence in support of bad repetition. Ms. Shillingford contended that issues of mitigation had not been addressed by the master and therefore this goes to the chance of

success. It was also suggested that the master erred in not considering the issue of corruption and the contextual background of the matter and that he also failed to consider the apology. Mr. Murdock in his submissions did not take issue with all of these matters. In any case the Court held that for the previous reasons indicated, it intended to aside the order of the single judge granting a stay of the proceedings. Additionally, the Court upon hearing the submissions of the parties on costs, held that the Respondents should pay costs to the Applicant in the sum \$2500.00.

Case Name:

**Arshiel Marshall
v
First Caribbean International Bank
[DOMHCVAP2013/0013]
(The Commonwealth of Dominica)**

Date:

Thursday, 29th April 2021

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal
[Ag.]**

Appearances:

Appellant

Ms. Dawn Yearwood

Respondent:

Ms. Heather Felix-Evans

Issues:

Civil appeal – Mortgage – Whether the learned judge erred in law and misdirected himself when he failed to find that First Caribbean’s conduct unconscionable in its dealing with the appellant which caused him to be unable to pay his debt -

Whether the learned judge erred in law and misdirected himself when he failed to give the appellant equitable relief notwithstanding the strict common law principles applicable to the contractual relationship between the parties - Whether the learned judge's decision is against the weight of evidence – Whether the judge erred in law when he dismissed the appellant's counterclaim – Costs – Whether costs should have been ordered in the circumstances of the case

Type of Order

N/A

Result /
Order:

IT IS HEREBY ORDERED THAT:

Judgment reserved to be delivered on Friday 30th
April 2021 at 9 am.

JUDGMENTS

Case Name:

Arshiel Marshall
v
First Caribbean International Bank

[DOMHCVAP2013/0013]
(The Commonwealth of Dominica)

Date:

Friday, 30th April 2021

Coram for
delivery:

The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard St. C Farara, Justice of Appeal [Ag.]

Appearances:

Appellant

Ms. Dawn Yearwood

Respondent:

Ms. Heather Felix-Evans

Issues:

Civil appeal – Mortgage – Whether the learned judge erred in law and misdirected himself when he failed to find that First Caribbean’s conduct unconscionable in its dealing with the appellant which caused him to be unable to pay his debt - Whether the learned judge erred in law and misdirected himself when he failed to give the appellant equitable relief notwithstanding the strict common law principles applicable to the contractual relationship between the parties - Whether the learned judge’s decision is against the weight of evidence – Whether the judge erred in law when he dismissed the appellant’s counterclaim – Costs – Whether costs should have been ordered in the circumstances of the case

Result:

It is ordered that the appeal is dismissed and the order of the learned judge is affirmed. The appellant is to pay First Caribbean International Bank Limited costs of \$5000.00 being 2/3 of the costs of \$7500.00 awarded in the court below. The counter appeal is also dismissed with no order as to costs.

Reason:

- 1. Baptiste JA: This is the unanimous judgment of the court. This appeal arises out of a mortgage claim instituted by First Caribbean International Bank (First Caribbean) against Arshiel Marshall in respect of default on two loans made to him by that bank in March and September 2005. One loan was \$10,000.00, the other loan was for \$268,848.00. The loans were to be secured by the mortgage of three portions of land including a property at Ravine Bernard, on which Marshall’s father had built a house on land owned by government. Marshall counter - claimed**

against First Caribbean. The learned judge ordered that judgment be entered in favour of First Caribbean for the balance of the principal and interest in respect of the two loans. Further, and in the alternative, the mortgaged property is to be sold in accordance with the Title by Registration Act. First Caribbean was awarded prescribed costs of \$7,500.00. Marshall appealed the judge's order.

2. The terms of the two loans were contained in a Facility letter dated 9th September 2005 which Marshall accepted by signing and which formed the loan agreement between the parties. The loan agreement which Marshall signed provided for repayment by 36 installments of \$341.78 on the smaller loan and 276 monthly instalments of \$2,436.16 on the larger loan; this would have resulted in a total payment monthly payment of \$2,777.94. The loans were being serviced by monthly deductions from his salary. A bank employee erroneously omitted the installments on the smaller loan on the monthly repayment schedule, telling Marshall that his repayment would be \$2,436.16. Marshall offered to pay \$50.00 more and the salary deduction authorization was prepared in the amount of \$2,486.16, which Marshall began to pay.
3. Upon discovering the error about 5 months after, First Caribbean approached Marshall with another salary deduction form requiring him to pay an additional \$371.78 - reflective of the smaller loan. Marshall stated that he could not afford the additional payment and had he known that the repayment each month would exceed \$2,436.16, he would not have taken the loan. Marshall's position is that he had

approached First Caribbean for a consolidation of his loans with several financial institutions and that he viewed the two amounts disbursed as a single loan and as such expected to pay a single monthly repayment. He was surprised when the bank contacted him in March 2006 to indicate that his loan was in arrear.

4. Marshall advanced five grounds of appeal. The first two grounds allege that the learned judge erred in law and misdirected himself when he: (a) failed to find that First Caribbean's conduct unconscionable in its dealing with Marshall which caused him to be unable to pay his debt; and (b) failed to give Marshall equitable relief notwithstanding the strict common law principles applicable to the contractual relationship between the parties. Ground (c) alleges that the decision is against the weight of evidence, while ground (d) alleges the judge erred in law when he dismissed Marshall's counterclaim. The final ground takes issue with the award of costs. The complaint being that costs should not have been ordered in the circumstances of the case.
5. The first two grounds seek to invoke an appeal to equity. In that vein, learned counsel Ms. Yearwood, appearing for Marshall, Marshall's counsel, argues that equity should be applicable to protect Marshall from the grave injustice suffered at the hands of the bank. This was a unilateral mistake on the bank's part and estoppel should be applied against it. Learned counsel relies on several cases including the Court of Appeal's judgment in *Liddie v St Kitts Nevis Anguilla National Bank* SKBHCA 2003/010. There the

court found the bank to be estopped from insisting that the appellant pay an extra 6 months on the agreed 60 months duration to repay a loan based on the bank's error.

6. Ms. Yearwood argues that First Caribbean is responsible for Marshall being in arrears of his loan payment, as the bank erroneously prepared the salary deduction form with the amount they told him stated thereon inclusive of the additional sum Marshall proffered. Further, Marshall detrimentally relied on the representation of First Caribbean as to the amount due and payable, and the subsequent follow up to that statement by the preparation of the salary deduction form with the same amount stated thereon together with the amount Marshall volunteered. Ms Yearwood submits that this was a unilateral mistake on the bank's part and estoppel should be granted against it. First Caribbean should be estopped from insisting that the instalment amount agreed upon should be increased. In her oral submissions, Ms Yearwood stated that Marshall was looking for equitable remedies on the basis of the unequitable and unconscionable conduct of the bank.
7. None of the two grounds of appeal pertaining to equity are sustainable. The difficulty with these two grounds is that resort to equity was never ventilated before the learned judge. In fact, as Ms. Felix - Evans points out, the pleadings are devoid of an appeal to or reliance on equitable principles, and should not be considered by the Court of Appeal. Further, in the circumstances, an appeal at this stage to equitable principles of estoppel cannot avail Marshall. Estoppel does not arise against the bank from the facts and

circumstances of the case, or from the pleadings and evidence. Unconscionability does not arise on the pleadings or the evidence. Marshall does not deny that he entered into the loan agreement of 9th September 2005. He is certainly bound by the terms of the agreement. The Bank did not conduct itself in a manner to indicate that it intended not to enforce its strict legal / contractual rights. The Bank continued to deduct the monthly instalment payment for the long term loan until July 2009 when Marshall stopped making payment.

8. Ms. Felix - Evans argues, and I agree, that the authorities relied on by Marshall do not support his case. For example, in Liddie, the mistake was in a term of the contract between the parties. In the present appeal, the credit facility letter of 9th September contained no error. The error is in the salary deduction form. The error did not affect Marshall's obligation to pay the agreed amounts in the Facility letter.
9. In Liddie, the error was in the statement of the repayment term of the loan contract which was prepared by the Bank. The contract mistakenly stated that term to be 60 months instead of 66 months. The appellant had repaid the loan for 59 months in accordance with the terms of the loan contract. One month shy of the 60 months, the Bank informed the appellant that the repayment term was actually 66 months and not 60 as expressed in the loan agreement. The Court of Appeal held that the Bank's mistake was fundamental because the repayment term contemplated by the parties was 60 months and to request the appellant to now pay an

extra six months would be a fundamental change of circumstances. The court also stated that in view of the time that had elapsed - 59 months - the Bank was now estopped from claiming an additional 6 months.

10. Ms Felix - Evans submits that Marshall seeks to avoid his contractual obligation in respect of the insurance loan by relying on the incorrect figure stated on the salary deduction form, which was signed on 12th September 2005, three days after he entered into the loan agreement. Learned counsel quite correctly points out that the salary deduction form is not a contract between Marshall and the bank and was not intended to amend, modify or vary any term of the loan agreement concluded between the parties on 9th September 2005. The Bank, having recognised the error on the deduction form, unsuccessfully sought to rectify the position with Marshall. Marshall did not sign a new salary deduction reflecting the total monthly payment for the two loans which he had an obligation to pay. I also agree with Ms. Felix - Evans' submission that it must be imputed that Marshall knew that the figure in the salary deduction form was an error as the facility letter of 9th September 2005 clearly stated the monthly repayment for each loan which totalled \$2,777.94 and not \$2,486.16.

11. I now consider the ground of appeal that the decision is against the weight of evidence. This ground was not seriously pursued. The issues before the judge were quite straightforward and he made clear findings which were open to him on the evidence and not challenged on appeal. The judge's

decision was undoubtedly supported by the evidence.

12. The learned judge found that it is common ground that Marshall signed as agreeing to the loan and agreed to repay both loans. It is also accepted that the bank made an error in the figure inserted on the salary deduction slip. This error does not absolve Marshall of his obligation to repay his loan as he agreed. The salary deduction form could not modify the contract Marshall had entered into to pay the loan amounts. Even if the bank was in error, the defendant must have known this. There is no merit in Marshall's contention that the error of the bank in the calculation of the salary deduction form in any way relieves him of his obligation to pay.
13. The ground of appeal that the learned judge erred in law and misdirected himself when he dismissed Marshall's counterclaim is certainly not made out. In his pleadings Marshall repeated paragraphs 1 to 11 of the defence, and counter-claimed for loss of land and building at Ravine Bernard valued at \$200,000.00. The pleadings recited that Marshall's father constructed a house on government land at Ravine Bernard. Marshall would pay for the land and give his father \$25,000.00 for himself. Marshall applied for a loan from First Caribbean to consolidate several loans inclusive of a sum to pay his father for the land as well as the government's Housing Division. The money was approved and First Caribbean sent the money to be paid out on Marshall's behalf to the law chambers of Emanuel & Isidore which had failed or neglected to make payments as directed

causing Marshall to suffer loss of use of the property amounting to \$200,000.00.

14. At paragraph 4 of his judgment, the learned judge dealt with the purpose of the loan; which, according to Marshall, was to pay his father and the government for the house and parcel of land at Ravine Bernard that the government was going to sell to his father. His father had built the house on the land which was still owned by the government. Marshall stated that First Caribbean negligently paid the money to its solicitors, Messrs Emanuel & Isidore, for transmission to his father and the Ministry of Housing. The solicitors applied the sum to pay the agreed sum to Marshall's father but did not pay the government as the government had taken a decision to carry out a revaluation exercise. This took a long time and at its completion, the government informed Marshall's father of the price now due. This surprised his father who had expected Marshall to have already paid off the debt. The relationship between Marshall and his father broke down. The father decided not to transfer the land to Marshall. Marshall blamed First Caribbean for his loss.

15. The learned judge then dealt with First Caribbean's position that the failure was due to the delay by Marshall's attorney's Emanuel & Isidore to act. The judge opined that the question as to whom the solicitors acted for in the land transaction to be immaterial. However, for the purpose of completeness, he referred to a letter from Messrs. Emanuel & Isidore, stating that they took instructions from Marshall and paid to his father the sum of \$14, 131. 00 as payment for the house he

had built on the lands he acquired from the Government of Dominica. The learned judge found this to be conclusive of the question as to who the solicitors represented.

16. Having found that the law firm of Emanuel & Isidore acted for Marshall and were not acting for the bank, a finding open to him on the evidence, the judge concluded that Marshall's contention that the solicitors acted for First Caribbean affords him no excuse for his failure to perform his contractual obligations. As Ms. Felix-Evans submits, having regard to the basis of the counter-claim, once the learned judge had made a finding that Messrs Emanuel and Isidore were Marshall's solicitors; this was the end of the matter.

17. In any event, I agree that the evidence does not support a finding that the law firm of Emanuel & Isidore was negligent in failing to pay the government the price for the land before August 2009. The evidence shows that the sales transaction failed because Marshall's father refused to proceed with it after he was informed by the government that the price of the land had been reduced from \$18, 015. to \$3603.00. The land transaction having failed, the Bank was entitled to be reimbursed such amount of the loan proceeds as had been sent to Emanuel & Isidore for the transaction. The evidence is that the total amount was not reimbursed because pursuant to the instructions from Marshall, the law firm had paid his father \$14, 131.00, out of the monies sent by the bank months before the long term loan had been contracted. The amount reimbursed had been applied to the loan.

18. While it is matter of regret that the learned judge did not mention the counter claim in his judgment, it is clear that he addressed the allegation forming the basis of the counter - claim. It is evident that the learned judge specifically traversed the allegations underpinning the counter-claim and made specific finding of fact which effectively undermined the sustainability of the counterclaim. In the premises, the counter - claim could not have succeeded in light of the judge's finding. No useful purpose would be served in ordering that the counterclaim be remitted to the court below for hearing. This ground of appeal likewise fails.

19. With respect to the appeal on costs, there is no reason advanced for the disapplication of the general rule that costs follow the event. That ground of appeal accordingly fails.

20. It is ordered that the appeal is dismissed and the order of the learned judge is affirmed. The appellant is to pay First Caribbean International Bank Limited costs of \$5000.00 being 2/3 of the costs of \$7500.00 awarded in the court below. The counter appeal is also dismissed with no order as to costs.

Case Name:

**Ian Hope- Ross
v
Martin Dinning et al**

**[AXAHCVAP2020/0005]
Anguilla**

Date:

Friday, 30th April 2021

Coram for delivery:	The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mr. Gerard St. C Farara, Justice of Appeal [Ag.]
Appearances:	
Appellants:	Mr. Ian Benjamin, SC with him Ms. Rayana Dowden
Respondents:	Mr. Paul Dennis, QC with him Ms. Navine Fleming for the 1 st , 2 nd , 3 rd and 5 th Respondents
Issues:	Interlocutory appeal –Case management powers under rule26.3 of Civil Procedure Rules 2000 – Rule 26.3(1)(b) of Civil Procedure Rules 2000 – Striking out of statement of claim –Reasonable grounds for bringing the claim –Whether pleadings disclosed reasonable grounds for bringing claims – Negligence – Breach of fiduciary duty –Breach of trust –Exercise of judicial discretion –Approach of appellate court to exercise of case management discretion – Whether the master erred in law by concluding that the appellants’ statements of claim disclosed no reasonable grounds for bringing the claims against the respondents for negligence, breach of fiduciary duty and breach of trust –Whether the master erred in failing to properly consider matters pleaded in the appellants’ statements of claim–Amendments to statements of claim in lieu of striking out –Whether the master ought to have granted leave to appellants to amend statement of claim in lieu of exercising his discretion to strike them out
Result:	Held: dismissing the appeals and ordering the appellants to pay the respondents’ costs, to be assessed by a judge or master of the High Court at no more than two-thirds of the costs in the court below, if not agreed within 21 days.
Reason:	1. The court, in the exercise of its case management powers under CPR 26.3(1)(b),

has a discretion to strike out a statement of claim or any part thereof where it is shown that the statement of claim discloses no reasonable ground for bringing the claim. It is settled that an appellate court will not lightly interfere with the exercise of a discretionary case management power. In order to successfully challenge the exercise of the court's discretion, the appellants must therefore discharge the heavy burden of showing that the learned master was wrong in the exercise of his discretion to strike out the appellants' claims in the sense that the decision to strike out the claims was plainly wrong or falls outside the generous ambit within which reasonable disagreement is possible.

Rules 1.2 and 26.3(1)(b) of the Civil Procedure Rules 2000 applied; Michel Dufour and others v Helenair Corporation Limited and others[2002] ECSCJ No. 243 (delivered 2nd August 2002) considered Peter Toussaint et al v Martine Johnson (Representative of the Estate of Peter Michael Barnard), SLUHC VAP2018/0024 (delivered 16th September 2020, unreported) considered; America 2030 Capital Limited et al v Sunpower Business Group PTE Ltd et al[2020] ECSCJ No. 361 (delivered 26th October 2020) considered.

2. In this case, the master's decision to strike out the claims for breach of fiduciary duty and breach of trust cannot be impeached. This is because the relationship between banker and customer does not ordinarily give rise to a fiduciary relationship or to a

trustee/beneficiary relationship. The relationship between banker and customer is purely one of debtor and creditor. Accordingly, the monies deposited by a customer with a bank gives rise to a debt as between the depositor and the bank, and not a right or interest over any property held by the bank. The deposit gives rise to a chose in action, namely the right of the depositor, on request, to payment by the bank of the whole or any part of the aggregate amount of principal and interest which has been credited or ought to be credited to the depositor's account at the bank.

Foley v Hill and Others(1848) 2 HLC 28 applied; *Hirschhorn v Evans (Barclays Bank Ltd garnishees)*[1938] 2 KB 801 considered; *Space Investments Ltd v Canadian Imperial Bank of Commerce and others*[1986] 1 WLR 1072 applied.

3. In this case, the master's finding that the appellants had no reasonable grounds in law for bringing their claims against the respondents cannot be impugned. This is so because a party seeking to establish that a fiduciary relationship or a trustee/beneficiary relationship (and therefore questions of breach of fiduciary duties, or a breach of trust) can arise in the context of a bank/customer relationship, must specifically plead and prove that such a relationship and duty exists. The facts relied on in the appellants' pleaded cases must be sufficient to establish a viable claim for breach of fiduciary duty and breach of trust, outside the mere existence of the banker/customer

relationship. In the present case, however, the pleadings do not go further than relying on the usual parameters of the bank/customer relationship in seeking to establish that a fiduciary relationship or a trustee/beneficiary relationship existed. Accordingly, the learned master did not err in the exercise of his discretion in striking out the appellants' claims.

National Commercial Bank (Jamaica) Ltd v Hew and others [2003] UKPC 5 considered; Fahad Al Tamimi v Mohamad Khodari [2009] EWCA Civ 1109 considered; Bartlett v Barclays Bank Trust Co Ltd[1980] 1 All ER 139 considered; Tiger v Barclays Bank Ltd[1952] 1 All ER 85 considered; Bristol and West Building Society v Mothew [1997] 2 WLR 436 applied; Williams v Central Bank of Nigeria[2014] AC 1189 applied.

4. In the present case, the appellants' claim is one against the Banks for recovery of the debts owed to them (the chose in action) in the sum of their deposits plus any interest due to them in accordance with the terms of their banking contracts. Therefore, while it is arguable on certain pleaded facts that a parent company may owe a common law duty of care to individuals who suffer harm as a result of their subsidiary's dangerous activities, the appellants' pleaded case on the issue of negligence, fails on the basis that the appellants' monies, once deposited with the Banks, were no longer the property of the appellants. Accordingly, the master rightly found that the appellants

are not permitted to claim against the Conservators as de facto or de jure directors for their deposits with the Banks.

Williams v Natural Life Health Foods Ltd[1998] WLR 830 considered; White v Jones[1995] 2 AC 205 considered; Lungowe v Vedanta Resources[2019] UKSC 20 considered; Okpabi and others v Royal Dutch Shell Plc and another 2021] UKSC 3 considered.

5. It is not open to the appellants to transform their claim for breach of fiduciary duties, breach of trust and negligence, into a claim for deprivation of property under the Constitution or into a challenge to the nature and exercise by the ECCB of powers under the ECCB Act, where it is clear that the claims were not instituted for that purpose or on that basis. The appellants' claims clearly sought to establish the respondents' liability for negligence, breach of fiduciary duty and breach of trust. The appellants' claims were neither in form nor substance claims for deprivation of property under the Constitution nor did they seek relief under the Constitution or pursuant to CPR Part 56. Moreover, the claim at paragraphs 27 and 29 respectively of the appellants' statements of claim asserts a breach of section 7 of the Constitution as a consequence of the transfer of the deposits made by the appellants in PBT and CCIB to NCBA, with respect to which deposits the appellants have no legal or proprietary interest. Further, by logical extension, there could be no viable claim against the respondents, as pleaded, for

knowingly assisting the Government of Anguilla with depriving the appellants of their monies, even if such a cause of action exists in law or in equity. Accordingly, the learned master's decision to treat with the matter as a claim engaging the causes of action set out in the claim forms, was correct and cannot be a basis upon which this Court may interfere with the said decision.

The Attorney General of Anguilla et al v Bernice Lake et al Anguilla Civil Appeal No. 4 of 2004 (delivered 4th April 2005, unreported) distinguished; Gulf Insurance Ltd v The Central Bank of Trinidad and Tobago [2005] UKPC 10 distinguished.

6. When called upon to strike out a statement of claim or part thereof, the court ought to consider whether it is in the interests of justice to permit an amendment to the impugned statement of claim in lieu of striking out. In this case, there were several defects in the appellants' claims as pleaded, principal among which is that the claims seek relief of the court in relation to the money deposited with the Banks by the appellants. To permit an amendment in these circumstances would be to grant leave for the appellants to transform their claims into something that it was clearly never intended to be, this would be overwhelmingly and disproportionately unfair to the respondents and accordingly inimical to the overriding objective.

Real Time Systems Limited v Renraw
Investments Limited and Others[2014]
UKPC applied.

APPLICATIONS AND APPEALS

Joseph Michael George

v

**Land Sales Builders and Financial
Limited**

[DOMHCVAP2011/0012]

(Commonwealth of Dominica)

Date:	Friday, 30th April 2021
Coram for delivery:	The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mr. Gerard St. C Farara, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Mrs. Gina Dyer-Munro
Respondent:	Ms. Hazell Johnson
Issues:	Application to strike out appeal for want of prosecution
Type of Order:	Oral judgment
Result:	IT IS HEREBY ORDERED THAT: The appeal is struck out for want of prosecution.
Reason:	The Court upon noting that the notice of appeal was filed on 5th April 2011 and that since that date there was no further action was taken by the

appellant in prosecuting that appeal, the affidavit of Mrs. Zena Moore Dyer dated 20th April 2021, and the submissions before the Court, was the view that this appeal should be struck out for want of prosecution.

Case Name:

**Philomen Nixon
Annette Turney
v
Joseph Nixon
Jason Nixon
Stever Nixon
Johnnie Nixon
[DOMHCVAP2018/0005]
(The Commonwealth of Dominica)**

Date:

Friday, 30th April 2021

**Coram for
delivery:**

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard St. C Farara, Justice of Appeal [Ag.]**

Appearances:

Appellants:

Mr. Mark Douglas

Respondents:

**Mrs. Kathy Buffong-Royer for the 1st and 3rd
Respondents and holding papers for Mr. Ronald
Charles for the 2nd and 4th Respondents**

Issues:

Application for adjournment

**Type of
order:**

Adjournment

Result:

IT IS HEREBY ORDERED THAT:

1. The application by the 2nd and 4th respondents for adjournment of the hearing of the appeal is granted.
2. The hearing of the appeal is scheduled for a date to be fixed by the Chief Registrar.
3. The Chief Registrar shall give notice to the parties of the date of hearing no less than 14 days prior to the hearing.

Reason:

The Court upon having heard submissions from counsel for the appellant and counsel for the 1st and 3rd respondents in relation to the application for an adjournment made by the 2nd and 4th respondents and noting the medical certificate in relation to counsel for the 2nd and 4th respondents, granted the adjournment.