

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

TERRITORY OF THE VIRGIN ISLANDS
VIDEOCONFERENCE
10th – 14th January 2022

JUDGMENTS

Case name: **Zinna Zimbanni (As Personal Representative
of the Estate of Adelaide Joseph, deceased)**
v
Computron Limited
[SLUHCVAP2019/0017]
(Saint Lucia)

Date: **Monday, 10th January 2022**

Coram for
delivery of
judgment: **The Hon. Dame Janice M. Pereira, DBE, Chief Justice**
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal [Ag.]

Appearances:

Appellant: **Ms. Natalie Dabreo**

Respondent: **Ms. Paulette Francis**

Issues: **Civil appeal – Land law – Land Registration Act Cap.
5.01 of Revised Laws of Saint Lucia - Land
Adjudication Act Cap.5.06 of Revised Laws of Saint
Lucia – Land Registration and Titling Project –
Appellate court’s interference with trial judge’s
findings of fact – Whether learned judge erred by
failing to find respondent’s root of title defective –
Indefeasibility of title – Section 98 of Land Registration**

Act – Exceptions to indefeasibility of title – Fraud and mistake – Allegations of fraud and mistake must be expressly pleaded – Failure to introduce issues during trial – Prescription – Article 2057 of Civil Code of Saint Lucia – Article 2057 of the Supreme Court Prescription by 30 years (Declaration of Title) Rules – Possession to be continuous, uninterrupted, peaceable, public and unequivocal – Interruption of prescription by first registration – Whether learned judge erred in fact and law by finding that appellant failed to satisfy requisite 30-year prescriptive period – Overriding interest – Section 28 (f) and (g) of the Land Registration Act – Protection of rights of a person in actual occupation – Whether learned judge erred by finding that appellant had not acquired an overriding interest in subject land under section 28 (f) or (g) of the Land Registration Act – Costs – Prescribed costs – Rule 65.5(2) (b) of Civil Procedure Rules 2000 – Whether learned judge erred in awarding prescribed costs to respondent

Result/Order:

Held: dismissing the appeal; affirming the judgment in the court below; and awarding costs to the respondent on this appeal of no more than two-thirds of the prescribed costs awarded in the court below, that:

- 1. An appellate court may interfere with a trial judge's findings of fact in limited circumstances. It should only interfere with the trial judge's findings of fact if it is satisfied that the trial judge's ruling is unsafe due to a significant error made in assessing the evidence, be it by overlooking or discounting critical material, applying the wrong legal principles to his evaluation of the evidence or for some other substantial reason. In this case, it was open to the learned judge having addressed her mind to the applicable rules of court and having assessed the witnesses, their demeanour, and credibility, to conclude that there was no evidence on which to find that**

Computron's root of title, Sephanise Joseph's Will, Probate, the vesting deed and vesting assent were defective. Her findings of fact were commensurate with the evidence and the weight that she reasonably ascribed to it. Accordingly, the learned judge's findings in this respect cannot be impugned.

Watt (or Thomas) v Thomas [1947] 1 ALL E.R. 582 applied; Betteto Frett and Flagship Properties Limited [2011] ECSCJ No. 220 (delivered 27th September 2011) followed; Beacon Insurance Company Limited v Maharaj Bookstore Ltd [2014] UKPC 21 applied.

2. In order to be considered, assertions of fraud and mistake must be expressly pleaded by a litigant in the court below. Further, a litigant will not be permitted to introduce at the appellate level, issues which were not before the lower court. In these circumstances, where the appellant, Ms. Joseph, did not expressly plead or outline the essential features of fraud and/or mistake in the court below and belatedly introduced the issues of fraud and mistake before this Court, her contentions regarding mistake and fraud, being new, cannot be entertained.

Drane v Evangelou and others [1978] 1 WLR 455 considered; Austin Martin, Executor of the Estate of Mary Edith Doreen Grason v The Attorney General of Antigua and Barbuda [2009] ECSCJ No. 347 (delivered 24th April 2009) followed; *Newport (Monmouth) Slipway Dry Dock and Engineering Co Ltd v Paynter* (1886) 34 Ch D 88 applied.

3. In Saint Lucia prescription is governed by Article 2103A of Civil Code and Article 2057 of the Supreme Court – Prescription by 30 years (Declaration of Title) Rules. The conjoint effect of these provisions is that title to land is prescribed by 30 years, during which the possession must be continuous, uninterrupted, peaceable, public and unequivocal. However, where there is first registration of title to land under the LRA, this has the effect of

interrupting any period of possession for the purposes of acquiring prescriptive title, which started before or during the Land Registration and Titling Project (“LRTP”). It follows that once possession is interrupted by such first registration, a person seeking to acquire title by prescription or adverse possession must remain in continuous, uninterrupted, peaceable, open and unequivocal possession of the subject land for a fresh period of 30 years, commencing at some point after the date of such interruption. In this case, there is abundant probative and relevant evidence on which the learned judge could reasonably have found that any possession which Ms. Joseph exercised over the disputed land before and during the LRTP, was interrupted by Mr. Phillip’s registration as owner in September 1987; that period of possession from the date of first registration to the day that Computron served her with its the claim, had not met the requisite 30-year prescription period; and that Ms. Joseph’s possession of the disputed land was by consent from the owner Computron and was accordingly equivocal and inadequate to satisfy the factual and legal requirements of prescription. Therefore, the learned trial judge cannot be faulted for finding that Ms. Joseph’s possession did not satisfy the Code’s 30-year pre-requisite. Her evaluation of the evidence in relation to Ms. Joseph’s prescription defence and counterclaim is unassailable.

Article 2103A of the Civil Code of Saint Lucia Cap. 4.01 Revised Laws of Saint Lucia applied; Article 2057 of the Supreme Court Act – Prescription by 30 years (Declaration of Title) Rules Cap. 2.01 Revised Laws of Saint Lucia applied; JA Pye (Oxford) Ltd. and others v Graham and another [2002] UKHL 30 applied; British American Cattle Co v Caribe Farm Industries Ltd (in receivership) [1998] 53 WIR 101 applied; Moses Joseph et al v Alicia Francois SLUHCVP2011/0025 consolidated with SLUHCVP2012/0037, (delivered 21st August 2015, unreported) followed.

4. It is evident that the learned judge did not misconstrue the submissions of Ms. Joseph in relation to her prescription defence and counterclaim or her overriding interest claims pursuant to section 28 (f) and (g) of the LRA. The learned judge captured and succinctly outlined Ms. Joseph's contentions in her analysis in the judgment. She also addressed those contentions comprehensively. Further, having indicated that the learned judge's determination on the prescription issue cannot be faulted and having dismissed the related ground of appeal, it follows that this aspect of the appeal is without merit.

Section 28(f) and (g) of the Land Registration Act Cap. 5:01 of the Revised Laws of Saint Lucia applied.

5. Section 28(g) of the LRA protects the rights of a person in actual occupation. It does not however protect the actual occupation of the land itself, as it is not the actual occupation which gives rise to the right or determines its existence. Actual occupation merely operates as the trigger, for the treatment of the right as an overriding interest. In this case, Ms. Joseph relied on the actual occupation of the disputed land to ground the overriding interest claimed under section 28 of the LRA and failed to state in her counterclaim what rights if any, she was asserting under section 28(g). Her counterclaim as such failed to engage any protection under that provision. Accordingly, the learned judge's findings that Ms. Joseph could not have acquired an overriding interest under the LRA cannot be impugned.

Section 28(g) of the Land Registration Act Cap. 5:01 of the Revised Laws of Saint Lucia applied; *Spiricor of St Lucia Ltd v Attorney General of Saint Lucia and Another* (1997) 55 WIR 123 followed.

6. A successful party is generally entitled to costs. There being no reason advanced which commended a departure from the general rule of awarding costs to the successful party and Computron having prevailed in both claims was entitled to prescribed costs in accordance with rule 65.5(2) (b) of the CPR. The learned judge having applied the formulae in Appendices B and C of the CPR correctly, arrived at the appropriate costs award. Accordingly, there is no discernible error committed by the learned judge which could justify appellate interference with her costs award.

Rule 65.5(2) (b) of the Civil Procedure Rules 2000 applied.

Case name:

**Claudette Joseph
v
Dr. Keith C. Mitchell**

**[GDAHCVAP2021/0006]
(Grenada)**

Date:

Tuesday, 11th January 2022

**Coram for
delivery of
judgment:**

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

Appearances:

Appellant:

Mr. Ian Benjamin SC with him Ms. Lisa Taylor

Respondent:

Mr. Nigel Stewart

Issues:

Interlocutory appeal — Request for information — Part 34 of the Civil Procedure Rules 2000 — Rules 11.7(1) and 11. 13 of the Civil Procedure Rules 2000 — Whether the master erred in law in determining that there was no extant application pursuant to rule 34.2 on which it was open to him to make an order compelling the claimant to provide the information requested — Extension of time to file defence — Exercise of a master’s discretion — Whether the master erred in fact and law and wrongly exercised his discretion in refusing the appellant’s application for the time to file her defence to run from the time that the respondent gives full disclosure to the appellant, or alternatively an extension of time to file her defence

Result/Order:

Held: dismissing the appeal and ordering the appellant to pay the respondent’s costs of the appeal to be assessed by a master if not agreed within 21 days, that:

- 1. In absence of any permission given by the court to pursue an order which did not feature in the application sought, an applicant may not ask the court for such an order. The appellant failed to set out any request in her application, and particularly in the orders sought, for the court to compel the respondent to produce the information requested. Therefore, a CPR 34.2(1) application cannot be inferred from the appellant’s application as particularised and the learned master did not err in so finding.**

Rules 11.7(1), 11. 13 and 34.2(1) of the Civil Procedure Rules 2000 applied.

- 2. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is plainly wrong, that an appellate body is entitled to interfere with a discretion exercised by a master. Appellate authorities ought not to reverse a master’s order merely because they would themselves have exercised the original**

discretion, had it attached to them, in a different way. Moreover, It must not be assumed that a litigant can intentionally flout the rules and then ask the court's mercy by invoking the overriding objective. It is pellucid from the master's order that he applied the relevant principles in considering the application to extend the time to file the defence. He also took into account relevant factors and did not take into account irrelevant factors in his determination of the appellant's application. His assessment of the various factors was not irrational. Therefore, there is no basis for this Court to reverse the master's decision.

Dufour v Helenair Corporation Limited (1996) 52 WIR 188 followed; Attorney General et al v Geraldine Cabey MNIHCVAP2008/0008 (delivered 12th January 2009, unreported) followed; Ming Sui Hung and others v JF Ming Inc and another (British Virgin Islands) [2021] UKPC 1 followed; The Treasure Island Company et al v Audubon Holdings Limited et al British Virgin Islands Civil Appeal No. 22 of 2003 (delivered 20th September 2004, unreported) followed.

Case name:

Flavio Maluf

v

[1] Durant International Corp

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

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

[BVIHCMAP2021/0025]

(Territory of the Virgin Islands)

Date:

Thursday, 13th January 2022

**Coram for
delivery of
judgment:**

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

Appearances:

**Appellant: Mr. John Machell, QC with him Mr. Timorthy de Swardt
Respondents: Mr. Adrian Francis**

Issues:

Interlocutory appeal – Preliminary issue – Whether leave was required to appeal order dispensing with service – Fresh evidence – Ladd v Marshall principles – Service Out of the Jurisdiction – Part 7 of Civil Procedure Rules – Whether service had been effected on the appellant in accordance with Brazilian law – Whether service on appellant had been effected in accordance with Hague Service Convention – Whether service on the appellant in Brazil by sending Letters Rogatory directly to the Brazil courts was contrary to the Reservation by the Federal Republic of Brazil to Article 10 of the Hague Convention – Whether good service had been effected on the appellant in accordance with the Service Out Order – Rules 13.3 and 13.4 of the E-litigation Portal Rules – Whether the purported service was ineffective under rule 13.4 of the E-Litigation portal rules – Judicial discretion – Test for dispensing with service – Exceptional circumstances – Whether the judge erred in making an order dispensing with service of the BVI Court Documents on the appellant pursuant to CPR 7.8B – Whether the judge erred in failing to discharge the freezing order on the basis that the validity of the claim form had expired

Result/Order:

Held: dismissing the appeal, affirming the orders of the judge in the court below dated 23rd and 24th August 2021 dispensing with service and continuing the Freezing Order; setting aside the order awarding costs to the respondents in the court below and ordering that each party bear their own costs of this appeal and in the court below, that:

1. Section 30(4) of the Eastern Caribbean Supreme Court (Virgin Islands) Act provides that, subject to the exceptions stated therein (none of which are applicable to the instant matter) no appeal shall lie without the leave of the Court of Appeal from any interlocutory order or interlocutory judgment made by a judge of the High Court. In this case, it is pellucid that the learned judge considered and, for the reasons foreshadowed in his unsealed judgment circulated to counsel for the parties, granted the appellant's application filed subsequently to dispense with service. It follows therefore that the order of a single judge of this Court granting leave to appeal the judgment "in so far as it concerns issues of service", clearly incorporates an appeal challenging the Dispensation Order of the court below. Accordingly, the respondents' preliminary point is without merit and is dismissed.

Section 30(4) of the Eastern Caribbean Supreme Court (Virgin Islands) Act Cap. 80 of the Revised Laws of the Virgin Islands, 1991.

2. The three step test in *Ladd v Marshall* to be applied by an appellate court when considering whether to grant to a litigant permission to adduce fresh evidence on the hearing of an appeal, is intended to ensure that the important requirement of bringing finality to litigation and the overriding objective and duty of a court to manage litigation justly and proportionately are complied with, and permission to adduce fresh evidence is only granted in circumstances where the application satisfies all three requirements of the test. In the instant matter, the appellant's application, made after the hearing of the appeal, for an order that the written opinion of the Deputy Federal Attorney General of the Republic of Brazil dated 8th November 2021 issued in proceedings before the courts in Brazil, satisfies all three limbs of the test and should be granted. Specifically, had the November 2021 opinion been before the judge below it would probably have had an important influence on the judge's determination of the issue of service of the BVI Court Documents in accordance with Brazilian law, and the said document, albeit a non-binding legal opinion issued in proceedings before the Brazilian

courts, is apparently credible. Moreover, the opinion focuses on the legal issue of Durant's standing under Brazilian law to send the Letter Rogatory from the BVI Court directly to the courts in Brazil and is material to any determination of whether the appellant was properly served with the BVI Court Documents in accordance with Brazilian law, and in accordance with the process for effecting service on a defendant in Brazil under the Hague Service Convention.

Ladd v Marshall [1954] EWCA Civ 1 applied; Emmerson International Corporation and another v Viktor Vekselberg [2021] ECSCJ No. 718 (delivered 8th October 2021) considered.

3. The learned judge erred in coming to the conclusion that the evidence before him favoured good service having taken place on the appellant in accordance with Brazilian law. This is so because it is questionable so as to be unclear whether the exequatur decision of the President of the STJ also authorised the service of the BVI Court Documents on the appellant. Further, the First dos Santos decision, properly construed, falls short of deeming access to the file and documents by the appellant's lawyers as 'service' or as 'good service' in accordance with Brazilian law. Service on the appellant has not been shown or established by the First dos Santos Decision to have been effected under Brazilian law, and the learned judge erred in so concluding. It follows therefore that the judge erred in finding that service had been effected on the appellant pursuant to the avenue permitted under CPR 7.8(1)(b), in accordance with the law of the country in which it is to be served. It was for Durant to satisfy the court that service on the appellant had in fact been effected under Brazilian law and in accordance with the Hague Service Convention and the Service Out Order. However, the evidence led was unsatisfactory and inconclusive as to good service on the appellant in Brazil.

Rule 7.8(1)(b) of the Civil Procedure Rules 2000 considered.

4. Where an order permitting service out requires personal service to be made at a specified address, a

claimant cannot serve at an alternative address and rely on CPR 7.8(1)(b). In the case at bar, permission was granted to serve the appellant at a specified address in São Paulo, Brazil or at any other address for service in Brazil. However, it is clear that the appellant had not in fact been served “personally” with the said documents in accordance with the Service Out Order which specified service in accordance with the Hague Service Convention. The Service Out Order did not authorize service in accordance with the laws of Brazil pursuant to CPR 7.8(1)(b). It follows therefore that such service in accordance with CPR 7.8(1)(b), as found by the learned judge, was not service in compliance with the Service Out Order.

YA II PN Ltd v Frontera Resources Corporation [2021] EWHC 1380 (Comm) distinguished.

5. CPR 7.10 provides that service through the judicial authorities of another state must take place through diplomatic channels and not directly to the judicial authorities of that state. In the instant matter, the Letters Rogatory were not addressed or sent to the minister with responsibility for foreign affairs but directly to the Brazilian Court in clear breach of CPR 7.10(3). Further, this breach of BVI procedural law, was compounded by the resulting breach of Brazilian law by utilising a method of transmission of the request which was clearly not in compliance with that country’s law in light of its 2018 Reservation to the methods stipulated in Article 10 of the Hague Service Convention. Accordingly, it cannot be said that service was effected on the appellant in accordance with the laws of Brazil when his lawyers there were permitted access to the court file which also contained the BVI Court Documents required to be served on the appellant as requested by the Letters Rogatory. The learned judge therefore erred in finding that good service had been effected on the appellant in accordance with Brazilian law or pursuant to CPR 7.8(1)(b), which was not the chosen method of service or one of the chosen methods.

Rules 7.8 and 7.10 of the Civil Procedure Rules 2000 applied; YA II PN Ltd v Frontera Resources Corporation [2021] EWHC 1380 (Comm) distinguished.

6. Pursuant to rules 13.3 and 13.4 of the E-Litigation Portal Rules a party to civil litigation must serve the claim form and other documents in accordance with the applicable rules of court relating to service and the authorisation code generated by the Electronic Litigation Portal must also be served on the other party at the same time. Rule 13.4 specifies that a failure to serve the authorisation code at the same time with the documents has the consequence that service is deemed not to have been effected. However, the failure to serve the authorisation code at the same time as the court documents is a mere procedural misstep and is not fatal and may be remedied by re-serving the court documents with the authorisation code. In the instant matter, the respondents did not have the appellant served in Brazil with the BVI Court Documents and the authorisation code. Instead, they relied on service of the BVI Court Documents being deemed to have been effected under Brazilian law and in accordance with CPR 7.8(1)(b), albeit without service of the authorisation code. Accordingly, the judge's conclusion that service was effected and complete when the authorisation code was provided subsequently to the appellant's BVI lawyers, does not accord with rules 13.3 and 13.4 of the E-Litigation Portal Rules and is flawed.

Rules 13.3 and 13.4 of the Eastern Caribbean Supreme Court Electronic Litigation Filing And Service Procedure Rules 2018 applied.

7. It is trite that the purpose of service of documents in civil proceedings is to bring the claim form and other documents setting out the allegations of fact and the legal basis for the claim to the attention of the defendant. The significance of this requirement for service of originating process, is a fundamental pillar in ensuring open litigation in a free and democratic society, and to give meaning to the imperative for justice to be dispensed openly and according to law, buttressed and circumscribed by applicable rules of court which have, as their overriding objective, courts dealing with cases justly and ensuring that the parties are, as far as it is practicable, on an equal footing.

Abela and others v Baadarani [2013] UKSC 44, [2013] 1 WLR 2043 considered.

8. CPR 8.13 expressly provides that an application to extend the time for service of a claim form must be made prospectively, that is, prior to expiration of the stipulated period of validity for service of the claim form or any extended period granted by the court upon application. There is no provision to apply retrospectively to extend the time for service of a claim form.

Rules 8.13 and 26.1(2)(k) of the Civil Procedure Rules 2000 considered.

9. The court's general case management power and discretion under CPR 26.1(2)(k) to extend time to comply with a rule, practice direction or order and to do so even after the time for compliance had expired, is not applicable to extend the time for service of a claim form, since the power to extend time for service of a claim form is circumscribed by CPR 8.13. However, where special circumstances were shown to exist, a court has the power under CPR 26.1(6) to wholly disapply the times lines established by CPR 8.13 for obtaining an extension of time for service of a claim form. This notwithstanding, Durant made no application to disapply the timelines in CPR 8.13. It is clear that the judge in coming to his conclusion and granting the application to dispense with service, did not consider or address the invalidity of the claim form in his reasons for decision. This he ought properly to have done and his failure to do so was a grave omission and an error of principle in the proper exercise of his discretion, thus entitling this Court to exercise its discretion afresh.

JSC VTB Bank v Alexander Katunin and another (BVIHCMAP2016/0047 delivered 18th April 2018, unreported) considered.

10. Where the evidence before the judge establishes that a defendant has not disputed that the claim form and other court documents were received by his legal advisers and were brought to his attention

by a permitted method of service within the requisite period of the validity of the claim form, a court may retrospectively dispense with service notwithstanding the subsequent expiration of the validity of the claim form (“Anderton Category 2”). In the instant matter, Durant obtained a Service Out Order providing for service of the claim form and other documents on the appellant under the Hague Service Convention in Brazil and the BVI Court issued Letters Rogatory addressed directly to the court in Brazil. This was a clear attempt to serve the claim form and other documents on the appellant in Brazil through one of the modes of service permitted under CPR 7.8. In the circumstances, it can be said that an Anderton Category 2 case arises here. It follows therefore that the judge was correct to consider whether to exercise his discretion to dispense with service on the appellant.

Rhiannan Anderton v Clwyd County Council [2002] EWCA Civ 933 applied.

11. CPR 7.8B empowers a court, in the exercise of its discretion, to dispense with service on a defendant of the claim form and statement of case where it is satisfied, on application, that exceptional circumstances have been made out. It follows therefore that a court is empowered to consider and to make an order dispensing with service on a defendant, in circumstances where, as here, there has been a clear attempt by the claimant to serve the claim form and other documents on the defendant. In the instant matter, service on the appellant in Brazil pursuant to the Hague Service Convention was being effected during the current prevailing world-wide COVID-19 pandemic, making it difficult, if not impossible, to utilise the normal diplomatic channels to effect service on the appellant in Brazil in accordance with the Hague Service Convention. Further, it is clear that the evidence before the learned judge discloses conclusively, and the appellant has not disputed, that the BVI Court Documents were received by his lawyers in Brazil and have been brought to his attention since August 2020, well before the validity of the claim form would have expired under CPR 8.12. Accordingly, the fundamental requirement of service of court process

on a defendant has been satisfied in this matter and the appellant is fully aware of the claim brought against him in the BVI proceedings in Claim No. 62 of 2020. In the circumstances, this Court concludes that the decision by the learned judge to dispense with service of the BVI Court Documents on the appellant was the correct decision and must be upheld.

Rule 7.8B of the Civil Procedure Rules 2000 considered; Commercial Bank of Dubai v 18 Elvaston Place Ltd 2020] ECSCJ No. 202 (delivered 16th June 2020) considered; Michel Dufour and others v Helenair Corporation Ltd (1996) 52 WIR 188 applied; Olafsson v Gissurarson (No.2) [2008] EWCA Civ 152 considered; Lonestar Communications Corp LLC v Kaye [2019] EWHC 3008 (Comm) considered.

12. Having found that the court was entitled to dispense with service and that the judge was correct to conclude that the test of exceptional circumstances had been met by Durant, it follows that the judge was correct not to have discharged the Freezing Order on the basis that the validity of the claim form in the substantive proceedings had expired.

Case name:

**Gaston Browne
v
Isaac Newton**

**[ANUHCVP2020/0028]
(Antigua and Barbuda)**

Date:

Thursday, 13th January 2022

Coram for
delivery of
judgment:

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

Appearances:

Appellants: Ms. Rose-Mary Reynolds holding for Mr. Anthony Astaphan, SC and Ms. Rika Bird

Respondent: Mr. Lawrence Daniels

Issues:

Civil appeal – Defamation – Libel – Defence of truth – Section 20 of the Defamation Act of Antigua and Barbuda – Qualified privilege – Whether judge erred in finding words defamatory – Whether judge erred in finding the defence of truth did not avail the appellant

Result/Order:

Held: allowing the appeal in its entirety; setting aside the decision of the learned judge; remitting the claim in relation to the first publication to be retried by a different judge of the High Court; and awarding the appellant prescribed costs in the court below and two thirds of those costs on appeal, in accordance with rules 65.5 and 65.13 of the Civil Procedure Rules 2000, that:

1. To succeed in an action for defamation, a claimant must prove the making of a statement by a defendant tending to lower the claimant in the estimation of right-thinking members of the society and the publication of that statement to a third party or parties. The words must be construed in their natural and ordinary meaning which may include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction would draw from the words.

Jones v Skelton [1963] 1 WLR 1362 applied;
Lewis v Daily Telegraph [1964] A.C. 234 applied.

2. A defendant to an action for defamation may successfully invoke the defence of truth if he can show that the imputations of the words used were true or not materially different from

the truth. Alternatively, he may succeed if he can prove that the publication taken as a whole was substantially true, if the words not proven to be true do not materially injure the reputation of the respondent having regard to the truth of the remaining imputations. However, the judge is required to assess all the evidence in making the determination of whether the defence of truth avails the defendant. In this case, the learned judge, albeit rehearsing some of the factors relied on by the appellant, which the appellant alleged were true and therefore could've assisted the judge in her determination, failed to analyse them in the context of the defence of truth. The learned judge instead attributed a criminal meaning to the word "misconduct" and determined that in its ordinary and natural meaning, the word "misconduct" imputed a criminal offence which meant that the respondent was found by an administrative or criminal investigatory body to have misconducted himself in public office and found that since there was no such finding, the words were not true nor true in substance. The learned judge therefore restricted herself to a technical and legalistic meaning of the word "misconduct" and fell into error by not making a proper assessment of whether the defence of truth was established.

Section 20 of the Defamation Act, Act No. 7 of 2015 of the Laws of Antigua and Barbuda applied; *Bonnick v Morris & others* [2002] UKPC 31 applied.

3. The assessment of the ordinary and natural meaning of a publication is a matter for the trial judge and an appellate court should only disturb such finding if satisfied that the learned judge was wrong. Where the words complained of are capable of bearing a number of good interpretations, it is unreasonable to seize upon the only bad one to give the words a defamatory sense as the ordinary reader is not presumed to be avid for scandal and would not select one bad meaning where other non-defamatory

meanings are available. Accordingly, the court must read the publication as a whole and eschew overelaborate analysis, and also, too literal an approach. In this case, the learned judge gave a preference to the imputation derived from one meaning of “extort” in the context of to obtain by means of threats or other unfair means, while discounting the non-defamatory meaning of “extortionate” and failing to consider the whole context in which the words were used. A complete reading of the publication showed that the appellant meant that the fee of US\$500,000.00 was exorbitant and unjustified. They were accordingly not capable of being defamatory of the respondent in the sense that he engaged in extortion by force, threats or other unfair means. In light of the foregoing conclusion, the need to address the defence of qualified privilege is rendered otiose.

Bonnick v Morris & others [2002] UKPC 31 applied; Halsbury’s Laws of England 4th edn., Vol. 28 applied.

Case name:

[1] Francis Chitolie
[2] Vance Chitolie
v
St. Lucia National Housing Corporation

[SLUHC VAP2020/0022]
(Saint Lucia)

Date:

Thursday, 13th January 2022

Coram for
delivery of
judgment:

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

Appearances:

Appellants: Dr. Lloyd Barnett with Mr. Weiden Daley and Dr. Synther Chitolie

Respondent: Ms. Edith Petra Jeffrey-Nelson

Issues:

Civil Appeal – Land – Whether respondent is the owner of disputed land and entitled to possession – Whether appellants and their ancestors had been in occupation of the disputed lands for over 100 years – Whether the judge wrongly concluded that the unlodged 1976 survey plan could not be used as evidence of the appellants’ occupation of the disputed land

Result/Order:

Held: dismissing the appeal, affirming the orders of the learned judge at paragraph 204 of the judgment; awarding costs in the appeal to the respondent to be paid by the appellants jointly and severally such costs to be assessed by a judge of the High Court or master at no more than two-thirds of the respondent/claimant’s costs in the court below, if not agreed within 21 days, that:

- 1. In the circumstances of this case, the learned judge erred in concluding that the unlodged 1976 Augustin Survey Plan is of no evidential value concerning the appellants’ occupation of the disputed land. It was clear from the other evidence before the judge that material facts of occupation, boundaries and monuments as referenced in the unlodged Augustin Survey Plan have been corroborated and verified by subsequent, independent and authenticated survey plans and reports, namely the McKenna Report and the Hippolyte Survey. Accordingly, the learned judge erred in not taking into account the unlodged Augustin Survey Plan as evidence of the appellants’ or Francis’**

occupation of an area of the disputed land in 1976 and the erection thereon of a house to the northern part of Parcel 227. This was cogent evidence of occupation by the appellants at least as far back as 1976 of an area of Parcel 227.

2. Notwithstanding the evidential value of the unlodged Augustin Survey Plan, there is no cogent evidence of the Chitolies' occupation of the entirety of the land comprising the disputed land. This is not borne out by the 1995 letter, the unlodged Augustin Survey Plan, the McKenna Report, the 2011 survey report of Mr. Ronald Polius, the Hippolyte Survey or the testimony of Mr. Hippolyte at trial to the effect that the Chitolies occupied the northern part of Parcel 227. Furthermore, the totality of the evidence led at trial disclosed that in 1991 the Chitolies' occupation of the disputed land extended to some 33.5 acres of the land, and they continued thereafter to expand their acts of occupation by rebuilding the wooden dwelling-house into a concrete structure and by building a fence around the area which they occupied. Moreover, on the totality of the evidence the learned judge was correct in not accepting the evidence of Jonah Chitolie that his ancestors owned and occupied the entirety of the disputed land going back several generations for over 100 years.
3. Section 27 of the LRA provides that where there is a transfer without consideration (a voluntary transfer), the transferee obtains a title to the land subject to any unregistered rights or interests to which the transferor held it. Properly construed, the 2008 Deed by which the respondent obtained title to Parcel 227, is not a voluntary transfer within the meaning of section 27. On a proper reading of the 2008 Deed, it satisfies the definition of 'consideration' under Article 917A(1) proviso (b) of the Civil Code. The said instrument was clearly for an identifiable 'cause or reason' for

entering into the contract or obligation incurred and there is no need for consideration to be monetary in nature as Article 917A(1) Proviso (b) provides that it may be either onerous or gratuitous. Accordingly, the respondent's absolute title to Parcel 227 is not subject to any unregistered rights or interest subject to which the SDC or the NDC held title to the said property, unless such rights or interests constitute overriding interests under section 28 of the RLA.

Section 27 of the Land Registration Act, Chapter 5.01 of the Laws of Saint Lucia applied; Article 917A of the Civil Code of Saint Lucia, Chapter 4.01 of the Revised Laws of Saint Lucia 2017 applied.

4. The remedy of rectification of the land register by the court pursuant to its powers under section 98 of the LRA, is available only where the mistake or fraud alleged occurred in the process of registration, including a first registration. Any failure by the recording officer to meet with Francis, even if accepted as a fact, did not amount to a failure or breach of statutory duty by him such as to render the process unfair or to lead to a mistake in the land adjudication process applicable to the original Parcel 46. There is no suggestion, and there cannot be any, that the adjudication record, when it became final, contained any error which led to the Registrar of Lands incorrectly transcribing entries onto the land register for Parcel 46. Likewise, there is no suggestion that the recording officer acted in excess of his statutory authority or that the adjudication officer acted contrary to law by failing to adjudicate rival claims to Parcel 46 or any part thereof or exceeded his statutory powers so as to render the adjudication record a nullity or patently incorrect. The appellants made no claim to the disputed land during the LRTP, whether based on documentary or possessory title. No 'mistake' was properly pleaded by the

appellants, and there could be no error, omission or mistake in the registration process such as to lead to the court's powers under section 98 of the LRA being invoked and the rectification of the land registers relating to the disputed land.

Section 23 and 98 of the Land Registration Act, Chapter 5.01 of the Laws of Saint Lucia applied; *James Ronald Webster et al v Beryl St. Clair-Fleming* [1995] ECSCJ No. 32 (delivered 8th May 1995) followed; *Sylvia Louisien v Joachim Rodney Jacob* [2009] UKPC 3 applied.

5. The appellants were required by the provisions of the LAA to claim any land in which they had an interest as owners during the LRTP. Their failure to make a claim, whether based on documentary or possessory title, meant that the title to the disputed land fell to be a recorded in the names of the person(s) who claimed it, subject to whether the title to be vested is adjudged to be absolute or provisional title. Once the adjudication record became final and absolute title to the said land vests in the proprietor, the only avenue available to a person to challenge that title is by way of an application for rectification of the land register under section 98 of the LRA, in circumstances where there has been fraud or mistake in the registration of the parcel, including its first registration. The appellants, some 34 years after the first registration of the NDC as proprietor with absolute title to Parcel 46, can no longer, by way of a defence and counterclaim, claim ownership of the disputed land and invoke the statutory remedy of rectification. The remedy of rectification pursuant to section 98 is not an alternative remedy for a party who failed to avail himself of the process of making a claim to land under the LAA or of the avenues for review and appeal provided in the said Act.

Sections 6, 8, 15, 20, 21, 23 and 24 of the Land Adjudication Act, Chapter 5.06 of the Laws of Saint Lucia applied; *Graham-Davis and Another v Charles and Others* (1992) 43 WIR 188 distinguished; *David George v Albert Guye* [2019] CCJ 19 (AJ) distinguished; *Moses Joseph and others v Alicia Francois consolidated with Matty and Others* [2015] ECSCJ No. 190 (delivered 21st August 2015) followed.

6. The conjoint effect of the LAA and LRA in Saint Lucia is that the adjudication and first registration of a parcel of land interrupts any prescriptive rights which have or were being acquired prior to first registration and, accordingly, the period of occupation prior to first registration is not to be counted or reckoned when making a defence or claim based on prescription. The appellants' failure to make a claim during the LRTP did not preserve any entitlement to maintain a claim to prescriptive title or any other right, title or interest in the disputed land after the first registration in 1987. In such circumstances, the first registration of Parcel 46 in the name of NDC as proprietor extinguished any documentary or possessory claim which the appellants had acquired or may have been in the process of acquiring based upon their actual occupation of the said land or receipt of the income from it. Any claim which the appellants make based upon occupation of and receipt of income from the disputed land prior to 1987, were and have been extinguished by the legislative effect of the LAA and LRA which required them at the time to make a claim to the land which they occupied, which they failed to do. Accordingly, the learned judge was correct to so conclude, and to also conclude that any occupational claim by the appellants would have to be reckoned from 1987.

Sections 6, 8, 16 and 18 of the Land Adjudication Act, Chapter 5.06 of the Laws of Saint Lucia applied; Sections 23(b), 27, 28(f)

and (g) of the Land Registration Act, Chapter 5.01 of the Laws of Saint Lucia applied; Moses Joseph and others v Alicia Francois consolidated with Matty and Others [2015] ECSCJ No. 190 (delivered 21st August 2015) followed.

7. An interest acquired after first registration of land in Saint Lucia under the LRA may constitute an overriding interest. This includes rights acquired or in the process of being acquired, such as the rights of persons in actual occupation or receipt of income from the land. Therefore, though the unlodged Augustin Survey Plan was cogent evidence that the appellants and, in particular Francis, had been in occupation of at least part of the disputed land as far back as 1976, they are precluded from relying on any possession prior to the LRTP in the 1980s. It follows then that the occupation of the disputed land or part thereof by the appellants after 1987 amounts to a period of 19 years up to the commencement of the 2006 claim and 21 years up to the commencement of this claim in 2009, both of which periods fall short of the 30-year period proscribed in Article 2103A of the Civil Code necessary to acquire prescriptive title. Accordingly, the appellants' claim to a prescriptive title to the disputed land fails and the learned judge was correct to so find.

Article 2103A of the Civil Code of Saint Lucia, Chapter 4.01 of the Revised Laws of Saint Lucia 2017 considered; Section 28(f) and (g) of the Land Registration Act, Chapter 5.01 of the Laws of Saint Lucia applied; Moses Joseph and others v Alicia Francois consolidated with Matty and Others [2015] ECSCJ No. 190 (delivered 21st August 2015) followed; Ulina Jennifer George v Hilary Charlemagne [2003] ECSCJ No. 33 (delivered 3rd April 2003) considered; Ferdinand James v Planviron (Caribbean Practice) Limited and

Another [2019] ECSCJ No. 336 (delivered 16th October 2019) followed.

8. The judge was correct in declining to consider the appellants' reliance upon the 10-year limitation period in Article 2112 of the Civil Code as a defence to the respondent's claim as it was only raised for the first time in their submissions at the conclusion of trial and not at case management conference as the rules require.
9. The appellants having failed to establish a valid claim to the disputed land whether based upon documentary title or possession, it follows that the learned judge was correct and there is no basis upon which this Court ought to overturn the decision in the court below dismissing the amended counterclaim and all reliefs sought thereby.

Case name:

[1] Karen Allen
[2] Steven Fagen
[3] Marie Carole Lidbetter
v
[1] Registrar of Companies
[2] Financial Services Commissioner

[MNIHCVAP2019/0006]
(Montserrat)

Date:

Friday, 14th January 2022

Coram for
delivery of
judgment:

The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal [Ag.]
The Hon. Mr. Dexter Theodore, Justice of Appeal [Ag.]

Appearances:

Appellants:

In person

Respondents: Ms. Renee Morgan

Issues: Commercial appeal — Disqualification of directors — Sections 67, 148A(3), 476, 500, 501, 518 and 519 of the Companies Act — Article 15 of the Institute of Chartered Accountants of the Eastern Caribbean Agreement Act — Part 32 of the Civil Procedure Rules 2000 — Whether the appointment of the inspector was contrary to the laws of Montserrat — Whether the learned judge erred by accepting the inspector's report although it was inadmissible and not in conformity with Part 32 of the Civil Procedure Rules 2000 — Whether the learned judge erred by accepting the inspector's findings although the appellants had produced prima facie evidence that refuted the largely hearsay evidence contained in the inspector's report

Result and reasons: Held: allowing the appeal in part to the extent that the order of the learned judge is varied and ordering that the second and third appellants, without the prior leave of the court, may not, for four and three years respectively, be directors of Montobacco Limited, Emerald Metal Co. Limited or 888 International Limited, setting aside the disqualification order made against the first appellant and making no order as to costs, that:

1. Neither section 518 nor section 519 of the Companies Act requires the inspector appointed by the court to be a chartered accountant or an accountant at all. Furthermore, Article 15 of the Institute of Chartered Accountants of the Eastern Caribbean Agreement Act is not violated by someone merely holding himself out to be an accountant, as distinct from a chartered accountant. When making an appointment under the Companies Act the judge should appoint whomsoever he deems qualified given the scope of the assignment, which will vary from case to case. The learned judge had a discretion to exercise and an appellate court will not interfere with a trial judge's exercise of his discretion unless it can be shown that he exceeded the generous ambit within which reasonable disagreement is possible and was therefore clearly wrong. In the instant case the tasks to be undertaken seemed reasonably to call for the

expertise of an accountant and a fraud examiner and the appellants have not satisfied this Court that the learned judge erred in appointing the inspector, or that the inspector broke the law by accepting the appointment.

Sections 518 and 519 of the Companies Act Cap 11.12, Revised Laws of Montserrat 2019 considered; Article 15 of the Institute of Chartered Accountants of the Eastern Caribbean Agreement Act Cap 16.07, Revised Laws of Montserrat 2019 considered.

2. The inspector's report was obtained pursuant to relevant statutory powers to order an investigation and therefore the learned judge was entitled to admit the report of the inspector notwithstanding any hearsay, opinion evidence or findings of fact contained in it. Moreover, the report of the inspector is not the report of an expert as defined by the CPR and was not therefore required to be compliant with CPR Part 32.

Section 67 of the Companies Act Cap 11.12, Revised Laws of Montserrat 2019 considered; Secretary of State for Business Enterprise and Regulatory Reform v Aaron and others [2008] EWCA Civ 1146 followed; Hoyle v Rogers and another [2014] 3 All ER 550 followed; Rule 32.1(2) of the Civil Procedure Rules 2000 applied.

3. The learned judge had not given the inspector's report the limited weight that a report which is not compliant with CPR Part 32 should have received. Furthermore, the learned judge used the 'need for disqualification to protect the public' test in his determination, however, the test of "unfitness" is whether the director's conduct, viewed cumulatively and taking into account any extenuating circumstances, had fallen below the standards of probity and competence appropriate for persons fit to be directors of companies.

Hoyle v Rogers [2014] 3 All ER 550 followed; Re Barings plc and others (No. 5), Secretary of State for Trade and Industry v Baker and others (No. 5) [2000] 1 BCLC 523 followed; re Grayan Building Services Ltd

(In Liquidation) [1995] 3 WLR 1 followed; Section 67 of the Companies Act Cap 11.12, Revised Laws of Montserrat 2019 considered.

4. While the judge considered the first appellant's conduct troubling, he did not ascribe to her the sufficiently high degree of incompetence that should warrant disqualification. He also found that she had acted without dishonesty. In those circumstances, the judge was plainly wrong to visit disqualification upon the first appellant. It was also an error to disqualify all of the appellants from holding office as directors of 'any company' in Montserrat where section 67(1) of the Companies Act only restricts disqualification to the management of 'the company' concerned. Notwithstanding those errors, the learned judge did find that there was an element of dishonesty in the dealings of the second and third appellants, and there was ample evidence upon which he could have made such a finding. Therefore, his decision to disqualify them will not lead to any miscarriage of justice, so long as their disqualification is restricted to Montobacco Limited, Emerald Metal Co. Limited and 888 International Limited.

Re Barings plc and others (No. 5), Secretary of State for Trade and Industry v Baker and others (No. 5) [2000] 1 BCLC 523 followed; re Grayan Building Services Ltd (In Liquidation) [1995] 3 WLR 1 followed; Section 67 of the Companies Act Cap 11.12, Revised Laws of Montserrat 2019 applied; Shankar Khushalani et al v Lindsay Mason (trading as Tropical Home Designs Architectural & Construction Services) GDAHCVAP2016/0017 (delivered 11th June 2021, unreported) followed.

APPLICATIONS AND APPEALS

Case Name:

Candey Limited

v

Russell Crumpler & Others

**[BVIHCMAP2020/0021]
(Territory of the Virgin Islands)**

Date: Monday, 10th January 2022

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal [Ag.]

Appearances:

Applicant: Mr. Muhammed Haque QC, with him, Mr. Olliff Cooper and Mr. Robert Nader

Respondent: Mr. Andrew Willins for liquidators

Issues: Application for conditional leave to appeal to Her Majesty in Council - Article 3(2)(a) of the Virgin Islands (Appeals to the Privy Council) Order 1976 - Whether proposed appeal to Her Majesty in Council raises question of great general or public importance

Type of Order: Oral decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The motion is dismissed.
2. Costs to the respondent to be assessed by the Commercial Court, if not agreed within 21 days of the date of this order.

Reason: The applicant, Candey Limited (“Candey”), seeks by way of motion, conditional leave to appeal to Her Majesty in Council from the decision of the Court of Appeal contained in its judgment delivered on 21st September 2021. That judgment dealt with the question, whether Candey’s notice of appeal was to be struck out as a nullity, Candey not having obtained permission of the Court to appeal. The Court of Appeal’s judgment also refused to grant to Candey an extension of time for seeking leave to appeal, applying

the well-established principles guiding the exercise of the Court's discretion when considering whether or not to grant an extension of time.

In respect of the strike out of the notice of appeal as a nullity having been filed without leave, the applicant says that this raises a point of great general or public importance or a point which should be otherwise submitted to Her Majesty in Council pursuant to article 3(2)(a) of the Virgin Islands (Appeals to the Privy Council) Order 1976. The same is said with regard to the refusal to extend time to seek leave to appeal.

The Court was of the unanimous view that the appeal raises no point of great general or public importance or which otherwise in the opinion of this Court ought to be submitted to her Majesty in Council. Furthermore, the Court was of the view that there is really no qualitative difference in the test of determining whether an order is final or interlocutory and the way it has been applied, either in the cases of Nigel Hamilton Smith v Alexander Fundora et al ANUHCVP2010/0031 (delivered 31st August 2010, unreported); Nam Tai Electronics Inc v David Hague and another BVIHCVP2003/0012 (delivered 21st September 2004, unreported) or Phoenix Group Foundation v Jackson BVIHCMAP2020/0012 & BVIHCMAP2020/0019 (delivered 26th February 2021, unreported) and the principle as codified in the Civil Procedure Rules 2000.

There is nothing unsettled about how the Court in this jurisdiction applies the test of whether a judgment or order of the Court is final or interlocutory. Further, as it relates to the extension of time, the principles which are applied and the factors which the Court would consider are so well settled as to be considered trite. The Court adopts the learning as set out in the seminal case, in this jurisdiction, of Martinus Francois v The Attorney General [2004] ECSCJ No. 126 (delivered 7th June 2004):

“Leave under this ground [section 2(3)(a)] is normally granted when there is a difficult question of law involved. In construing the phrase “great general or public

importance”, the Court usually looks for matters that involve a serious issue of law; a constitutional provision that has not been settled; an area of law in dispute, or, a legal question the resolution of which poses dire consequences for the public.”

In this case, this application does not come anywhere near meeting the test as set out and formulated in Martinus Francois and several other cases. The Court also followed and adopted the ruling that was set out by the Court of Appeal in its ruling dealing with the Phoenix Group motion for leave to appeal to the Privy Council which dealt specifically with a matter on the subject of liquidation proceedings. Furthermore, the Court was also of the view that the matters raised herein are procedural. It is well settled that this Court is best placed to interpret and apply the procedural rules of the court. This principle was emphasised in Pacific Wire & Cable Company Limited v Texan Management Limited and others BVIHCVAP2006/0019 [2008] ECSCJ No. 109 (delivered 6th October 2008) and Marinor Enterprise Limited v First Caribbean International Bank (Barbados) LTD DOMHCVAP2013/2003 (delivered 6th July 2016). For the same reasons, the Court is not in any uncertainty as to how the rules and the principles in respect of the matter raised herein, that is, whether leave to appeal is required or the principles for granting an extension of time, are to be applied. Therefore, there is no basis for holding the view that the matter can benefit from a referral to Her Majesty in Council for guidance.

Case Name:

[1] Emmerson International Corporation

[2] Mikhail Abyzov

v

Viktor Vekselberg

[BVIHCMAP2020/0011]

[1] Emmerson International Corporation

[2] Mikhail Abyzov

v

[1] Viktor Vekselberg
[2] Gothelia Management Limited
[3] Integrated Energy Systems Limited

[BVIHCMAP2021/0004]

(Territory of the Virgin Islands)

Date: Monday, 10th January 2022

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal [Ag.]

Appearances:

Applicant: Mr. Philip Marshall QC, with him, Miss Colleen Farrington and Mr Ajay Rattan

Respondent: Mr. David Quest QC, with him, Miss Arabella di Iorio, Mr. Michael Bolding and Mr. Shane Quinn for the respondent in claim no. BVIHCMAP2021/0011

Mr. David Quest QC, with him, Miss Arabella di Iorio, Mr. Michael Bolding and Mr. Shane Quinn for the first and second respondents in claim no. BVIHCMAP2021/0004

The third respondent in claim no. BVIHCMAP2021/0004 unrepresented

Issues: Application for Conditional leave to appeal to Her Majesty in Council - Article 3(2)(a) of Virgin Islands (Appeals to the Privy Council) Order 1976 - Whether proposed appeal to Her Majesty in Council raises question of great general or public importance

Type of Order: Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The motions are dismissed.

2. Costs to the respondent to be assessed by the Commercial Court, if not agreed within 21 days of the date of this order.

Reason:

The applicants seek conditional leave to appeal to Her Majesty in Council against the judgments of the Court of Appeal rendered in what has been termed an appeal against the “Russian judgment” delivered on 8th October 2021 and an appeal against the “Cyprus judgment” delivered on 6th October 2021 where the Court upheld the decision of the trial judge in refusing to grant anti-suit injunctions whether framed along the lines of the order made in the case of Munib Masri v Consolidated Contractors International Company (UK) Ltd & Anor (No 3) [2009] QB 503 (“the Masri style order”), in respect of the Russian judgment and in relation to the Cyprus proceedings. The motion is brought in reliance of article 3(2)(a) of the Virgin Islands (Appeals to the Privy Council) Order 1967 which allows this Court to grant conditional leave to appeal where the Court is of the opinion that the question involved in the appeal is one that by reason of its great general or public importance or otherwise ought to be submitted to Her Majesty in Council.

The Court read the applications and heard counsel for the parties on the question whether the matters raised in the appeal involve questions of great general or public importance which should be submitted to Her Majesty in Council. The Court was of the opinion that no such question rising to the level of great general or public importance are raised in the matters. The Court reiterated and adopted the observations made in the case of Marinor Enterprise Limited v First Caribbean International Bank (Barbados) LTD DOMHCVAP2013/2003 (delivered 6th July 2016) at paragraphs 6 and 7 of the decision:

“6. As to what may constitute a question of ‘great general or public importance’ has been the subject of much judicial authority across the region. Reference need be made only to Martinus Francois v The Attorney General SLUHCVP2003/0037 (delivered 7th June 2004, unreported) a decision of the Eastern

Caribbean Court of Appeal, for the authoritative pronouncement on the approach to be adopted by the Court in construing the phrase 'great general or public importance'. There it was stated that:

'Leave under this ground is normally granted when there is a difficult question of law involved. In construing the phrase 'great general or public importance', the Court usually looks for matters that involve a serious issue of law; a constitutional provision that has not been settled; an area of law in dispute, or, a legal question the resolution of which poses dire consequences for the public.'

This pronouncement has stood the test of time and has informed the approach of the Court in many subsequent decisions in construing this phrase."

"7. The Jamaica Court of Appeal in respect of a similar phrase in its laws, and predating this Court's decision in Martinus Francois, in Dr. Dudley Stokes and Gleaner Company Limited v Eric Anthony Abrahams (1992) 29 JLR 79 held that the principle which guides the court in deciding whether to grant leave is that it is not enough that a difficult question of law arose, it must be an important question of law; further, the question must be one not merely affecting the rights of the particular litigants, but a decision which would guide and bind others in their commercial and domestic relations.

The Court considered all the matters including the points raised in respect of the Masri style order, the point on fresh evidence and its admission and the question of best endeavours and was not satisfied that any of them reached the level of issues being of great general or public importance in the sense to which the Court looks. The Court did not doubt the importance to the parties and the applicants but maintained that the points did not amount to questions which affect

the rights of others and would be affecting others in relation to their commercial and domestic relations generally.

Case Name:

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

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

Date:

Tuesday, 11th January 2022

Coram:

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

Appearances:

Applicant: Mr. Adrian Francis and Ms. Akesha Adonis

Respondent: Mr. Peter Ferrer and Mr. Richard Parchment

Issues:

Interlocutory appeal – Freezing order – Purpose of freezing order – Appellate interference in trial judge’s exercise of discretion – Whether learned judge failed to apply well established legal principles applicable to the determination of freezing injunctions and ancillary disclosure applications – Risk of dissipation – Failure to apply correct legal test – Whether learned judge erred in finding that there was a risk of dissipation - Delay – Whether learned judge failed to consider respondents’ delay in assessment of risk of dissipation – Appellate interference in trial judge’s findings of fact – Whether learned judge made erroneous findings of fact – Damages – Not entitled to security for claim where it is just a claim for damages

Type of Order: N/A

Result / Order: IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name: Oscar Trustee Limited (as trustee of the Chloe Trust
v
MBS Software Solutions Limited

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

Date: Thursday, 13th January 2022

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

Appearances:

Applicant: Mr. Mungo Lowe

Respondent: Mr. Sharif Shivij, QC

Issues: Application for leave to appeal – Exercise of discretion – Forum challenge application – Respondent incorporated in the Territory of the Virgin Islands - Whether learned judge erred in exercise of discretion in concluding that claim below had no connection with the BVI beyond being place of incorporation – Whether respondent discharged its burden of demonstrating

that Hong Kong is clearly and distinctly the more appropriate forum – Whether there was any proper basis on which to decline jurisdiction over the claim – Whether judge erred in concluding that medium weight should be ascribed to the Hong Kong governing law clause in the underlying contract – Convenience of witnesses – Whether judge erred in attaching too much weight to location of witnesses residing in Australia – Costs – Whether judge erred in ordering applicant to pay costs of applications

Type of Order: Oral decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. Leave to appeal is granted.
2. The notice of appeal shall be filed in accordance with the rules of court.

Reason: The Court was of the view that the applicant has demonstrated that it has arguable grounds of appeal.

Case Name: Glanville Penn
v
The Attorney General
[BVIHCVAP2017/0009]

(Territory of the Virgin Islands)

Date: Friday, 14th January 2022

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

Appearances:
Appellant: Mr. Sydney Bennett, QC

Respondent: Ms. Jo-Ann Williams-Roberts

Issues: Civil appeal - Award of damages - Whether the award of damages to the appellant grossly inadequate - Landlord and tenant - Unreasonable notice of termination of tenancy - Damages for unreasonable notice - Whether 6 months' notice was reasonable notice of termination of the appellant's tenancy - Whether 12 months' notice would have been a more reasonable period of notice - Whether the award of damages for the unreasonable period of notice was too low - Legitimate expectation - Whether the issue of legitimate expectation arises in light of both parties' admission that damages for unreasonable notice are due and owing - Tender Agreement - Whether the government was in breach of the tender agreement owing to its failure to deliver up the premises to the appellant for final outfitting and operation of the concession from the new terminal building - Whether the government is liable in damages to the appellant for this breach of the tender agreement - Whether the appellant was owed damages for loss of profits owing to the government's breach of the tender agreement - Economic duress - Whether the threat to put the passenger catering concession back out to public tender amounted to unlawful coercion by the government against the appellant - Whether the appellant was under economic duress when he signed the Deed of Licence in 2005 - Whether the award of damages for the non-functioning dishwasher was too low - Whether the learned judge erred in finding that the appellant was not entitled to exclusivity in relation to the operation of the passenger catering concession - Whether the learned judge erred in declining to award damages to the appellant for the government's wrongful increase in the rent or licence fee payable in respect of the passenger catering concession - Whether the learned judge erred in finding that there was no meeting of the minds in relation to the 10 year lease to be granted to the appellant

Type of Order: N/A

Result / Order:

IT IS HEREBY ORDERED THAT:

Judgment is reserved.