

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING
VIDEOCONFERENCE

MONTSERRAT
25th January - 29th January 2021

JUDGMENT

Case Name:

Bennette Roach

V

**National Development Foundation
Montserrat Limited**

**[MNIHCVAP2018/0002]
(Montserrat)**

Date:

Monday, 25th January 2021

Coram:

**The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of
Appeal [Ag.]**

Appearances:

Appellant: Mr. Warren Cassell

Respondent: Mr. Justin Simon, SC

Issues:

**Civil appeal — Debt recovery — Limitation of actions —
Montserrat Limitation Act — Revival of cause of action
— Whether question of revival of cause of action having
not been pleaded in the court below can be determined
on appeal — Leave to appeal — Whether the Court of
Appeal has jurisdiction to hear appeals from
interlocutory orders without leave first being granted —
Disturbing of a trial judge's findings of fact by an
appellate court — Accrual of a cause of action for debt
recovery — Whether learned judge erred in refusing
application to stay claim on the basis that limitation
period had expired**

**Result /
Order:**

IT IS HEREBY ORDERED THAT:

Held: dismissing the appeal, affirming the decision in the court below, and ordering costs to the respondent be assessed by a master of the High Court, if not agreed between the parties within 21 days of delivery of this judgment, at a figure not exceeding two-thirds of the assessed costs in the High Court, that:

- 1. A claimant's failure to plead an issue in the court below precludes the Court of Appeal from determining that issue at trial and the claimant from raising that issue on appeal. Accordingly, as the respondent, the claimant in the court below, did not plead revival of the cause of action as part of its claim, the court below was not entitled to address it and this Court is also not obliged to consider that issue or submissions thereon in the appeal.**

East Caribbean Flour Mills Limited v Ormiston Ken Boyea [2007] ECSCJ No. 110 considered; McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775 applied; George Knowles (as executor and beneficiary of the Estate of Oliver Knowles) v Elaine Knowles [2006] ECSCJ No. 94 applied; Marie Makhoul v Cicely Foster and another [2015] ECSCJ No. 34 applied.

- 2. The Court of Appeal has no jurisdiction to hear an appeal from an order made in interlocutory proceedings if no leave to appeal that order has been obtained. In so far as there may have been an interlocutory application to strike out the respondent's claim in the court below, leave would have been required to appeal that order as this would have been an interlocutory order. No such leave being obtained, the Court of Appeal does not have jurisdiction to hear an appeal from that order. Similarly, the appellant's challenge to**

an order allowing the admission at the trial of affidavits filed in relation to an interlocutory application fails as no leave was sought to appeal against that order.

Marvin Roy Dey v The Attorney General of Saint Lucia [2008] ECSCJ No. 216 applied.

- 3. An appellate court is slow to disturb a trial judge's findings of fact and the appellant has not shown any basis for this Court to depart from the lower court's finding that the payments made by the appellant to the Credit Union were not intended to be forwarded to the respondent as payments on the debts owed to the respondent.**
- 4. It is clear that an agreement has to be considered on its own terms to determine when the cause of action accrues. Although an acceleration-type clause which calls in an entire debt on the occurrence of a specific occurrence can have the effect of causing a cause of action to accrue prior to the stated term of the contract, there was no acceleration clause in the loan agreements between the parties. The respondent's cause of action would therefore have accrued no earlier than March 2011 when the appellant stopped paying altogether or more likely when the debt was demanded in October 2012. In the circumstances, the learned judge did not err in concluding that the claim was not statute barred.**

Reeves v Butcher [1891] 2 QB 509 distinguished; Lakshmijit s/o Bhai Suchit v Faiz Mohammed Khan Sherani (as administrator for the estate of Shabhaz Khan, dec'd) [1974] AC 605 considered; Clifford Robertson v HM Bhola & Co Ltd. [2012] ECSCJ No. 202 distinguished.

APPLICATIONS AND APPEALS

Case Name: Vaughn Fenton
v
The Commissioner of Police

**[MNIMCRAP2020/0001]
(Montserrat)**

Date: Monday, 25th January 2021

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

Appearances:

Appellant: Mr. Garth Sergeant

Respondent: Mr. Oris Sullivan, Director of Public Prosecutions

Issues: Civil Appeal – Application for adjournment

Type of Order: Adjournment

Result / Order: Based on the application filed by the learned Director of Public Prosecutions for an adjournment and for leave to file written submissions, it is hereby ordered that:

1. Leave is granted to the learned Director of Public Prosecutions to file and serve written submissions together with authorities on or before Wednesday, 27th January 2021 at 10:00am.
2. The hearing of the appeal is adjourned to Thursday, 28th January 2021 at 9:00am.

Reason: Counsel for the respondent requested a short adjournment to facilitate the filing of submissions. There was no opposition by the appellant.

Case Name: [1] Providence Estate Limited
[2] Owen Rooney
v
[1] Clifton Cassell
[2] Clifford West

[MNIHCVAP2016/0012]
(Montserrat)

Date: Monday, 25th January 2021

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

Appearances:

Appellants: Mr. Owen M. Rooney

Respondents: Mr. Kharl Markham

Issues: Civil Appeal – Application for leave to appeal to Her Majesty in Council made out of time – Section 4 of Montserrat (Appeals to the Privy Council) Order 1967

Type of Order: Oral decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The application for leave to appeal to Her Majesty in Council is dismissed.
2. No order as to costs.

Reasons: Before this Court is an application, by way of motion, for leave to appeal to Her Majesty in Council. It relates to an

order of the Court of Appeal which was granted by the Court of Appeal on 27th November 2018.

The applicants are aggrieved with the order of the Court of Appeal and they have filed an application for leave to go to Her Majesty in Council on 9th July 2020. The Court noted that the rules of the Privy Council are clear, and section 4 of the Montserrat (Appeals to the Privy Council) Order 1967 indicates that an application shall be made within 21 days of the decision from which leave to appeal is being sought. In so far as the applicants have filed their motion for leave in excess of 540 days of the date of the decision of the Court of Appeal, they are out of time and outside of the rules of the Privy Council Order and this Court has no jurisdiction to entertain the application which is filed in excess of 21 days.

Case Name: **David Dorsett**
v
The Attorney General
[MNIHCVAP2020/0026]
(Montserrat)

Date: **Monday, 25th January 2021**

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

Appearances:
Appellant: **Mr. David Dorsett**
Respondent: **Ms. Renee Morgan**

Issues: **Interlocutory appeal – Appointment of attorney amicus curiae – Application to strike out notice of appeal – Whether appeal rendered academic since order of judge was set aside – Whether issue of whether the court can appoint an attorney amicus curiae against his will is one of great general public importance**

Type of Order:

Oral decision

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The application to strike out the application is dismissed.**
- 2. Costs on the application shall be costs on the appeal.**

Reason:

This is an application to strike out a notice of appeal filed by Dr. David Dorsett. In his notice of appeal, Dr. Dorsett complains, that the issue raised in the court below, being whether the court can appoint an attorney-at-law amicus curiae against his will, was not determined by the court below. The applicants contend, in their submissions, that the appeal is now academic as the order appointing Dr. Dorsett has since been set aside by the learned judge, and further that the issue raised by Dr. Dorsett in seeking the declaration did not arise based on the facts as found by the learned trial judge, and therefore this Court should strike out the appeal.

Dr. Dorsett in his response, has urged the Court to find that the matter is one of general importance, that the issue which was before the judge was not determined and that this Court should hear the matter and make a determination that it is a matter of great public importance. The Court having considered both the oral and written submissions of both sides and was of the view that in view of the issue that arises on the appeal – whether the court can appoint an attorney amicus, against his will, is one of great importance, that there is a public interest element, that a ruling from this Court will clarify this issue and this is a matter that will be of interest to the bar and the wider public. Accordingly, the application to strike out the notice of appeal was dismissed.

Case name:

**Royal Bank of Canada
v
Demornea Armstrong**

**[MNILTAP2019/0001]
(Montserrat)**

Date: Tuesday, 26th January 2021

Coram: The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Margaret Price-Findlay, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. Jean Kelsick

Respondent: Khari Markham

Issues: Civil appeal – Labour dispute – Labour Tribunal –
Sections 23 and 24 of the Labour Code – Jurisdiction –
Whether the Tribunal was lawfully constituted in
accordance with the applicable legislative provision at
the hearing of the labour dispute

**Type of
Order:** N/A

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

Decision is reserved.

Case name: Jonathan Daly
v
John Gage T/a Gages Car Rental

**[MNIMCVAP2018/0001]
(Montserrat)**

Date: Tuesday, 26th January 2021

Coram: The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
[Ag.]

Appearances:

Appellant: In person

Respondent: In person

Issues: Magisterial civil appeal – Damages – Quantification of damages – Findings of fact – Whether the magistrate erred in the assessment of damages

Type of Order: Oral decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.
2. The decision of the magistrate is affirmed.
3. No order as to costs.

Reason: The Court having read the record and unfortunately not having any written submissions by either party but having heard from the appellant and the court having formed the view that there was no need to call on the respondent, the court was of the view that there was no basis to interfere with the decision of the magistrate.

Case Name: [1] Rovika Inc.
[2] Manish Valechha
[3] Dennison Daley
v
[1] Attorney General
[2] The Office of the Premiere
[MNIHCVAP2020/0004]
(Montserrat)

Date: Wednesday, 27th January 2021

Coram: The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
[Ag.]
The Hon. Mr. Dexter Theodore, Justice of Appeal [Ag.]

Appearances:

Appellants: Mr. Farid Scoon

Respondents: Ms. Renee Morgan

Issues: Interlocutory appeal – Appeal from refusal of application for extension of time to file defence – Appeal from entry of judgment in default of defence – Failure to file defence within the prescribed period – Whether learned master considered relevant factors in exercising her discretion – Rule 26.1(2)(k) of Civil Procedure Rules 2000 – Whether learned master erred in law in granting the default judgment – Rules 12.5 and 12.10(4) of the Civil Procedure Rules 2000

Type of Order: Oral judgment

Result / Order: IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.
2. Costs to the respondent in the sum of \$1500.00.

Reason:

In this interlocutory appeal the appellants, Rovika Inc., Manish Valechha and Dennison Daley, appeal against the refusal of the learned master to grant their application for an extension of time to file a defence and against the entry of default judgment against them. The application for an extension of time was made on 5th November 2018, approximately 12 days after the respondents had filed an application for default judgment on 24th October 2018. The appellants contend that no, or no sufficient regard was paid to the to the overriding objective and the fact, they contend, that they had a good defence.

Issues for Consideration

Mr. Farid Scoon, learned counsel for the appellants identified the following issues:

- (1) What is the threshold to be crossed to set aside the ruling of the learned master;
- (2) What criteria must be satisfied on an application for an extension of time when no sanction has been imposed by the rules, order or direction of the court for non-compliance;
- (3) Was the learned master plainly wrong to refuse the appellants' application for an extension of time to file a defence; and
- (4) Did the learned master err in granting the respondents' request for default judgment.

This Court accepts that these are the issues to be addressed but considers that they may be all crystallised into one overarching issue which is, whether the learned master erred in the exercise of her discretion.

Background

I propose to state the relevant background in order to provide the relevant context of the appeal.

On 27th July 2018, the first respondent filed a without notice application against the first appellant, intituled MNIHCV2018/0032, seeking various reliefs.

On 3rd August 2018, the court granted the relief sought, including an interim injunction, and adjourned the matter to 13th September 2018 for further consideration.

On 30th August 2018, the court office issued a notice for the hearing of MNIHCV2018/0032 on 13th September 2018.

On 12th September 2018, the first respondent filed a claim against the appellants intituled MNIHCV2018/0037, alleging breach of copyright, to which the appellants filed, in person, an acknowledgement of service on 17th September 2018.

The appellants were represented by local counsel on 17th September 2018 when the court heard, and refused, an application to discharge the injunction. On that day, the appellants were served with the claim form and accompanying documents which had been filed in MNIHCV2018/0037.

The appellants failed to file a defence within the prescribed period and the respondents made a request for judgment on 22nd October 2018, followed two days later by a notice of application for judgment to be entered against the appellants, on terms to be determined by the court.

On 5th November 2018, the appellants filed an application for an extension of time to file their defence, which was granted. A defence was filed on 9th November 2018.

The respondents applied for leave to appeal against the order granting leave, which was refused by the learned judge, whose decision was overturned on appeal. On 3rd June 2019, this Court ruled that the application for the extension of time for the present appellants to file their defence and the application for default judgment, be remitted to the learned master for determination, who was also to determine the order in which the applications were to be heard.

In due course, the learned master decided to hear the application for extension of time first to be followed by the application for default judgment.

On 3rd February 2020, the learned master ruled that the application for extension of time having been made some 19 days after the time for filing a defence had expired and 13 days after new counsel had been officially retained in the matter and without any satisfactory explanation for the delay had not been made promptly.

The learned master considered that the difficulty in obtaining appropriate counsel was not a good explanation for the delay because: (i) the appellants had confirmed that they did in fact have legal (albeit junior) counsel from Trinidad and Tobago visiting Montserrat as early as 5th October 2018, which was 11 or so days before the deadline for filing their defence; (ii) the perceived complexity of the claim and the need for experienced counsel should have triggered an early request to extend the timelines for a defence or, a formal application for same; and (iii) the principles attendant upon an application for an extension of time are not complex or novel (and presumably here the learned master was reasoning that such an application could have been handled by junior counsel while the search continued for appropriate senior counsel).

The learned master rejected the submission that the respondents would suffer no prejudice if the extension were granted, ruling that ‘the prejudice is innate in that the application is an attempt to retard the due consideration and possible granting of judgment in favour of the Claimants’.

The learned master considered that the appellants could not treat the rules “scantily and expect favourable consideration of the Court’s discretion”.

The learned master concluded her consideration of the application for extension of time by indicating that she had also considered the other applicable principles including whether the appellants had complied with other rules and directions and whether the failure was intentional but considered the factors of length of delay,

reason for delay and degree of prejudice to carry more weight. The learned master finally indicated that it was not enough for the appellants to submit that they may have a good defence.

On the application for default judgment, the learned master ruled that in accordance with rule 12.10(4) of the Civil Procedure Rules, 2000 (“CPR”), when a request for default judgment had been made and the claim is for a remedy other than for money or goods the court had no discretion but to enter a default judgment when no defence had been served at the time of the making of the request for judgment.

As to the first issue, it is settled law that:

“An appeal against the exercise of judicial discretion will not be allowed unless the appellate court is satisfied (1) that in the exercise of the discretion the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of error, in principle the judge's decision exceeded the generous ambit within which reasonable disagreement is possible and, accordingly, the decision may be said to be clearly or blatantly wrong.”

Appellant's Submissions

The appellants relied on the decision of the Court of Appeal in Trinidad and Tobago in *Dr. Keith Rowley v Anand Ramlogan* where it is stated that the factors stated, in that country's equivalent of our CPR 26.8, the overriding objective and the question of prejudice should be taken into account when determining whether to extend time. The court there ruled that it was for the court to attach such weight to each factor, having regard to the circumstances of the case bearing in mind that not all the factors will be relevant to every case and the list of factors is not exhaustive.

Learned counsel for the appellants, relied on *BBL Limited et al v Canouan Resorts Development Limited et*

al SVGHCVAP2019/0006 (delivered 12th January 2021, unreported) in his oral arguments to the court and stressed that BBL Limited was authority for the submission that the court has a wide discretion even after time has expired with a view to giving effect to the overriding objective.

In BBL Limited this Court held, at paragraph 57 of the judgment:

“ Under CPR 26.1(2)(k) the court has a wide discretion to extend the time to comply with any order, rule or practice direction, and to do so even where the application to extend time was made after the time for compliance has expired. As Pereira JA (as she then was) very helpfully stated at paragraph 12 of the judgment in Carleen Pemberton v Mark Brantley SKBHCVAP2011/0009 (delivered 14th October 2011, unreported), this discretion is not to be exercised in a vacuum, but in accordance with well-established principles, and with a view to giving effect to the overriding objective. It is trite that in determining an application to extend time or to vary the time imposed in an order of the court for compliance, the court must consider (i) the length of the delay, (ii) the reasons for the delay, (iii) any prejudice to the respondent; and (iv) whether the applicant’s pleaded case is, in any event, a hopeless one - the chances of success.²¹ However, these four considerations or factors, which to some extent are reflected at CPR 26.8(2), are not exhaustive of the matters to be taken into account by the court in determining an application to extend or to vary time for compliance.”

Learned counsel for the appellants considered that the case provided a gloss on the Carleen Pemberton case, in the sense that, according to learned counsel, BBL Limited went further than Carleen Pemberton by declaring that the court was to seek to give effect to the overriding objective, while considering the criteria established by John Cecil Rose v Anne Marie Uralis Rose SLHCVAP2003/0019 (delivered 22nd September 2003, unreported). Learned counsel submitted that while in Carleen Pemberton Pereira JA (as she then was) stated that the factors enumerated in Rose v Rose were not exhaustive, the learned Justice of Appeal did not link the factors outlined in Rose v Rose with the overriding

objective, as learned counsel submitted, had been done in BBL Limited.

Learned counsel for the appellants submitted that in situations where no sanction applied, or if one applied it had not yet bitten, the court ought to be less stringent in its deliberations especially where it was dealing with a situation where the parties have not yet had their day in court unlike the situation where, as in *Rose v Rose and Carleen Pemberton* the court was considering an application for an extension of time to file a notice of appeal.

Mr. Scoon urged that a delay of 20 days was not inordinate and placed much emphasis on the fact that the proceedings were in what he called a state of confusion which, learned counsel argued, the learned master did not adequately consider.

Learned counsel for the appellants further submitted that the learned master did not consider the injunction which had been granted in the claim intituled MNIHCV2018/0032. Mr. Scoon submitted that the respondents' rights were protected by the injunction and this ought to have been considered by the learned master. However, he was unable to provide the Court with any authority on that submission.

Learned counsel submitted that the learned master had acknowledged that the appellants might have had a good defence, but he took issue with her ruling that this did not override the fact that the reasons for the delay were unsatisfactory.

Learned counsel posited that the learned master ought to have balanced the reason for the delay with the other factors such as the strength of the defence before exercising her discretion whether or not to grant the extension.

Learned counsel relied on the case of *Nelson Springs Homeowners Association v Deon Daniel et al*, where the learned master granted an extension of time although there had been an earlier application for default judgment.

Learned counsel further submitted that the fact that he was only called to the local bar on the day of the hearing of the case was not given sufficient weight. Mr. Scoon criticised the learned master's finding that junior counsel had been on the record for some time before, and at the time when, the deadline for filing the defence expired and the finding that Mr. Scoon had been retained on 23rd October 2018.

Learned counsel for the appellants also submitted that the learned master misapplied the law when she ruled in effect that there was no option but to enter default judgment.

Mr. Scoon submitted that the learned master should have considered whether the request for judgment satisfied CPR 12.10(4) and 12.10(5) having regard to the nature of the claim. Learned counsel relied on the case of *Minvielle & Chastenet Insurance Brokers Ltd v Risk Consultants and Insurance Brokers Ltd et al* where the learned master refused to grant default judgment in a claim which sought various reliefs, including a declaration of right.

Senior Crown Counsel for the respondents, Ms. Renee Morgan, submitted that the learned master did not err in the exercise of her discretion and considered all relevant matters in this case, and properly applied the *Carleen Pemberton* decision and *Rose v Rose*, in coming to the conclusion that the appellants had not satisfied the threshold in order to persuade the master to exercise her discretion in their favour.

She further submitted that the appellants failed to advance any argument to the learned master, as to the strength of their defence and therefore the learned master could not properly be faulted for the observations that were made.

Discussion

An appellate court will not interfere with the exercise of the judge's discretion, unless it is satisfied that the judge erred in principle, considered matters she ought not to have considered or failed to have considered matters which ought to have been considered, with the result that decision exceeded the generous ambit within

which reasonable disagreement is possible or could be said to be plainly wrong.

I have considered the submissions both oral and in writing by both counsel and I find that the arguments for learned counsel for the respondent more attractive, and I accept them. However, I do not consider that BBL Limited provided a gloss on Carleen Pemberton's case. On the contrary, it is entirely consistent with Carleen Pemberton and indeed expressly applied that case. The Court can do no better than apply the enunciations in Pemberton and BBL.

All in all, I have not been persuaded by the appellants that the learned master committed any of the errors complained of or that her decision was not within the ambit of generous disagreement, or was plainly wrong.

Case Name:

Millicent Bass

v

Julian Daniel

**[MNIHCVAP2019/0017]
(Montserrat)**

Date:

Thursday, 28th January 2021

Coram:

**The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
[Ag.]**

Appearances:

Appellant: Mr. Jean Kelsick

Respondent: Mr. Khari Markham

Issues:

**Civil Appeal – Costs – Award of costs retroactively –
64.5 of Civil Procedure Rules – Exercise of judicial**

discretion – Whether or not master erred in the exercise of her discretion in granting a retroactive costs order

**Type of
Order:**

Oral judgment

**Result /
Order:**

IT IS HEREBY ORDERED THAT:

- 1. The appeal against the costs order of the learned master made on 12th December 2019 is allowed.**
- 2. The second paragraph of the order of the learned master dated 12th December 2019 is set aside.**
- 3. The appellant is awarded costs in the sum of \$1333.00.**

Reason:

This is an appeal against the decision of the learned master which was made on 12th December 2019 in which the learned master awarded costs retroactively in the sum of \$2000.00 in relation to an order that had been made on 21st June 2018.

In the order of 21st June 2018 the learned master had made no order as to costs but sought in excess of 17 months after to indicate that the court had failed to make an order or to address the issue of costs and therefore the learned master in those circumstances felt able to make a costs order in the sum of \$2000.00 which was to be set off against a costs order in favour of the appellant.

The appellant is aggrieved by the order of the learned master dated 12th December 2019 in so far as the learned master made the retroactive costs order in the sum of \$2000.00 and has filed an appeal. The appellant has listed 7 grounds of appeal which can be crystalised into one main ground of appeal; whether or not the learned master erred in the exercise of her discretion in granting a retroactive costs order on 12th December 2019, in relation to an earlier order that had been granted on 21st June 2018.

We have read the written submissions by learned counsel Mr. Jean Kelsick and also those by learned

counsel Mr. Kharl Markham. We have also given deliberate consideration to the oral arguments of both learned counsel and we find the arguments advanced by learned counsel Mr. Kelsick more attractive and persuasive. We acknowledge that the exercise of a discretion by the learned master to award costs must be done on proper and juridical basis in so far as the order of June 2018 had been entered and perfected. We are of the view that the matter was *res judicata* and in any event it was not open to the learned master to seek to correct an error that the learned master quite professionally accepted that the court had failed to address the issue of costs on the June 2018 order by simply utilising rule 64.6 of the Civil Procedure Rules 2000 to impose a retroactive costs order on the appellant. CPR 64.6 is not authority for the proposition that a court can impose a retroactive costs order in circumstances where the original costs order has been entered and perfected and the learned master was dealing with a matter in which *res judicata* would apply. In so far as the learned master exercise her discretion to do that she did that in breach of the well-known principles of Michael Dufour and others v Helenair Corporation Ltd and others (1996) 52 WIR 188 and her decision was clearly wrong.

The appellate court would only interfere with this exercise only in circumstances where the decision was plainly wrong and not within the generous ambit of disagreement. This Court accordingly has to exercise the discretion afresh. In so doing, the Court was of the view that the learned master having ordered that the appellant should pay the respondent the cost of \$2000.00, erred, therefore set aside that order in its entirety in so far as the costs of \$2000.00 is concerned. Accordingly, the appeal of the aspect of that order is allowed. The Court was also of the unanimous view that there is no basis upon which this court should depart from the usual order as to costs on the appeal.

Case Name:

**Vaughn Fenton
v
The Commissioner of Police**

**[MNIMCRAP2020/0001]
(Montserrat)**

Date:

Thursday, 28th January 2021

Coram:

**The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Dexter Theodore, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. Garth Sargeant

Respondent: Mr. Oris Sullivan

Issues:

Civil Appeal – Unlawful assault – Trespass – Whether the virtual complainant was a trespasser – Appeal against sentence – Whether the sentence was appropriate in all the circumstances

**Type of
Order:**

Oral judgment

**Result /
Order:**

IT IS HEREBY ORDERED THAT:

- 1. The conviction of the appellant is upheld.**
- 2. The appeal against sentence is allowed to the extent that this Court will set aside the custodial sentence visited upon the appellant and the order that the appellant pay the sum of \$300.00 as the prosecution costs.**
- 3. This Court substitutes the following:
The appellant will pay a fine of \$500.00 within a period of 3 months from today's date, in default he will spend one month at Her Majesty's prison.**
- 4. The order with respect to compensation of \$200.00 to the virtual complainant is affirmed.**

Reason:

Having heard both the appellant and the respondent in the application of the applicant appealing against the decision of the learned magistrate finding the appellant guilty of assault and sentencing him to a term of imprisonment of two months and compensation in the sum of \$500.00.

The appellant's grounds of appeal being that: (i) whether the virtual complainant was a trespasser; and (ii) the appellant having abandoned ground 2 of his grounds of appeal, whether the sentence was appropriate in all the circumstances. With respect to ground 1, the magistrate was well within her right to accept the evidence of witnesses for the prosecution who indicated that the incident took place in the public road and not on the appellant's property. Therefore, the virtual complainant was not trespassing at the time of the incident. The magistrate saw the witnesses giving evidence and was in a position to assess their credibility. Clearly the magistrate believed the witnesses of the prosecution and not the appellant.

The Court can find no fault with the magistrate's finding of fact in the circumstances, as a result, the conviction of the appellant is upheld. With respect to the sentence, the appeal against sentence is allowed to the extent that this court will set aside the custodial sentence visited upon the appellant and the order that the appellant pay the sum of \$300.00 as prosecution costs. This Court substitutes the following: the appellant will pay a fine of \$500.00 within a period of 3 months from today's date, in default he will spend one month at Her Majesty's prison. The order with respect to compensation of \$200.00 to the virtual complainant is affirmed.

Case Name:

Stephen Molyneaux

v

[1] Her Majesty's Prison

[2] Superintendent of Prisons

[3] Head of Prison Function, Eustace Allen

**[MNIHCVAP2019/0010]
(Montserrat)**

Date: Thursday, 28th January 2021

Coram: The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
The Hon. Mr. Dexter Theodore, Justice of Appeal [Ag.]

Appearances:

Appellant: In person

Respondents: Ms. Renee Morgan

Issues: Civil appeal – Incentives and Earned Privileges Scheme ('IEPS') –Prison Act Cap. 10.04–Prison Rules Cap. 10.04 – Whether the IEPS is ultra vires the Prison Rules – Whether there is a legal basis for the establishment of the IEPS – Section 21 of the Prison Act –Rule 6 of the Prison Rules – Cellular confinement – Whether appellant's confinement during specific period amounted to cellular confinement and was therefore unlawful – Whether appellant's confinement during specific period amounted to removal from association with other inmates and was contrary to Rule 26 of the Prison Rules – Whether learned judge erred in his finding that confinement in a cell in excess of twenty-two hours amounted to cellular confinement – Whether learned judge erred in his finding that 'basic level' under the IEPS was equivalent to cellular confinement under the Prison Rules – Appellate interference with trial judge's findings of fact – Whether learned trial judge erred in refusing to order any declarations or make any award of damages to appellant

Type of Order: N/A

**Result /
Order:**

IT IS HEREBY ORDERED THAT:

Judgment is reserved.