

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING
ANTIGUA AND BARBUDA
VIDEOCONFERENCE
Monday 17th to Friday 21st May 2021

JUDGMENTS

Case Name:

Leon O. Taylor

v

[1] Wilfred Julien

[2] Annette Smith

[3] Carmen Juliette Smith

[4] Peter Smith

[5] Phillip Smith

[6] Daphne Ann Vidal

[7] Daphne Ann Vidal

(Executrix of the Estate of Charles David Williams, substituted for Charles David Williams by order of Madam Justice Clare Henry, dated January 25, 2013)

[8] Michael Julien

[9] Patricia Julien

**[GDAHCVAP2016/0019]
(GRENADA)**

Date: **Tuesday, 18th May 2021**

Coram: **The Hon Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal**

Appearances:

Appellant: **Mr. Dickon A. Mitchell, Mrs. Crystal Braveboy-Chetram and Ms. Skeeta Chitan**

Respondents: **Ms. C. Debra Burnette holding papers for Mr. Alban M. John**

Issues: **Civil Appeal — Company law — Sections 241 and 242 of the Companies Act — Exercise of directorial powers — Oppressive conduct by director — Whether the learned judge misapprehended the nature of the claim by wrongfully treating**

it as an oppressive claim and in particular, one in which the general affairs of PSDL was being conducted in an oppressive manner — Whether the learned judge erred in his findings of fact so as to warrant appellate interference — Whether the learned judge's order contravened the established legal principles which circumscribe the amplitude of orders made under section 241 of the Companies Act to what is necessary to rectify the grievance complained of — Whether Felicity was a duly qualified director despite not having resigned or been re-elected and was therefore authorised to execute the impugned conveyances

**Result and
Reason:**

Held: dismissing the appeal and ordering the appellant to pay costs of the appeal to the respondents of 2/3 of the prescribed costs of \$113,649.00 awarded in the court below; dismissing the counter-notice with no order as to costs, that:

1. A pleading must make clear the general nature of the case of the pleader since it is inimical to a fair hearing that a party should be exposed to issues and arguments of which he has no fair warning. The claim filed by the respondents clearly raised the issue of oppression, unfair prejudice and the disregard of their interests as shareholders or of the entity PSDL as a whole. Further, in the reply, the respondents specifically pled that the appellant acted oppressively in the running of PSDL and in particular by taking the Cave House property. It is therefore incorrect to assert that the respondents did not file or pursue an oppressive claim or seek oppression remedies under section 241 of the Companies Act. The claim was properly dealt with as an oppressive one. Accordingly, the argument that the learned judge misapprehended the claim or erred in treating it as an oppressive action under section 241 cannot be accepted. Moreover, the essential elements of the respondents' case were known to Mr. Taylor and he had sufficient notice of the case that was being made against him. Therefore, the argument that Mr. Taylor was exposed to arguments or issues of which he had no fair warning, also fails.

McPhilemy v Times Newspapers Ltd and others [1999] 3 All ER 775 considered; Prudential Assurance Company Ltd v Revenue and Customs Commissioners [2016] EWCA Civ 376 at paragraph 20 considered.

2. An appellate court should not interfere with the trial judge's conclusion on primary facts unless satisfied that the finding of fact is plainly wrong. This applies to findings of primary facts, the evaluation of those facts and inferences to be drawn therefrom. The adverb 'plainly' does not refer to the degree of confidence the appellate court may feel that it would not have reached the same conclusion as the trial judge. What matters is

whether the decision under appeal is one which no reasonable judge could have reached. Moreover, a trial judge does not have to make a finding on every disputed item of evidence. It is enough if he makes a finding on matters which he needs to be resolved before coming to his conclusion. A review of the judge's findings is constrained by the circumstances that, usually, the initial fact finder would have been exposed to a wider range of impressions that influenced a decision on factual matters than would be available to an appellate court. For this reason, a measure of deference to the conclusions reached by the initial fact finder is appropriate. Unless the finding is insupportable on any objective analysis, it will be immune from review.

McGraddie v McGraddie [2013] UKSC 58 considered; Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5 considered; Henderson v Foxworth Investments Ltd and another [2014] UKSC 41 considered; Volcafe Ltd and others v Cia Sud Americana de Vapores SA [2018] 3 WLR 2087, [2018] UKSC 61 considered; Re B (a Child) (FC) [2013] UKSC 33 considered; Sohal v Suri and another [2012] EWCA Civ 1064 considered; Perry v Raleys Solicitors [2019] UKSC 5 considered; Housen v Nikolaisen [2002] 2 SCR 235 considered.

3. The weight of evidence is essentially a matter for the judge who has sat through the entire case and is immersed in all its aspects; he is aptly placed to test the evidence at first hand and his ultimate judgment reflects this total familiarity with the evidence. It is therefore inappropriate for this Court to interfere with that evaluation unless it is perverse. The trial judge must consider all the material evidence although it need not all be discussed in his judgment. The weight he gives to it is pre-eminently a matter for him subject only to the requirement that his findings be such as might be reasonably made. The complaint that the judge attached too much weight to Paula's letter protesting to the transfer of the Cave House property to Mr. Taylor does not approach the high hurdle which must be surmounted for a successful challenge. It has not been shown that the judge was clearly wrong or reached a conclusion on the evidence he was not entitled to reach. It was open to the judge to attach such weight to the letter as he considered necessary. In the circumstances, there being no perversity, appellate interference is unwarranted.

Manzi v Kings College NHS Foundation Trust [2018] EWCA Civ 1882 considered; Henderson v Foxworth Investments Ltd and another [2014] UKSC 41 considered; Royal Wolverhampton Hospitals NHS Trust v Evans [2015] EWCA Civ 1059 considered; The Queen

on the Application of Johnson v Bristol Crown Court [2017] EWHC 2528 (Admin) considered.

4. In a case where there are contemporary documents which appear on their face to provide cogent evidence contrary to the conclusion which the judge proposes to reach, it is very important that he must state why they are not to be taken at face value or are outweighed by other compelling considerations. Additionally when considering the credibility of a witness, it is important to test their veracity by reference to the objective facts proved independently of their testimony, in particular, by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. The learned judge was obliged to consider, and his analysis reveals that he did consider, the whole sea of evidence and did not engage in impermissible island hopping. There is therefore no basis to challenge the following findings of the learned judge:

- (i) that there was no agreement and hence no resolution passed at the board meeting of 11th November 2006 for Mr. Taylor to be granted the Cave House property;
- (ii) the purported act of PSDL in giving away part of its real estate assets to Mr. Taylor reduced its assets and thus affected its financial result;
- (iii) that Mr. Taylor exalted himself as the indispensable hard-working genius behind the growth and glory of PSDL who merits the compensation he has caused the company to dispense to him;
- (iv) that taking the land was Mr. Taylor's exit plan from PSDL;
- (v) that Mr. Taylor administered PSDL and the land from his own home on the property; treated PSDL as his banker; took a number of substantial advances from its cash, and apparently washed his personal day to day living through PSDL as expenses and disbursements for running the company since he administered the company from home;
- (vi) that the governance of PSDL had become completely dysfunctional; and
- (vii) that neither the Cave House property nor the services rendered by Mr. Taylor were professionally or independently valued.

These are findings which were clearly open to the judge and did not go against the weight of the evidence. This Court is bound to conclude that the trial judge has taken the whole of the evidence into his consideration, there being no compelling reason to the contrary. Accordingly, there is no basis for appellate interference.

Simetra Global Assets Limited and another company v Ikon Finance Limited and others [2019] EWCA Civ 1413 considered; Watt (or Thomas) v Thomas 1947 AC 484 considered; Armagas Ltd v Mundogas SA, The Ocean Frost [1986] A.C. 717 considered.

- 5. Section 242(1) of the Companies Act provides that an application made or an action brought or intervened in under this part, may not be stayed or dismissed by reason only that the alleged breach of a right or duty owed to the company or its subsidiary has been or might be approved by the shareholders of the company or its subsidiary, but evidence of approval of the shareholders may be taken into account by the court in making an order under section 240, 241 or 377. The matter of shareholder approval of the impugned transfer of the Cave House property to Mr. Taylor was addressed by the learned judge, who found as a fact that there was no evidence that the shareholders agreed to the proposal. As such, the complaint that the judge failed to consider adequately or at all section 242(1) is not valid.**

Section 242(1) of the Companies Act, Cap 58A of the Revised Laws of Grenada considered.

- 6. There is no requirement for a judge to identify and explain every factor which weighed in his appraisal of the evidence. The judge must say enough to show that care has been taken and that the evidence as a whole has been properly considered. Which points need to be dealt with and which can be omitted requires an exercise of judgment. Deciding whether or not the directors were authorised to fix Mr. Taylor's remuneration as managing director or whether they could agree to settle his claim, or whether or not good reasons existed to convey the Cave House property, could not trump a finding that there was no board agreement to so do. The learned judge having found that there was no agreement by the board to so convey, the other issues naturally fell away. Further there is no reason to conclude that he was not seised of the cogent reasons relied on by Mr. Taylor. Accordingly, the learned judge cannot be properly criticised for failing to consider and treat with the issue that Mr. Taylor's remuneration as managing director was a matter exclusively for the directors of PSDL and not its shareholders or PSDL itself in general meeting.**

Simetra Global Assets Limited and another company v Ikon Finance Limited and others [2019] EWCA Civ 1413 considered; Sandra Maria Correia v University Hospital of North Staffordshire NHS Trust [2017] EWCA Civ 356 considered.

7. The essential basis of the remedy for oppression or unfairly prejudicial conduct, is derived from principles of equity. The Companies Act confers a wide power to do what is just and equitable. Section 241 permits the court to intercede in the internal affairs of the company in order to rectify the matters complained of. Section 241(1) permits an application to the court for an order against a company or an officer or director of that company to restrain oppressive action. Any order made under section 241 exists only to rectify the matters complained of as provided by section 241(2). The purpose of the oppression remedy is therefore corrective. An oppression remedy request must, in itself, be a fair way of dealing with the situation and any order made should go no further than necessary to rectify the oppression. Furthermore, the order may serve only to vindicate the reasonable expectations of security holders, creditors, directors or officers in their capacity as corporate stake holders and the court should consider the general corporate law context in exercising its remedial discretion under section 241(3). Additionally, actions of directors which are properly described as corporate conduct may render directors and or the corporation liable under the oppression provisions. The attribution of the conduct to the corporation does not forego a remedy against directors personally.

Section 241 of the Companies Act, Cap 58A of the Revised Laws of Grenada. considered; *Re Stanford International Bank Ltd (In liquidation) (Acting by and through its Joint Liquidators Mark McDonald and Hugh Dickson) (Antigua and Barbuda)* [2019] UKPC 45 considered; *Wilson v Alharayeri* [2017] 1 SCR 1037 considered; *Budd v Gentra Inc* (1998) 43 BLR (2d) 27; *BCE INC v 1976 Debentureholders* 2008 SCC 69 considered; *Galantis v Alexiou and another (Bahamas)* [2019] UKPC 15 considered; *Sparling v Royal Trustco Ltd* [1986] 2 SCR 537 considered.

8. The order of the learned judge went no further than was necessary to rectify the oppression, unfair prejudice and disregard of interests in the circumstances. The judge engaged in a fact sensitive contextual inquiry, looking at business realities and not merely narrow legalities. He would have also considered the general corporate law context in exercising his broad discretion as to the appropriate relief. It is clear that the intercession in the affairs of PSDL was geared towards remedying the existing unfairness and oppression. Accordingly, the reasoning of the learned judge is unimpeachable in circumstances where he properly exercised his discretion in making the orders.

9. The learned judge reasoned how he arrived at his decision to order and declare, pursuant to section 241 of the Companies Act, that Felicity is a director of PSDL as at the date of his judgment, and dealt with the matter in a way he considered fair, paying regard to the circumstances of the case. He was persuaded that where the directors are due to retire and no valid appointment of new directors have been made, the acting directors as a rule are qualified to act, if the Articles of Association do not provide otherwise. Having noted that the Articles of Association do not provide otherwise, he accepted this as the operative proposition. His order was also within the plenitude of power conferred by section 241. Accordingly, there is no basis to set the order aside.

Halsbury's Laws of England (5th ed., 2008), Vol. 14, at para 524 considered; Section 241 of the Companies Act, Cap 58A of the Revised Laws of Grenada considered.

Case name:

Myett's Enterprises Limited

v

[1] Kimberly Cooke Leigh

[2] Cheryl Couture

[3] Cora Liburd

[4] Veronica Bailey

[5] Rudolph Stone

[6] Luz Adell Francisco De Callwood

[7] Sofia Small

[8] Xiomara Luisa Rhymer Mason

[9] Alexander Carina Henriquez

Industrus

[10] Carina Industrus

[11] Davina Gordon

[12] Ernie Carol Claxton

[BVIHCVAP2020/0005]

(TERRITORY OF THE VIRGIN ISLANDS)

Date:

Wednesday, 19th May 2021

Coram:

The Hon. Dame Janice M. Pereira, DBE, Chief Justice

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

The Hon. Mr. Anthony Gonsalves, Justice of Appeal [Ag.]

Appearances:

Appellant: Ms. Dancia Penn, QC

Respondents: Mr. Richard Rowe and Mr. Daniel Fligelstone Davies

Issues:

Interlocutory appeal — Principles governing appellate interference with exercise of discretion by court below —

Summary judgment — Claim for pay in lieu of notice and severance pay — Whether learned master erred in granting summary judgment — Whether appellant's defence has real prospect of success — Statutory interpretation — Whether force majeure and/or act of God is a defence available to claim for pay in lieu of notice and severance pay under Labour Code — Whether respondents employment terminated or temporarily suspended — Whether learned master erred in bifurcating issues of liability and quantum on summary judgment application

**Results and
Reasons:**

Held: dismissing the appeal; ordering that the appellant shall pay prescribed costs to the respondents on this appeal, being no more than two-thirds of the prescribed costs in the court below; and remitting the matter to the court below for the hearing of the assessment of damages, that:

- 1. Summary judgment should not be granted unless it is apparent that the claimant or defendant has no real prospect of succeeding on or defending the claim. In determining whether the claimant or defendant has a real prospect of success, the judge or master must critically examine the pleadings and such evidence which has been adduced, but must refrain from conducting a mini-trial and making factual findings on important issues. In order for this Court to interfere with the learned master's exercise of discretion to grant summary judgment in favour of the respondents, it must be shown that the master erred in principle, took into account irrelevant matters, failed to take into account relevant matters and that as a result of the error or its degree, his decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to him.**

Rule 15.2 of the Civil Procedure Rules 2000 applied; Dufour and Others v Helenair Corporation Ltd. and Others (1996) 52 WIR 188 followed; Sagicor Bank Jamaica Limited v Taylor-Wright [2018] UKPC 12 applied; Swain v Hillman [2001] 1 All ER 91 applied; Saint Lucia Motor and General Insurance Co. Ltd. v Peterson Modeste [2010] ECSCJ No. 8 (delivered 11th January 2010) followed; The Bank of Bermuda Ltd. v Pentium (BVI) Ltd. and Landcleve Limited [2004] ECSCJ No. 94 (delivered 20th September 2004) followed.

- 2. According to section 89(2) of the Labour Code an employee may be terminated, with notice or pay in lieu thereof, where: the employee is unfit to continue employment due to incapacity of the mind or body; the employee could not continue employment without being in contravention of the law; and the employee is made redundant. In this case, the pleaded facts on both sides**

are that the hurricanes caused damage to Myett's business operations which led to a cessation of work from September 2017. These circumstances give rise to a redundancy which the Labour Code provides may occur where the work of the employee is affected due to a force majeure and/or an act of God. There is nothing contained in the Labour Code which suggests that an employer is absolved from giving notice or payment in lieu of notice to employees in these circumstances. Additionally, under section 104 (1) of the Labour Code, an employee whose period of continuous employment is at least twelve months is entitled to severance pay upon termination by way of redundancy. Accordingly, the learned master correctly found that the respondents are clearly entitled to pay in lieu of notice and severance pay.

Sections 89 and 104 of the Labour Code, 2010 Act No. 4 of 2010 considered; *Sundry Workers (Veronica Joseph) v Kings Casino Limited* [2003] ECSCJ No. 34 (delivered 3rd April 2003) followed.

3. Where an employee is temporarily suspended, the employer must inform the employee in writing and provide an indication of a date when the employee is likely to be re-engaged. Where this occurs, pursuant to section 96 of the Labour Code, there is no break in the employment relationship and the employer has no obligation to pay severance once the date of re-employment is within three months. If the date of re-employment is more than three months following the date of termination, the employee is entitled to severance pay as well as notice or pay in lieu of notice pursuant to section 89. In this case, there is nothing to suggest that Myett's had provided a proposed date for the respondents' re-employment or even informed the respondents of their temporary suspension in writing. Further, the evidence adduced in the court below suggested a clear termination of the respondents' employment. The master therefore correctly found that the respondents' employment was not merely temporarily suspended but was terminated by way of redundancy under section 89(2), and as a consequence, the respondents are entitled to pay in lieu of notice and severance pay. Accordingly, Myett's has no real prospect of successfully defending the respondents' claim and the master correctly exercised his discretion in granting summary judgment.

Sections 89, 96 and 107 of the Labour Code, 2010 Act No. 4 of 2010 considered; *Home and Overseas Insurance Co. Ltd. v Mentor Insurance Co. (UK) Ltd* 1989] 3 All ER 74 considered.

4. The matters which affected the respondents' entitlement to the relief sought were the assertions raised in Myett's defence. The issue of the specific dates of the respondents' termination has no bearing on the respondents' entitlement to the relief claimed and Myett's liability or obligation to pay but affects the quantum to be awarded. The ventilation of the issue of quantum on the summary judgment application would have required the master to embark on a mini-trial and make factual findings. This approach would not be in keeping with the approach to be followed by the court in dealing with summary judgment applications. Furthermore, rule 15.6(1) of the Civil Procedure Rules 2000 clearly permits the court to grant summary judgment in circumstances, such as in this case, where the issue of liability may be suitably determined summarily, but the issue of quantum requires ventilation upon an assessment of damages. Accordingly, there is no basis for contending that the learned master erred in bifurcating the issues of liability and damages.

Rule 15.6(1) of the Civil Procedure Rules 2000 considered; *Sagicor Bank Jamaica Limited v Taylor-Wright* [2018] UKPC 12 applied.

Case Name:

Junior Meade

v

The Queen

**[MNIHCRA2019/0002]
(MONTSERRAT)**

Date:

Wednesday, 19th May 2021

Coram:

The Hon Davidson Kelvin Baptiste, Justice of Appeal

The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mde. Margaret Price-Findlay, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Jean Kelsick

Respondent: Shannon Jones-Gittens holding for Henry Gordon

Issues:

Criminal appeal – Indecent assault – Appeal against conviction – Appellant's defence contained in caution statement – Whether judge failed to adequately put the appellant's defence to the jury – Adequacy of judge's summation – Whether judge's summation to the jury rendered the verdict unsafe and constituted a material irregularity – Whether in the circumstances the fresh evidence adduced at trial constituted a material irregularity – Disclosure – Section 64 of the Criminal

Procedure Code – Whether judge erred in preventing defence from seeing psychologist's notes

Results and Reason:

Held: dismissing the appeal and affirming the appellant's conviction, that:

1. The directions to the jury must set out the position of the Crown and the defence, the legal issues involved and the evidence that may be applied in resolving the legal issues and in determining the guilt or innocence of the accused. However, a judge in a criminal trial is under no obligation to review all of the evidence. The judge must refer to sufficient evidence in the context of the case and the entirety of the charge, to alert the jury to the specific parts of the evidence that are significant to its decision on particular issues and to the position of the parties on those issues. The judge's charge to the jury, read as a whole, must leave the jury with an adequate understanding of the evidence relied upon by the parties on the issues raised. It follows therefore that merely reading the appellant's caution statement in full, as part of the summing up, cannot without more, constitute putting of the defence to the jury. The judge has a duty to put to the jury all defences that appear on the facts whether or not the accused has advanced such a defence. In this case, the learned judge erred in failing to bring to the jury's attention to material in the caution statement which may have assisted the appellant.

R v Huard 2013 ONCA 650 considered; R v Cooper [1993] 1 SCR 146 considered; R v Knox 2017 SKCA 8 considered; R v Daley 2007 SCC 53 considered; R v Royz, 2009 SCC 13 considered; R v Lawrence [1982] AC 510 considered.

2. A trial judge needs to do more than just remind the jury of the inconsistencies in the evidence if they, the jury, find that inconsistencies exist. It will often be appropriate for the judge to refer to important inconsistencies or incongruities in the evidence. In this case, even though the matters raised were fully explored by the defence in cross-examination, it was incumbent upon the learned judge to instruct the jury as to how to treat with the inconsistencies. However, the critical issue here boiled down to whether the jury believed the child's evidence and were sure that the appellant indecently assaulted her, as charged. The jury would have been cognisant that the appellant denied the charge and advanced two theories as to why the charge was preferred. Their verdict showed that the jury believed the child's evidence and rejected the theories that the child's mother was using her as bait to extract

money from the appellant and that the child was over-sensitised by her mother to the sexual danger posed by men. Therefore, the jury were clearly entitled to convict the appellant on the child's evidence.

3. It is an established principle that disclosure is governed by relevance and materiality to ensure a fair trial for the accused. On that basis, section 64(1) of the Criminal Procedure Code provides that to the extent necessary to ensure a fair trial, the prosecution shall disclose material which will not form part of its case. Therefore, ordinary fairness would require that the defence be allowed to see the psychologist's notes before the judge made a decision disallowing the defence request. However, in this case, the psychologist's notes recorded nothing about what the child told the psychologist about what had happened to her. It follows therefore that nothing turns on the judge's decision to disallow the defence request with respect to the disposition of the appeal.

Section 64 (1) of the Criminal Procedure Code, Cap. 4.01, Revised Laws of Montserrat 2013 considered.

4. The test for whether a miscarriage of justice has actually occurred is not simply whether the appellate court is itself persuaded of guilt. The test is normally whether the appellate court is, further satisfied that any jury acting properly must inevitably have convicted the defendant if the flaws in the proceedings had not occurred. In this case, it is clear that notwithstanding the inadequacies in the summation, any jury acting properly would inevitably have convicted the appellant. In the circumstances, it cannot be said that any miscarriage of justice occurred. Accordingly, this is a fit case to apply the proviso to section 39 (1) of the Eastern Caribbean Supreme Court Act.

Section 39(1) of the Eastern Caribbean Supreme Court (Montserrat) Act, Cap. 2.01, Revised Laws of Montserrat 2013 applied; Warren Cassell and another v The Queen [2016] UKPC 19 applied.

Case Name:

Elmoalis Ltd.

v

The Attorney General of Anguilla
[AXAHCVAP2019/0002]
(ANGUILLA)

Date:

Friday, 21st May 2021.

Coram:

The Hon. Dame Janice M. Pereira, DBE, Chief Justice

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

Appearances:

Appellant: Ms. Tara Carter
Respondent: Ms. Sherma Blaize-Sylvester

Issues:

Civil appeal — Judicial review — Decision of Procurement Board refusing appellant's bid for solid waste management contract — Recommendation of Evaluation Committee — Illegality — Ultra vires — Whether learned judge correctly applied the relevant provisions of the Public Procurement and Contract Administration Act and Regulations in concluding that decision was not illegal and ultra vires — Whether evaluation criteria for bids disclosed in bid documents as required by section 41 of the Public Procurement and Contract Administration Act — Whether responsibility of Evaluation Committee to assess bidders' waste collection vehicles was improperly delegated to a member of the Committee — Whether grading of bids done in breach of the Public Procurement and Contract Administration Act and Regulations — Unfairness — Whether procurement process was unfair — Damages — Whether appellant entitled to damages for loss of profits — Joinder of parties — Whether Attorney General is a proper or necessary party to the judicial review claim

Results and Reason:

Held: dismissing the appeal and ordering that each party shall bear its own costs, that:

- 1. A public authority which acts outside of the power conferred on it by law acts ultra vires its discretion or illegally. In determining whether a decision is illegal, the court must construe the content and scope of the instrument conferring the duty or power upon the decision-maker. In this case, the remit of the Evaluation Committee was to evaluate bids and report its findings to the Procurement Board following which the Procurement Board decides on the successful bidder. The Evaluation Committee is not a decision maker under the Procurement Act. It is therefore incumbent upon Elmoalis to show that the Procurement Board's decision-making process, in exercising its own statutory discretion to accept the recommendations of the Evaluation Committee fell within some recognised ground of judicial review. It is not enough to attempt to impugn matters at the level of the Evaluation Committee, without reference to how these matters render the decision-making process of the Procurement Board unlawful.**

Council of Civil Service Unions and Others v Minister for the Civil Service [1984] 3 WLR 1174 considered; Quorum Island (BVI) Ltd v Virgin Islands Environmental Council BVIHCVP2009/0021 (delivered 12th August 2011, unreported) followed; Chief Constable of the North Wales Police v Evans [1982] WLR 1155 applied; Belize Alliance of Conservation Non-Governmental Organisations v The Department of Environment and Another [2003] UKPC 63 considered.

- 2. The learned judge did not err in finding that the decision to refuse Elmoalis' bid was not illegal and ultra vires. It is clear that section 41 of the Procurement Act requires the publication of criteria for the assessment of bids and the respective weight to be attached to each criterion, and that the Committee abides by those published criteria in its evaluation of the bids. The requirements of section 41 were satisfied since the evaluation criteria for all bids were set out in clear terms in the RFP. Further, given that Mr. Richardson's appointment has not been challenged or revoked, he is a lawful member of the Committee and therefore capable of conducting business anticipated by the legislation to be within his purview. It therefore cannot be said that the responsibility of assessing the suitability of the bidders' waste collection vehicles was improperly delegated to him. Additionally, where the details of the decision-making process of a statutory administrative body are not specified by statute, as is the case here, the body is permitted to delegate tasks among itself and to thereafter collectively exercise its decision-making power in the manner contemplated by the statute. The Committee's failure to collectively carry out each step of the evaluation process did not therefore taint the decision-making process with illegality. There is also no basis for concluding that the grading of the bids was not done by all the members of the Committee, as required by the Procurement Act and the Regulations. The evidence before the learned judge showed that the report represented the collective suggestions of each member of the Committee as to the bidders who ought to be awarded contracts.**

Section 41 of the Public Procurement and Contract Administration Act, Cap. P161, Revised Statutes of Anguilla 2016 considered; Attorney General of Turks and Caicos v Misick and Others [2020] UKPC 30 applied; Selvarajan v Race Relations Board [1976] 1 All ER 12 considered; Barnwell v Attorney-General and Another (1993) 49 WIR 88 considered; Allingham v Minister of Agriculture and Fisheries [1948] 1 All ER 780 considered; R v Monopolies and Mergers Commission, ex parte Argyll Group plc [1986] 2 All ER 257 considered.

3. The common law duty to act fairly in procurement processes is enshrined under section 2(3)(d) of the Procurement Act which requires public procurement and contract administration to ensure fair treatment of all persons who participate in the procurement process. On the evidence, the statutory and common law obligation to treat bidders fairly cannot be said to have been compromised in this case. Elmoalis has not produced any evidence that matters related to the calculation of the lowest priced bid were either incorrect or were manipulated by members of the Procurement Board, such that Elmoalis would have been the lowest responsive bidder and awarded a contract. The Procurement Board's decision-making process cannot therefore be said to have been unfair, and the learned judge did not err in failing to conclude that it was unfair.

Section 2(3)(d) of the Public Procurement and Contract Administration Act, Cap. P161, Revised Statutes of Anguilla 2016 considered; Central Tenders Board and Another v White [2015] UKPC 39 applied; Re H.K. (an Infant) [1967] 2 WLR 962 applied; Chief Constable of North Wales Police v Evans [1982] WLR 1155 applied; Central Tenders Board, London and Clydeside Estates Ltd v Aberdeen District Council [1979] 3 All ER 876 applied; Director of Public Prosecutions of the Virgin Islands v Penn [2008] UKPC 29 applied.

4. As there is no basis to interfere with the learned judge's decision to dismiss Elmoalis' judicial review claim, the possibility of an award for damages occasioned by the alleged unlawful conduct raised by the claim automatically falls away. In any event, to obtain an award of damages in judicial review proceedings, a claimant must plead and prove a recognised private law cause of action, for which damages would be available as a remedy. Outside of the alleged illegalities and unfairness in the procurement process, Elmoalis' claim did not assert any civil liability on the part of the state. There is therefore no private law claim to which Elmoalis' claim for damages for loss of profits could have been appended.

Tchenguiz and another v Director of the Serious Fraud Office [2014] EWCA Civ 472 applied; Dr. Abner James v The Medical and Dental Council SLUHCVP2018/0018 (delivered 12th March 2020, unreported) followed; Central Tenders Board and Another v White [2015] UKPC 39 distinguished.

5. The named defendant in judicial review proceedings ought to be the public functionary or body whose

decision-making process is subject to review. It follows that the Attorney General ought only be named as a defendant to judicial review proceedings where he or she has made the decision in relation to which judicial review has been sought. In this case, the decisions Elmoalis has complained of were not made by the Attorney General but were made by the Procurement Board and the Evaluation Committee. The Attorney General was therefore neither a necessary nor proper party to these proceedings. The Evaluation Committee and the Procurement Board and/or their members were the proper parties to Elmoalis' claim.

Bahamas Hotel Maintenance and Allied Workers Union v Bahamas Hotel Catering and Allied Workers Union and others [2011] UKPC 4 applied; Quorum Island (BVI) Ltd v Virgin Islands Environmental Council BVIHCVAP2009/0021 (delivered 12th August 2011, unreported) followed; Minister of Foreign Affairs v Vehicles and Supplies Limited [1991] 1 WLR 550 applied.

Case Name:

- [1] Glenroy Cuffy**
- [2] Dayne Oswald George**
- [3] Atherley Robin**

v

- [1] Melissa Skerit**
- [2] Ian Anthony, Chief Elections Officer**
- [3] Josephine Lewis, Returning Officer**
- [4] Gerald Burton, Chairman Of The Electoral Commission**
- [5] Hilary Shillingford, Member Of The Electoral Commission**
- [6] Wayne James, Member Of The Electoral Commission**
- [7] Kondwani Williams, Member Of The Electoral Commission**
- [8] Alick Lawrence, Member Of The Electoral Commission**
- [9] Dominica Broadcasting Corporation**
- [10] Roosevelt Skerit (Prime Minister And Minister Of Finance)**
- [11] Attorney General Of The Commonwealth Of Dominica**
- [12] The Commissioner Of Police, Daniel Carbon**

and

Ernie Lawrence Jno Finn

v

- [1] Octavia Alfred**
- [2] Ian Anthony, Chief Elections Officer**
- [3] Cleve Edwards, Returning Officer**
- [4] Cleve Edwards, Registering Officer**
- [5] Gerald Burton, Chairman Of The Electoral Commission**
- [6] Hilary Shillingford, Member Of The Electoral Commission**
- [7] Wayne James, Member Of The Electoral Commission**
- [8] Kondwani Williams, Member Of The Electoral Commission**
- [9] Alick Lawrence, Member Of The Electoral Commission**
- [10] Dominica Broadcasting Corporation**
- [11] Roosevelt Skerrit (Prime Minister And Minister Of Finance)**
- [12] Attorney General Of The Commonwealth Of Dominica**
- [13] The Commissioner Of Police, Daniel Carbon**

and

Pharo Cuffy

v

- [1] Gretta Bernadette Roberts**
- [2] Ian Anthony, Chief Elections Officer**
- [3] Sherline Prescott, Returning Officer**
- [4] Gwenth Anselm, Registering Officer**
- [5] Gerald Burton, Chairman Of The Electoral Commission**
- [6] Hilary Shillingford, Member Of The Electoral Commission**
- [7] Wayne James, Member Of The Electoral Commission**
- [8] Kondwani Williams, Member Of The Electoral Commission**
- [9] Alick Lawrence, Member Of The Electoral Commission**
- [10] Dominica Broadcasting Corporation**
- [11] Roosevelt Skerrit (Prime Minister And Minister Of Finance)**
- [12] Attorney General Of The Commonwealth Of Dominica**

[13] The Commissioner Of Police, Daniel Carbon

and

Felix Thomas

v

- [1] Rayburn Blackmore**
- [2] Ian Anthony, Chief Elections Officer**
- [3] Stephen C. Joseph, Returning Officer**
- [4] Linda Bellot, Registering Officer**
- [5] Gerald Burton, Chairman Of The Electoral Commission**
- [6] Hilary Shillingford, Member Of The Electoral Commission**
- [7] Wayne James, Member Of The Electoral Commission**
- [8] Kondwani Williams, Member Of The Electoral Commission**
- [9] Alick Lawrence, Member Of The Electoral Commission**
- [10] Dominica Broadcasting Corporation**
- [11] Roosevelt Skerit (Prime Minister And Minister Of Finance)**
- [12] Attorney General Of The Commonwealth Of Dominica**
- [13] The Commissioner Of Police, Daniel Carbon**

and

Francisca Joseph

v

- [1] Kent Edwards**
- [2] Ian Anthony, Chief Elections Officer**
- [3] Bertha Warrington, Returning Officer**
- [4] Bertha Warrington, Registering Officer**
- [5] Gerald Burton, Chairman Of The Electoral Commission**
- [6] Hilary Shillingford, Member Of The Electoral Commission**
- [7] Wayne James, Member Of The Electoral Commission**
- [8] Kondwani Williams, Member Of The Electoral Commission**
- [9] Alick Lawrence, Member Of The Electoral Commission**
- [10] Dominica Broadcasting Corporation**

- [11] Roosevelt Skerrit (Prime Minister And Minister Of Finance)**
[12] Attorney General Of The Commonwealth Of Dominica
[13] The Commissioner Of Police, Daniel Carbon

and

Daria Eugene

v

- [1] Chakira Lockheart Hypolite**
[2] Ian Anthony, Chief Elections Officer
[3] Anna Warner, Returning Officer
[4] Linda Defoe, Registering Officer
[5] Gerald Burton, Chairman Of The Electoral Commission
[6] Hilary Shillingford, Member Of The Electoral Commission
[7] Wayne James, Member Of The Electoral Commission
[8] Kondwani Williams, Member Of The Electoral Commission
[9] Alick Lawrence, Member Of The Electoral Commission
[10] Dominica Broadcasting Corporation
[11] Roosevelt Skerrit (Prime Minister And Minister Of Finance)
[12] Attorney General Of The Commonwealth Of Dominica
[13] The Commissioner Of Police, Daniel Carbon

and

Ronald Charles

v

- [1] Irvin McIntyre**
[2] Ian Anthony, Chief Elections Officer
[3] Merrill Matthew, Returning Officer
[4] Colbert Pinard, Registering Officer
[5] Gerald Burton, Chairman Of The Electoral Commission
[6] Hilary Shillingford, Member Of The Electoral Commission
[7] Wayne James, Member Of The Electoral Commission

- [8] Kondwani Williams, Member Of The Electoral Commission**
- [9] Alick Lawrence, Member Of The Electoral Commission**
- [10] Dominica Broadcasting Corporation**
- [11] Roosevelt Skerit (Prime Minister And Minister Of Finance)**
- [12] Attorney General Of The Commonwealth Of Dominica**

and

Anette Sanford

v

- [1] Cozier Frederick**
- [2] Ian Anthony, Chief Elections Officer**
- [3] Kathleen Auguiste, Returning Officer**
- [4] Helius Auguiste, Registering Officer**
- [5] Gerald Burton, Chairman Of The Electoral Commission**
- [6] Hilary Shillingford, Member Of The Electoral Commission**
- [7] Wayne James, Member Of The Electoral Commission**
- [8] Kondwani Williams, Member Of The Electoral Commission**
- [9] Alick Lawrence, Member Of The Electoral Commission**
- [10] Dominica Broadcasting Corporation**
- [11] Roosevelt Skerit (Prime Minister And Minister Of Finance)**
- [12] Attorney General Of The Commonwealth Of Dominica**
- [13] The Commissioner Of Police, Daniel Carbon**

and

Monelle Williams Jno Baptiste

v

- [1] Adis King**
- [2] Ian Anthony, Chief Elections Officer**
- [3] Anthony Joseph, Returning Officer**
- [4] Cynthia Serrant, Registering Officer**
- [5] Gerald Burton, Chairman Of The Electoral Commission**

- [6] Hilary Shillingford, Member Of The Electoral Commission
- [7] Wayne James, Member Of The Electoral Commission
- [8] Kondwani Williams, Member Of The Electoral Commission
- [9] Alick Lawrence, Member Of The Electoral Commission
- [10] Dominica Broadcasting Corporation
- [11] Roosevelt Skerrett (Prime Minister And Minister Of Finance)
- [12] Attorney General Of The Commonwealth Of Dominica

and

Ezekiel Bazil

v

- [1] Fidel Neil Grant
- [2] Ian Anthony, Chief Elections Officer
- [3] Diane Williams-Telemacque, Returning Officer
- [4] Annie Bruno, Registering Officer
- [5] Gerald Burton, Chairman Of The Electoral Commission
- [6] Hilary Shillingford, Member Of The Electoral Commission
- [7] Wayne James, Member Of The Electoral Commission
- [8] Kondwani Williams, Member Of The Electoral Commission
- [9] Alick Lawrence, Member Of The Electoral Commission
- [10] Dominica Broadcasting Corporation
- [11] Roosevelt Skerrett (Prime Minister And Minister Of Finance)
- [12] Attorney General Of The Commonwealth Of Dominica
- [13] The Commissioner Of Police, Daniel Carbon

[DOMHCVAP2021/0012A-DOMHCVAP2021/0012J]
(DOMINICA)

Date: Friday, 21st May 2021

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice

Appearances:

Appellants: Ms. Zahidha James

Respondents: Mr. Anthony Astaphan, SC with him Mr. Lennox Lawrence and Ms. Jodie Luke for the 1st Respondents
Mrs. Heather Felix-Evans for the 2nd, 3rd, 4th, 5th, 8th and 9th Respondents
Mr. Anthony Astaphan, SC with him Ms. Ernette Kangal holding for Mr. Stephen Isidore for the 10th Respondent
Mr. Levi A. Peter, Attorney General, and Ms. Nadira Lando for the 11th, 12th and 13th Respondents
No appearance for the 6th and 7th Respondents

Issue:

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

Results and Reason:

Held: striking out the petitioners' appeals; ordering that the petitioners/appellants shall, within 21 days, pay costs to each of the respondents (save and except for the 6th and 7th respondents) in the sum of \$2,000.00, and save further, that a respondent named in more than one application or notice of appeal shall be entitled to one set of costs only and not in respect of each application or notice of appeal in which he/she/it is named as a respondent, that:

1. Sections 40(1)(a), 40(6) and 40(7) of the Constitution together provide that no appeal shall lie from any decision of the High Court other than a final decision determining whether a person has been validly elected as a Representative to the House of Assembly. The learned judge's decision to strike out the election petitions, before trial, on the basis that the pleadings contained in the petitions were deficient is therefore, by its very nature, not a final decision on the question of whether a person was validly elected as a Representative in the House of Assembly which the Court has jurisdiction to entertain under the provisions of the Constitution.

Sections 40(1), 40(6) and 40(7) of the Constitution of the Commonwealth of Dominica Cap. 1.01 of the Laws of the Commonwealth of Dominica interpreted; Eugene

Hamilton v Cedric Liburd et al [2006] ECSCJ No. 36 (delivered 3rd April 2006) followed; The Attorney General of Grenada v Peter Charles David and others [2008] ECSCJ No. 52 (delivered 2nd June 2008) considered; Benjamin Exeter v Winston Gaymes et al SVGHC VAP2016/0021 (delivered 13th June 2017, unreported) distinguished.

2. There is no sustainable argument in this case that the learned judge exceeded the scope of enquiry required on an application to strike, and therefore that his treatment of the respondents' applications to strike out the election petitions transformed his decision into a final decision. The judge clearly confined himself to assessing the pleadings with a view to determining whether they were sufficient to sustain particularised cases for the avoidance of the election. In the circumstances, the judge's decision was not a final decision within the contemplation of sections 40(6) and 40(7) of the Constitution.

CITCO Global Custody NV v Y2K Finance Inc [2009] ECSCJ No. 165 (delivered 19th October 2009) considered; Piglowska v Piglowski [1999] 1 WLR 1360 applied.

3. On an application challenging the jurisdiction of the Court to hear an appeal, it would be highly unusual for the Court of Appeal to examine any alleged substantive errors or demerits of the decision of the court below, prior to the determination of the threshold question of jurisdiction. Such an examination would be tantamount to an assumption of jurisdiction in relation to the substantive appeal for the purpose of determining whether the Court in fact had jurisdiction. The law does not permit such a course in proceedings of this nature.
4. The public importance attached to election petitions cannot be a basis for the assumption of jurisdiction to hear an appeal from a decision to strike out an election petition in the circumstances of this case. It is simply not open to the Court to arrogate unto itself jurisdiction to hear an appeal where no such jurisdiction has been conferred upon it by either statute or the Constitution. The Constitution's provisions are clear and have been consistently interpreted to exclude appeals in the nature of the present appeals. In all the circumstances, the petitioners do not have a right to appeal against the learned judge's decision; and the Court of Appeal as a consequence has no jurisdiction to entertain the petitioners' appeals.

Attorney General v David Brandt [2020] ECSCJ No. 394 (delivered 11th November 2020) followed.

APPLICATIONS AND APPEALS

Case Name:

PIC Insurance Company Ltd

V

**[1] Zona Barthley and Zoral Barthley, Personal
Representatives of the Estate of the Estate of Dr. Rolston
Barthley, deceased**

[2] Zorol Barthley

**[ANUMCVAP2019/0003]
(ANTIGUA & BARBUDA)**

Date: **Monday, 17th May 2021**

Coram: **The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde Louise Ester Blenman, Justice of Appeal
The Hon. Mr. Gerard Farara, Justice of Appeal [Ag.]**

Appearances:

Appellant: **Dr. David Dorsett**

Respondents: **Mr. Kendrickson Kentish**

Issues: **Application for final leave to appeal to Her Majesty in Council –
Whether the applicant had fulfilled the conditions for a grant of
final leave to appeal to Her Majesty in Council**

**Type of
Order:** **Oral decision**

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

- 1. Final leave is granted to the applicant to appeal to Her Majesty in Council against the decision of the Court of Appeal delivered on 28th January 2021.**
- 2. Costs of this application is to be costs in the appeal to Her Majesty in Council.**

Reason: **The Court was satisfied that the necessary conditions in the order for conditional leave dated 8th March 2021 had been met, and therefore granted to the applicant final leave to appeal to**

Her Majesty in council against the decision of the Court of Appeal dated 28th January 2021.

Case Name:

**Cliff Williams
v
Mary John**

**[ANUHCVAP2020/0015]
(ANTIGUA & BARBUDA)**

Date: **Monday, 17th May 2021**

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde Louise Ester Blenman, Justice of Appeal
The Hon. Mr. Gerard Farara, Justice of Appeal [Ag.]**

Appearances:

Appellant: **Mr. Sylvester Carrott**

Respondent: **Mr. Wendel Robinson**

Issues:

Application to strike out notice of appeal – Whether time ran for the filing of the notice of appeal while the court office was closed during the pandemic – Extension of time – Whether or not the appellant should be granted an extension of time to file the notice of appeal – Adjournment – Whether in the circumstances the appellant ought to be granted an adjournment to produce further evidence to the court

**Type of
Order:**

Adjournment

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. The adjournment is granted on the condition that the appellant files and serves by close of business, Tuesday 18th May 2021 that is by 4:00 pm, such further evidence in relation to paragraph 4 of his affidavit filed on 14th May 2021.**
- 2. The respondent shall have by 4pm, Wednesday 19th May 2021 to file and serve any evidence in reply.**
- 3. The Court shall further consider the application to strike out on Friday 21st May 2021.**
- 4. Costs of the adjournment to be paid by the appellant to the respondent fixed in the sum as agreed of \$500.00.**

Reason

The Court considered the request by counsel for the appellant/respondent for an adjournment to produce further

affidavit evidence to the Court on the relevant dates when the court office was closed as a result of the pandemic. Counsel argued that the fact of the court office closing meant that that time for filing the notice of appeal would not run. Counsel for the applicant/respondent opposed the request for an adjournment on the basis that the appellant/respondent would have had ample time to produce the evidence. The Court was of the view that in the interest of justice a short adjournment ought to be granted but with conditions.

Case Name:

Joseph W Horsford

v

Geoffrey Croft

**[ANUHCVP2014/0028]
(ANTIGUA & BARBUDA)**

Date:

Monday, 17th May 2021

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde Louise Ester Blenman, Justice of Appeal
The Hon. Mr. Gerard Farara, Justice of Appeal [Ag.]**

Appearances:

Appellant: In person

Respondent: Mr. Sylvester Carrott

Issues:

**Application for final leave to appeal to Privy Council -
Discharge leave to appeal to Privy Council – Leave to adduce
fresh evidence – Leave to reopen appeal – Whether an
application to reopen an appeal can be made where the
applicant has already received conditional leave to appeal to
Her Majesty in Council – Stay pending final leave to appeal –
Whether the applicant will suffer greater harm if the stay is not
granted**

**Type of
Order:**

Oral decision

**Result/
Order:**

IT IS HEREBY ORDERED THAT:

- 1. On the applicant, Mr. Croft's application, for final leave to appeal to Her Majesty in Council, the court being satisfied the conditions attached to the grant of conditional leave has been satisfied hereby grants final leave to appeal to Her Majesty in Council from the decision of the Court of Appeal delivered on the 24th November, 2017.**

2. The court grants a stay of the order of injunction made on the said 24th November, 2017. The stay is however on condition that the applicant, Mr. Croft, files his appeal with her majesty in council no later than June 30, 2021, and thereafter taking all due expedition to prosecute his appeal before Her Majesty in Council. The stay hereby granted is also on the further condition that the applicant, Mr. Croft, makes a one off payment to the respondent, Mr. Hosford, in the sum of \$750.00 on or before the 17th June 2021, such payment to be made by way of a banker's cheque delivered to the registrar in Antigua and Barbuda to be handed over to the respondent, Mr. Horsford.
3. In the event that the applicant files his appeal with Her Majesty in Council by the date herein specified, the stay of the injunction order of the Court of Appeal as stated shall continue in effect pending the hearing and determination of the appeal to Her Majesty in Council without further payment to Mr Horsford in the meantime.
4. The costs of the application for the stay and for final leave shall be costs in the appeal to Her Majesty in Council.
5. The application to reopen the appeal and to adduce fresh evidence is refused.
6. The application to discharge the injunction order made by the court on the 24th November, 2017, is refused.
7. The unless order sought by the respondent, Mr. Horsford, hereby falls away, the court having granted final leave to appeal to Her Majesty in Council.

Case Name:

**Geoffrey Croft
v
Joseph Horsford**

**[ANUHCVP2021/0003]
(ANTIGUA & BARBUDA)**

Date: Monday, 17th May 2021

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde Louise Ester Blenman, Justice of Appeal
The Hon. Mr. Gerard Farara, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Sylvester Carrott

Respondent: In person

Issues: Application to discharge the order granting a stay made by a single judge of the court

**Type of
Order:**

Directions

Result/Order:

IT IS HEREBY ORDERED THAT:

1. The appeal in this matter is to be expedited and to that end, the appellant Mr. Croft shall request the transcripts of the hearings below no later than Tuesday 1st June, 2021.
2. The appellant shall take all steps to file and serve the record of appeal no later than 30th July, 2021.
3. The appellant shall file and serve written submissions in support of the appeal on or before 13th August 2021.
4. The respondent, Mr. Horsford, shall file and serve written submissions no later than 10th September, 2021.
5. The appeal shall be set down for hearing during the sitting of the court for the state of Antigua and Barbuda commencing 18th October 2021. Pending the hearing and determination of the appeal, the status quo shall remain.

Reason:

The Court was of the view that in circumstances where the appeal was to be expedited, further directions were necessary for the filing of submissions by both parties.

Case Name:

Yida Zhang
V
Lux Locations Limited

[ANUHCVP2021/0002]
(ANTIGUA & BARBUDA)

Date:

Monday 17th May 2021

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde Louise Ester Blenman, Justice of Appeal
The Hon. Mr. Gerard Farara, QC, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. Thomas Roe QC and with him Mr. Andrew O’Kola
Respondent: Mr. Barry Gale QC and with him Dr. David Dorsett

Issues:

Application for conditional leave to appeal to Her Majesty in Council – Section 122(2)(a) of the Constitution of Antigua and

Barbuda – Whether application involves a question of great general or public importance or otherwise – Whether the Court of Appeal was wrong to rule that the High Court’s decision determining the terms of the judgment under CPR 12.10 is an administrative decision and, as such, one that does not attract a right of appeal – Whether the Court of Appeal was wrong to rule that when making the determination under CPR 12.10(4) the court does not have any regard to the merits – Whether the Court of Appeal was wrong to rule that once the conditions for the entry of default judgment are satisfied, a defendant may not seek an extension of time for the filing of a defence – Whether the Court of Appeal was consequently wrong in failing to rule on the other issues which arose in the appeal - Application for continuation of the Stay of execution of the judgment – Whether there is a realistic prospect that the Privy Council will take a different view of the matter from the Court of Appeal

**Type of
Order:**

Oral decision

**Result/
Order:**

IT IS HEREBY ORDERED THAT:

- 1. The Court grants conditional leave to appeal to Her Majesty in Council.**
- 2. The grant of conditional leave will be on the usual conditions and those conditions are:**
 - i. that the applicant Lux Location Ltd. shall within 90 days or not more than 90 days of the date hereof, do enter into good and sufficient security in the sum of 500 pounds sterling for the due prosecution of the appeal, such security to consist of a deposit of the said amount at the court’s office.**
 - ii. Within thirty (30) days of the date hereof, the applicant takes the necessary steps for the purposes of procuring the preparation of the records, for settling of such records to the solicitors for the respondent to this application and the certification of the record by the registrar of the Court of Appeal.**
 - iii. The record shall be prepared in accordance with rules 18-20 of the Judicial Committee Appellate Jurisdiction Rules Order 2009; and its Practice Directions 4.2.1 to 4.3.2 and Practice Direction 5; and shall be transmitted to the registrar of the Judicial Committee of the Privy Council without delay where final permission to appeal has been granted.**
 - iv. The applicant shall make an application to the court for the grant of final leave to appeal to her Majesty in Council supported by the certificate of the registrar**

that the security for costs ordered has been given within the time prescribed by this order to the satisfaction of the Registrar.

3. As it relates to the application for a stay made in the motion for conditional leave to appeal, the court makes the following orders and gives the following directions:
- i. The time is granted to the applicant to make written application for a stay together with evidence in support and shall do so no later than Tuesday 25th May 2021.
 - ii. The respondent shall have until Monday, 31st May 2021, to file and serve evidence in response to the application.
 - iii. The parties shall file written submissions in respect of the stay no later than Monday, 8th June 2021. Thereafter, the court shall consider the application for the stay on papers and in this regard the court will invite the parties to have regard to Article 6 of the Appeals to Privy Council Order of Antigua and Barbuda.

Reason:

The Court considered its decision in this matter on the motion for the grant of conditional leave to appeal to Her Majesty in Council sought by the applicant, Lux Locations Ltd. Having heard the arguments, the Court was of the unanimous opinion that the threshold under the Constitution of Antigua and Barbuda namely section 122 2(a) has been met; and that section provides for an appeal –

“... where in the opinion of the Court 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;”

This is in relation to civil proceedings.

That provision has been interpreted by many decisions of the court and there is the decision of *Marinor Enterprises Limited and others v First Caribbean International Bank (Barbados) Ltd.* DOMHCVAP2013/0003 (delivered 6th July 2016, unreported), and it was recited again in relation to *Pentium (BVI) Ltd and others v The Bank of Bermuda BVICVAP 2003/0014* (delivered 12th January 2005, unreported), and what is said is basically what was said in *Martinus Francios v The Attorney General SLUHCVAP2003/0037* (delivered 7th June 2004, unreported), which was recited in *Marinor*; and that limbs normal application is where:

- i. there is a difficult question of law involved in matters that involved a serious issue of law;
- ii. a constitutional provision that has not been settled;
- iii. an area of law in dispute, that is in which there are conflicting decisions of the courts which needs to be settled with a greater degree of certainty; or
- iv. a legal question the resolution of which poses dire consequences for the public.

The Court was of the view that the matters here raises the question of whether there are conflicting decisions in the sense that from the Court's view there are tensions between this decision given by the Court and another decision of the Court, and that it requires some certainty and being settled. For that reason the Court granted conditional leave to appeal to Her Majesty in Council.

Case Name:

Keith Miller
v
Preston Delabanque
[ANUMCVAP2020/0009]

and

Amy Sam
v
Preston Delabanque
[ANUMCVAP2020/0010]
(ANTIGUA & BARBUDA)

Date: Tuesday 18th May 2021

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellants: Ms. Asheen Joseph

Respondent: Ms. Kema Benjamin

Issues: Application to strike out notice of appeal - Section 170(1) of the Magistrate's Code of Procedure Act, Cap 255 Laws of Antigua & Barbuda - Whether notice of appeal is in compliance with section 170(1) of the Magistrate's Code of Procedure Act, Cap 255 Laws of Antigua & Barbuda

Type of
Order:

Oral decision

Result/
Order:

IT IS HEREBY ORDERED THAT:

1. The notices of appeal filed on 3rd. December 2020 in appeal no. ANUMCVAP2020/0009 and appeal. No. ANUMCVAP2020/0010 are struck out for being a nullity having been filed outside of the time limit set in section 170(1) of the Magistrate's Code of Procedure Act.
2. The appellant shall pay costs to the respondent/applicant in appeal no. ANUMCVAP2020/0009 and appeal no. ANUMCVAP2020/0010 in the sum of \$330.00 each.

Reason:

This is an application to strike out the notice of appeal which was filed on the 3rd December 2020, in relation to the decision of the learned magistrate made on the 22nd December 2020. The grounds of the application to strike out are two fold:

- i. the notice of appeal was filed outside of the fourteen (14) days time limit as set out in *section 170(1)* of the Magistrate's Code of Procedure Act; and
- ii. that the grounds of appeal outlined in the notice of appeal were not in compliance with the grounds set out in section 170 (2).

The Court reviewed the submissions of both counsel and the Court was in agreement with the submissions made by the applicant in this matter, that pursuant to *section 170* of the Magistrate's Code of Procedure Act, Cap 255 Laws of Antigua & Barbuda an appeal from the Magistrate's Court must be made within fourteen (14) days of the date of the decision of the magistrate.

There was no application for an extension and therefore no extension was granted to the appellant to file the appeal outside of the fourteen (14) days stipulated by *section 170 (1)*. Also, *section 170 (2)* limits the bases on which the decision of the magistrate could be challenged on appeal, none of those grounds were outlined in the notice of appeal. For the aforesaid reasons, the Court agreed with the submissions made by the applicant.

Case Name:

Sylvester Spencer and Honora Thomas

V
Regino Nicholas
[ANUHCVP2019/0022]
(ANTIGUA & BARBUDA)

Date: Tuesday 18th May 2021

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant: Dr. David Dorsett

Respondent: Mr. Pete Semaj McKnight holding papers for Mr. Lawrence Daniels

Issues: Interlocutory appeal – Section 4 of the Fatal Accidents Act – Section 23 of the Eastern Caribbean Supreme Court (Antigua and Barbuda) Act - Whether the Fatal Accidents Act has no enabling section or otherwise which vests a party to apply to the court to have a jury consider the issue of damages – Whether section 4 of the Fatal Accidents Act is inconsistent with section 23 of the Eastern Caribbean Supreme Court (Antigua and Barbuda) Act – Oral application for an adjournment

Type of Order: Adjournment

Result/ Order: IT IS HEREBY ORDERED THAT:

The matter is adjourned to Thursday 20th May 2021 at 9am.

Reason: The Cour considered counsel for the appellant's request for an adjournment due to technical difficulties he was experiencing. The matter was therefore adjourned.

Case Name: Carlton Lewis
V
Neil Cochrane
[ANUCVAP2018/0039]
(ANTIGUA & BARBUDA)

Date: Wednesday 19th May 2021

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

Appearances:

Appellant: Ms. Kema Benjamin

Respondent: Mr. Kendrickson Kentish

Issues: Application to strike out notice of appeal – Whether the appellant had failed to prosecute the appeal

Type of Order: Oral decision

Result/ Order: IT IS HEREBY ORDERED THAT:

1. The Court declines to strike out the appeal and awards costs to the respondent/applicant in the agreed sum of \$850.00 to be paid by 21st May 2021.
2. The Court further orders and directs that:
 - i. The record of appeal filed by the appellant on 19th April 2021 is deemed properly filed.
 - ii. The appellant shall file and serve his written submissions with authorities in support of the appeal no later than 26th May 2021, failing which the appeal shall stand dismissed without further order.
 - iii. In the event that the appellant files and serves his written submissions with authorities as hereby ordered, the respondent shall file and serve his written submissions with authorities in response to the appeal no later than 30th June 2021.

Reason: The Court considered the application to strike out the appeal filed in this matter on 30th October 2020. The Court considered all the circumstances of the case given the chronology of events and the affidavits. The Court also considered the fact that this is an appeal which is regularly filed and one which is at least arguable. The Court also took into account that it is

common ground that the hearing and determination of the appeal can be fairly disposed notwithstanding the delay.

However, the Court marked its strong disapproval of the conduct of the appellant in disregarding the timelines contained in the rules of procedure without considering or thinking it necessary to take the necessary steps to put matters right. The case of *Attorney General of Trinidad & Tobago v Keron Matthews PC [2011] UKPC 38* does not provide a license to parties or their legal practitioner for flouting the rules of court. In fact, it is quite to the contrary. That said, the greater prejudice were the Court to strike out the appeal would fall on the appellant.

Case Name: [1] Flatpoint Development
[2] Emerald Cove Consortium Limited
v
Fairlight Limited
[ANUHCVAP2020/0037]
(ANTIGUA & BARBUDA)

Date: Wednesday 19th May 2021

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

Appearances:
Appellants: In person, by representative Mr. Stefano Cebrelli
Respondent: Ms. E. Ann Henry, QC with her Ms. Mandi Thomas

Issues: Interlocutory appeal - Adjournment

Type of Order: Directions

Result/Order: IT IS HEREBY ORDERED THAT:

1. Flat Point has until 18th June 2021 to instruct a legal practitioner to appear and prosecute this appeal on its behalf.
2. The Court will thereafter notify the parties of a hearing date to be fixed by the Chief Registrar.

Reason: The Court was of the view that an adjournment would be appropriate in the circumstances to allow the appellant to regularise proper representation by an attorney-at-law in the matter.

Case Name: Antigua Flight Training Center
v
[1] Deidre Pigott Edgecombe
[2] Nordel Edgecombe

[ANUHCVP2020/0017]
(ANTIGUA & BARBUDA)

Date: Wednesday 19th May 2021

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

Appearances:
Appellant: Mr. Warren Cassell
Respondents: Dr. David Dorsett

Issues: Interlocutory appeal- Oral application for an adjournment

Type of Order: Adjournment

Result/ Order: IT IS HEREBY ORDERED THAT:

1. The hearing of this appeal is adjourned with notice of hearing to be given by the Chief Registrar for a later date.
2. In the meantime, the parties shall seek to put matters right in respect of their respective cases before the Court.

Reason: The Court considered concerns it had regarding the manner in which the matter had been conducted by the parties. The Court was of the the view that both sides ought to take an opportunity to put their affairs in order to conduct the appeal in an efficient way, which will further the overriding objective of ensuring that the case is determined justly.

The Court also noted that in the circumstances of this case, various points were being taken in limine without notice and there had been breaches of several rules.

In light of the foregoing the Court was of the unanimous view that the hearing of the appeal ought to be adjourned for the parties to put matters right in respect of their cases before the Court so the appeal may be placed on a proper footing.

Case Name:

**Auto Hub
v
Caribbean Union Bank Ltd.**

**[ANUHCVP2019/0014]
(ANTIGUA & BARBUDA)**

Date: **Wednesday 19th May 2021**

Coram: **The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Gerard Farara, QC, Justice of Appeal [Ag.]**

Appearances:

Appellant: **Mr. Kendrickson Kentish**

Respondent: **Mr. Jomokie Phillips**

Issues: **Interlocutory appeal – Negligence – Breach of duty of care – Whether the learned trial judge wrongfully exercise her discretion in rejecting the application to admit expert witness in the proceedings – Whether the learned judge erred in law by failing to take into consideration that negligence in the handling of the claimant’s bank account was a live issue**

**Type of
Order:** **Oral judgment**

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

- 1. The appeal is dismissed and the order of the learned judge is affirmed.**
- 2. The appellant shall pay the respondent costs of the appeal fixed in the sum of \$2,000.00.**

Reason:

This is an appeal against the decision and order of the learned judge of the court below dated 17th May 2019, dismissing the appellant's application filed 4th December 2018 for permission to adduce at the trial the expert evidence of Mr. Everett Christian on banking practise, which application was opposed by the respondent/defendant. The learned judge's ruling on the application is set out at page 100 of the transcript of the hearing and proceedings below. The relevant passage reads as follows:

"In an application such of this nature the court is required to address its mind to what is reasonably required to resolve the proceedings justly. The court accepts the submission of the respondent that the parties have to a large extent have agreed to a substantial portion of the facts in this matter and that the issues of banking standards and acceptable banking practise is not a matter in issue. The court dismisses the notice of application filed 4th December 2018 as it dismisses the application file 4th November 2018."

This Court did not have before it a benefit of the detailed reasons of the learned judge and it is apparent that the learned judge was not requested to provide such reasons. In this regard learned counsel for the respondent Mr. Phillips had pointed the Court to the decision of Justice of Appeal Mitchell as he then was in *Donald Frederick v Choo Loi Poi et al* GDAHCVAP2021/005 (delivered 27th June 2012, unreported) and *Verbin Bowen et al v The Attorney General et al* ANUHCVP2013/0016 (delivered 4th November 2013, unreported)

Mr. Kentish, learned counsel for the appellant conceded during the course of his oral submission that although the appellant had pleaded negligence and breached of his duty of care, the particulars of negligence and paragraph 9 of the statement of claim relate to the alleged breaches of a banking mandate and corporate resolutions. Counsel also conceded that there was no pleaded case of breach of banking practises which indeed was the basis for the application to adduce expert evidence.

During the course of the his submissions Mr. Kentish formulated the issue in respect of which the expert would have been required to give evidence in these words:

"Would a bank having established a mandate and having established corporate foundational documents of his customers be obliged to consider those documents when and if they received the customer's request in relation to its account?"

It is common ground between the parties that this appeal concerns the exercise of judicial discretion under Part 32 of the Civil Procedure Rules 2000 and the well established principles and parameters within which an appellate court may review and interfere with the exercise of the judge's discretion were also common grounds. The Court does not propose to repeat or allude to those principles in the decision.

Counsel for the respondent Mr. Phillips in his submission also relied on the case of *British Airways plc v Paul Spencer [2015] EWHC 2477 (Ch)* and the learning set out in that case.

Having heard learned counsel for the parties, the Court was not satisfied that the judge erred in any way in the exercise of her discretion in dismissing the application. In this regard the Court accepted the submissions of learned counsel for the respondent. Accordingly, the appeal was dismissed with costs to the respondent.

Case Name:

**Greg Warner
v
The Queen**

**[ANUHCVP2020/0012]
(ANTIGUA & BARBUDA)**

Date:

Wednesday 19th May 2021

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Gerard Farara, QC, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. Sherfield Bowen

Respondent: Mrs. Shannon Jones-Gittens

Issues:

Criminal appeal – Appeal against sentence – Drug trafficking - Whether the learned judge paid proper or any regard to the sentencing guidelines – Whether the starting point is contrary to the sentencing guidelines – Appeal against fine - Whether the fines imposed on the appellant were excessive having regard to his financial means

**Type of
Order:**

Oral judgment

**Result/
Order:**

IT IS HEREBY ORDERED THAT:

The appeal against sentence is allowed to the extent that the fines imposed are set aside and the sentence of ten (10) is set aside and substituted for a sentence of five (5) years.

Reason:

The appellant plead guilty to the offences of possession of a control drug (cannabis) and drug trafficking. He was sentenced as follows:

- i. for the offence of possession of a control drug he was fine \$150,000.00 to be paid by 31st December 2019 in default, one (1) year imprisonment, he was also sentenced to previous imprisonment;
- ii. for drug trafficking he was fine thirty two million, one hundred thousand dollars (\$32,100,000.00) to be paid by 30th April 2020 in default one (1) year Imprisonment. He was sentenced also on this count to 10 years imprisonment.

Both sentences were to run concurrently.

The appellant appealed against his sentence. There was concurrence from both the appellant and the Director of Public Prosecutions that the fines imposed are to be vacated. It was evidenced that there was no means test conducted as to the capacity of the appellant to satisfy the fines imposed, so the fines which were imposed were vacated.

The issue remained as to the prison sentence. The appellant, as stated previously, was given ten (10) years imprisonment. Counsel for the appellant argued that in considering the appropriate sentence one ought to pay regard to the sentencing guidelines, and in application of that guideline the appropriate sentence would be four (4) years and eight (8) months. Counsel for the respondent contended that the sentence should range higher than that paying regard to a different case wherein the appellate court imposed a lesser sentence. Counsel Mrs. Gittens contended that the proper sentence should be in the range of seven (7) or six and a half (6 ½) years.

The Court considered the submissions of both sides on the issue of the appropriate sentence and the Court was of the view that the sentence imposed of ten (10) years should be amended or set aside and the appropriate sentence in this case should be five (5) years.

Case Name:

**Lev Josiah
v
The Commissioner of Police
[ANUMCRAP2017/0005]
(ANTIGUA & BARBUDA)**

Date:

Wednesday 19th May 2021

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Gerard Farara, QC, Justice of Appeal [Ag.]**

Appearances:

**Appellant: Mr. John Fuller
Respondent: Mrs. Shannon Jones- Gittens**

Issues:

Application to withdraw appeal

**Type of
Order:**

Oral decision

**Result/
Order:**

IT IS HEREBY ORDERED THAT:

**Leave is granted for the appellant to withdraw the appeal
and the appeal is accordingly dismissed.**

Reason:

**The Court considered that counsel for the appellant indicated
that he is unable to locate the appellant. He therefore indicated
that there was no intention to continue the appeal. Accordingly,
the Court dismissed the appeal as having been withdrawn.**

Case Name:

**Wayne Warrell
v
The Commissioner of Police
[ANUMCRAP2019/0013]
(ANTIGUA & BARBUDA)**

Date:

Wednesday 19th May 2021

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Gerard Farara, QC, Justice of Appeal [Ag.]**

Appearances:

Appellant: In person

Respondent: Mrs. Shannon Jones-Gittens

Issues:

Criminal appeal – Appeal against sentence - Breaking with intent to commit a felony to wit rape – Guilty plea- Section 31 (b) of the Larceny Act - Whether the learned magistrate erred in handing down the maximum sentence on the appellant in light of the circumstances of the case – Whether sentence was unduly excessive

**Type of
Order:**

Oral judgment

**Result/
Order:**

IT IS HEREBY ORDERED THAT:

1. The appeal against sentence is allowed.
2. The sentence of 18 months in prison is set aside and is substituted for a sentence of 12 months in prison.

Reason:

This is an appeal by Mr. Wayne Warrell against the sentence of eighteen (18) months imprisoned that was imposed by the Chief Magistrate against him for the offence of breaking with intent. The Court listened to the submissions of Mr. Warrell and also have paid regard to the submissions of the learned prosecutor in response.

In applying the relevant principles of sentencing and taking into account the totality of circumstances in this matter, the Court was of the view that a sentence of eighteen (18) months imprisonment that was imposed on the appellant by the Chief Magistrate will be accepted. In so concluding the Court took into account the fact that there was a guilty plea and also that the appellant had no previous conviction, however the Court also has to balance that he was a police officer at the time.

In all the circumstances, the Court was of the view that the appropriate sentence that ought to have been imposed on the appellant is a sentence of twelve (12) months imprisonment. In the circumstances, the appeal against sentence was allowed.

Case Name:

Marie- Anne Nelson Wilson

v

The Chief Magistrate

[ANUMCRAP2015/005]

(ANTIGUA & BARBUDA)

Date: Wednesday 19th May 2021

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Gerard Farara, QC, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Lawrence Daniels

Respondent: Ms. Rylis Adams

Issues: Criminal appeal - Appeal against conviction and sentence – Whether the fines imposed were grossly excessive in all the circumstances of the case – No case submission - Whether the Chief Magistrate misdirected herself in failing to accept a no case submission in all the circumstances of the case – Whether sentence imposed was against the weight of the evidence

Type of Order: Oral judgment

Result/ Order: IT IS HEREBY ORDERED THAT:

1. The appeal is allowed.
2. The conviction and sentence are set aside.

Reason: The Court considered the submissions made on behalf of counsel for the appellant and that the Crown conceded the appeal. In the circumstances, the Court was of the view that the appeal ought to be allowed.

Case Name:

Alvin Thomas
v
Karen Cabral Thomas

[ANUMCRAP2016/0001]
(ANTIGUA & BARBUDA)

Date: Wednesday 19th May 2021

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Gerard Farara, QC, Justice of Appeal [Ag.]

Appearances:

Appellant: Ms. Chantal Thomas holding papers for Mr. Hugh Marshall

Respondent: No appearance

Issues: Magisterial civil appeal - Adjournment

Type of Order: Adjournment

Result/Order: IT IS HEREBY ORDERED THAT:

1. The application of the appellant to adjourn the appeal on the ground of the ill health of counsel for the appellant is granted.
2. The appeal is adjourned to the next sitting of the Court of Appeal in Antigua and Barbuda during the week commencing 18th October 2021.

Reason: The Court considered the request by Ms. Thomas for an adjournment in circumstances where Mr. Hugh Marshall, who had conduct of the matter was on medical leave until 30th June 2021.

Case Name: Sylvester Spencer and Honora Thomas
v
Regino Nicholas
[ANUHCVP2019/0022]
(ANTIGUA & BARBUDA)

Date: Thursday 20th May 2021

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant: Dr. David Dorsett

Respondent: Mr. Pete Semaj McKnight holding for Mr. Lawrence Daniels

Issues: Interlocutory appeal –Statutory Interpretation - Fatal Accidents Act – Section 4 of the Fatal Accidents Act – Assessment of damages – Assessment of damages by a jury in fatal accident claims - Eastern Caribbean Supreme Court (Antigua

and Barbuda) Act - Section 23 of the Supreme Court Act – Discretion of a judge to appoint a jury in a civil claim - Whether the learned master erred in her interpretation and application of section 4 of the Fatal Accidents Act and section 23 of the Supreme Court Act - Plain ordinary meaning of section 4 – Whether the express mention of ‘jury’ in section 4 excluded an assessment of damages by a court or judge - Expressio unius est exclusio alterius – Presumption against implied repeal - Whether section 23 of the later Supreme Court Act impliedly repealed section 4 of the earlier Fatal Accidents Act - Whether the general provision in a later Act derogates a specific provision in an earlier Act - Generalia specialibus non derogant – Whether the absence of an enabling provision to apply for a jury in section 4 meant that a party could not apply for a jury to consider the issue of damages in a fatal accident claim – Section 16(3) of the Interpretation Act

Type of
Order:

N/A

Result/
Order:

IT IS HEREBY ORDERED THAT:

Judgment reserved.

Case Name:

[1] Tom Matthews
[2] Teresia Mathews
v
Linde Antigua Limited

[ANUHCVP2020/0006]
(ANTIGUA & BARBUDA)

Date:

Thursday 20th May 2021

Coram:

The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellants: Dr. David Dorsett

Respondent: Ms. E. Ann Henry QC with her Ms. Sherrie-Ann Bradshaw and Ms. Mandi Thomas

Issues: Interlocutory appeal – Application to adduce additional evidence - Whether the learned judge erred in dismissing an application to adduce evidence by means of a proposed witness taking all the circumstances in the round - Whether the learned judge erred in the exercise of her discretion by failing to have due regard to the principles underlying rules 1 and 26 of the Civil Procedure Rules 2000 (“CPR”) – Whether the learned judge exercised her discretion on a wrong principle of law in applying rules 26.8 and 29.11 of the CPR in the circumstances of the case - Whether the learned judge was plainly wrong in the exercise of her discretion so as to warrant appellate interference

Type of Order: Oral judgment

Result/ Order: IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed
2. Costs is awarded to the respondent of two thirds of the costs of \$1500.00 in the court below.

Reason: This is an appeal against the order of a judge dismissing an application that one Colin Robinson be called as a witness [to give evidence on the appellant’s behalf] and awarding costs to the respondent. Robinson’s evidence would be that on 18th December he witnessed a roof inspection which revealed that material used for the construction of the roof was substantially different from what the appellant had bargained for.

The substantive dispute between the parties involves a building contract with a key point of contention relating to the construction of the roof built by the respondent. The appellants contended that they contracted with the respondent for the roof to be built using the “Grace Ice and Watershield” product. The respondent represented that it was in fact used in the construction of the roof. An inspection in December 2018, which was videotaped and to which Robinson is an eye-witness, uncovered that most of the roof was constructed with an inferior product, ‘Certain Teed Winterguard HT’. Roof related evidence is important for both sides.

The appellant in the grounds of appeal allege that the judge erred in dismissing the application in that (i) the evidence was relevant and was put forward at the earliest possible time; (2) the learned judge approached the case as one where an application for relief from sanctions was proper whereas the circumstances of the case required the application to be treated as one by which the appellants were seeking to put evidence after the time prescribed by the case management orders on the basis that the evidence did not exist or had not

come to hand before the time limited by the case management orders. (3) The judge erred in the exercise of her discretion by failing to have due regard to the principles underlying rules 1 and 26 of the Civil Procedure Rules 2000 ("CPR").

Dr Dorsett submitted that the appeal should be allowed for the following reasons: There was no evidence that the respondent suffered or would have suffered fatal prejudice due to the late evidence the appellant sought to adduce or that the late evidence could not be properly dealt with by the respondent. The delay in making the application is fully explained and when viewed in proper context there was no inordinate delay. The case was not a proper one for the application of a CPR 29.11 application as the appellant sought to adduce late evidence. The late evidence did not alter the nature of the appellant's case and hence it cannot be said that the respondent would have been unduly prejudiced by the late evidence.

The appellant seeks an order setting aside the order of the judge that Colin Robinson be called as a witness and the witness summary filed by Robinson be deemed properly filed.

In her reason for decision, the learned judge accepted that the proposed evidence was relevant to the matters in issue in the proceedings. She however stated that other matters must be considered. In that regard the judge considered the inordinate delay in filing the application. The judge noted that the application was made on the eve of the trial and the court looks dimly at such applications. Further, the applicant must show the court that there is some material issue which prevented the application being made prior to when it was made.

The judge noted that the evidence before the court is that the inspection of the roof, to which the evidence of Robinson seeks to address occurred in December 2018, five months prior to the pre - trial hearing. There was no medical evidence to support the evidence of the applicant that Robinson was gravely ill; nor evidence by Robinson himself that he was ill and the extent of his illness was such that he was unable to give instructions for the application to have been previously made. The judge concluded that the evidence is insufficient to account for the delay in the application.

The judge also concluded that the evidence is likely to prejudice the claimant in that the proposed witness introduces new evidence on the eve of the trial that was not previously available to the claimant. The claimant would not have the opportunity to consider its case in response to the new witness.

The learned judge also considered that there would be a delay in the trial creating a prejudice to the respondent claimant. The proceedings were filed in 2011 and were previously scheduled for trial. It was likely that the trial date would have to be shifted to accommodate the preparation required by the claimant to deal with the proposed evidence. Given the vintage of the proceedings, the prejudice which would arise from a second loss of the court schedule date of hearing cannot properly be compensated in costs.

Lastly, the judge referred to Part 29 .11 of the CPR 2000 and said that implicit in subsection 2 is a requirement for a party seeking to call a witness after the time limited to file the witness statement or summary to apply for relief from sanctions and the applicant failed to make an application under rule 29.11.

Dr Dorsett contended that in excluding the evidence, the judge exercised her discretion on a wrong principle as a consequence, there was a miscarriage of justice. Dr. Dorsett dealt with the principles guiding the reception of late evidence. Counsel correctly contended that the decision whether or not to allow late evidence to be adduced is a matter of discretion to be exercised in accordance with the CPR. He posits that if late evidence emerges during the trial which is important, it is essential that the evidence be heard, provided that it will not cause a fatal prejudice to the other party. Where such late evidence cannot be properly dealt with by the other side, it is almost inevitable that the application will be refused, but where it can be so dealt with, even on terms as to adjournment in costs, the evidence should ordinarily be allowed. Counsel posits that a decision to exclude evidence should not be made merely because the evidence is late. A trial judge should consider all factors, including lateness and prejudice, when exercising her discretion but should not give lateness a greater significance. A party seeking to introduce the evidence does not have a heavy onus to justify it merely because it is late: *Nottinghamshire v Gladman Commercial Properties Ltd* [2011] 1 WLR 325, [2011] EWHC 1918 (Ch).

Dr. Dorsett further contended that there is no evidence of fatal prejudice. The application was filed and served more than two weeks before the trial. The respondent did not put any evidence that the late evidence the appellant was seeking to adduce would cause prejudice to their case. Dr. Dorsett argues that the judge erred in principle and in law in accepting the respondent's assertion by way of submission that adducing the evidence of Robinson would be prejudicial to it. The learned judge made a finding of prejudice in the absence of

evidence and in so doing committed an error of law, thus exercised her discretion on a wrong principle.

Dr. Dorsett rightly submitted that the case was not one giving rise to an application under CPR 29.11 and the learned judge erred in so finding. CPR 29.11 speaks to evidence existing “at the time specified by the court” for the service of the witness statement or summary; it does not refer to evidence that has not materialized. In exercising her discretion to dismiss the application on that ground, the trial judge exercised her discretion on the wrong principle.

It was also contended by Dr Dorsett that the late evidence does not alter the appellant’s case that the roof was constructed with inferior material. This is a relevant factor the judge failed to take into account. Finally, counsel submitted that the application should have been granted, having regard to the overriding objective.

The respondent chronicled the history of the matter and contended that the appellant failed to make the application in accordance with the requirement of CPR 26.8, 27.8. and 29.11. The court is of the view that these provisions are not engaged. The point is that the application was more about asking for permission to put evidence in after the dates on which case management directions required, but on the basis that the evidence either did not exist or had not come to hand before that date. So, it was a question of seeking the court’s permission rather than seeking to be excused for not failing to do something which at the time would have been impossible: *Jones v Owen* [2017] EWHC 1647 (Ch).

In so far as the judge relied on the provisions of CPR 26.8 and 29.11, she would have erred in principle as those provisions were not applicable to this matter. The Court also noted Dr. Dorsett’s submission with respect to delay. Notwithstanding the Court’s view of the non - application of CPR 26.8 and 29.11, it was clear that the learned judge arrived at her conclusion after considering several factors as articulated in her reasons in support of her decision. These factors, absent her error with respect to CPR 26.8 and 29.11 provided a proper basis for the exercise of her discretion.

Inordinate delay was certainly a relevant factor to be considered by the judge and the effect of that delay. Although Dr. Dorsett sought to impugn the judge’s finding of prejudice, asserting that there was no evidential basis therefor, it was seen from a close reading of the judgment that the judge was concerned with the effect on the trial date in granting the

application. Quite an important factor. The trial would most probably would have to be vacated and the trial date lost. It was not just an issue of delay. It was the effect of that delay. The judge quite properly adverted to the possibility of losing for the second time a scheduled hearing date. A need to change the trial date can be a powerful relevant factor for a judge to consider. It cannot be contended that prejudice would not flow therefrom.

In concluding that such delay or prejudice could not be compensated for in costs, the learned judge was in essence cognizant of the learning that payment of costs may not be adequate compensation for someone who is keen to have finality in litigation which has been hanging over his head for some time. The judge was very aware of the vintage of the matter. Further the issue of the roofing material was always important, and no proper reason has been advanced as to why that evidence was sought to be put in so very late, with the adverse consequential effects alluded to.

Taking all matters into account, it has not been demonstrated that the learned judge exceeded the ambit within which reasonable disagreement is possible and was plainly wrong in the exercise of her discretion so as to warrant appellate interference. The appeal was dismissed with costs to the respondent of two thirds of the amount awarded below.

Case Name:

**Antigua Hangers Inc
v
SFS Antigua Operations Limited**
**[ANUHCVP2020/0042]
(ANTIGUA & BARBUDA)**

Date:

Thursday 20th May 2021

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**

Appearances:

Appellant: Ms. Sherrie-Ann Bradshaw

Respondent: Ms. Kamilah Roberts and Mrs. Andrea Roberts-Nicholas

Issues:

Civil appeal – Interim injunction – Whether the learned judge erred in principle in the exercise of her discretion to continue an interim injunction until the determination of the substantive

claim at trial – Disclosure - Whether the learned judge erred in failing to take into account that there was material non-disclosure at the ex-parte application for the injunction – Whether the learned judge erred in failing to consider the appellant’s affidavit as it relates to access control – Adequacy of damages – Whether the judge’s finding that damages were not an adequate remedy is wholly erroneous - Balance of convenience- Whether the learned judge erred in holding that the balance of convenience favoured the respondent and that the status quo should be maintained

Type of
Order:

Oral judgment

Result/
Order:

IT IS HEREBY ORDERED THAT:

1. The order of the learned judge is affirmed and the appeal is accordingly dismissed.
2. Costs is awarded to the respondent in the sum of two-thirds of the costs of \$800.00 awarded in the court below.

Reason:

This is the judgment of the Court. Antigua Hangars appealed an order of a judge continuing an ex- parte interim injunction at the inter partes hearing until the determination of the substantive claim at trial, and awarding costs of \$800.00.

The grant or refusal of an injunction engages the exercise of the court’s discretion and can only be impugned upon the well - known principles upon which the exercise of the court’s discretion can be successfully challenged. An appeal court should not interfere with the discretion exercised by a judge, who has applied the correct principle and taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge: *Wallbrook Trustee Ltd v Fattal* [2008] EWCA Civ 427 paragraph 33.

The jurisdiction to grant an injunction resides in section 24 of the *Eastern Caribbean Supreme Court (Antigua and Barbuda) Act, Cap 143*. Subsection 1 thereof provides that an injunction may be granted by an interlocutory order of the High Court or a judge thereof in all cases in which it appears to the court or judge that it is just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms and conditions as the court or judge thinks just.

The injunction application arose from a claim the appellant filed against the respondent alleging various breaches of a lease agreement between the parties. The respondent denied the alleged breaches and filed a counterclaim alleging various breaches of the lease agreement by the appellant and seeking various remedies. The respondent filed an ex-parte application for an interim injunction to restrain the appellant from, among other things, entering and taking possession of the leased premises and interfering with the property. The court granted the interim order. At the inter-partes hearing the court ordered the interim injunction be continued until the determination of the substantive claim at trial as damages would not be an adequate remedy for the respondent and the balance of convenience and the status quo favoured the respondent. Being dissatisfied, the appellant appealed on four grounds.

The first ground alleged that the learned judge erred in failing to take into account that there was material non-disclosure at the ex-parte application for the injunction in that the respondent failed to highlight to the court that in the respondent's Space Permit, terms and conditions at paragraphs 7 and 14, there were prohibitions as it relates to storage of motor vehicles, recreational vehicles or boats in the space.

The principles relating to the duty of full and frank disclosure are well established: see *Brinks Mat Ltd v Elcombe* [1988] 1 WLR 1350; *YXB v TNO* [2015] EWHC 826 (QB). The applicant has a duty to make full and frank disclosure to the court of all matters of fact and law material to the application. If that duty is not observed, in an interim injunction case, the court may discharge the injunction order, without an examination of the merits. But the court has discretion to set aside or to continue the order. Whether the fact not disclosed is of sufficient materiality to require or justify immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues that were to be decided by the judge on the application.

The material facts are those which it is material for the judge to know in dealing with the application as made. Materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers. It is not for every omission that the injunction will be automatically discharged. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex-parte order, nevertheless, to continue the order, or to make a new order on terms: *Wild Brain Family International Ltd v Robson* [2018] EWHC 3163. When the whole of the facts, including that of the original non-disclosure are before the court, it may well grant a second injunction if the original non

- disclosure was innocent and if an injunction could properly be granted.

The duty to disclose applies to facts known to the applicant and additional facts which he would have known if he had made proper inquiries before the application. The extent of the inquiries which will be held to be proper depends on all the circumstances of the case.

The document entitled “Space Permit” was attached as an unmarked exhibit to the appellant’s affidavit in opposition dated 2 October 2020. The “Space Permit” document is unsigned and was made between the respondent and another party, a third party for the period 13 April 2015 to 12 April 2016. The respondent contended that the document does not relate to the appellant and does not relate to the material period in question. It was not relevant to the lease agreement or the material period in question.

The respondent pointed out that the relationship between the appellant and itself is governed by a lease agreement dated 14th August 2014 which was disclosed to the lower court as an exhibit “CSI”. The lease agreement does not contain a clause similar to clause 7 of the Space Permit. The respondent submitted that the Space Permit document was not relevant to the interim injunction application and as such there was no failure on its part to disclose it. The Court was of the view that given the law relating to materiality, the document was not material to the determination of the interim injunction application and would not have impacted the outcome of the interim application for the injunction. This ground accordingly failed.

Ground 2 alleged that the learned judge erred in failing to consider the appellant’s affidavit of 20th November 2020 exhibiting a letter dated 19th November 2020 of Peter Abraham as it relates to access control. The appellant contended that it disclosed that letter as soon as possible and it ought to have been considered by the court.

The affidavit in question (an affidavit in opposition) was served on the respondent on the afternoon of Friday 20th November 2020. The inter partes hearing of the injunction was heard on Monday 23 at 9 a.m. With such short notice, the respondent contends that it did not have sufficient time to take instructions to reply and objected to the admission of the affidavit on the basis of late filing. Upon hearing the parties, the judge disallowed the use of the affidavit. The Court was of the view that it was certainly within the judge’s power to do so and no fault can be taken with the exercise of the judge’s discretion as

it would be unfair in the circumstances indicated to allow the appellant to rely on the affidavit.

In any event the failure to consider the affidavit would not have impacted the outcome of the interim application. The sole purpose of the affidavit was to disclose a letter to the appellant from Abraham, an oversight officer in the Ministry of Aviation, stating that it had been concluded by a National Civil Aviation Security Committee meeting held on 17th November 2020 that there had been a security breach by a security officer at Gate 7 as it related to access control, security checks and screening. This ground likewise failed.

Ground 3 alleged that the judge's finding that damages were not an adequate remedy is wholly erroneous, in that having formed the view that where land is concerned damages are not an adequate remedy; similarly, hangars are to be treated in like fashion.

The judge concluded that damages were not an adequate remedy where land was concerned. Relying on the case of *Nunes v Jamaica Redevelopment Foundation Inc (2019) 96 WIR 588*, the appellant argued that the property before the court concerned the lease of hangars, which are chattels and the judge wrongly equated chattels to land. The appellant contended that damages are an adequate remedy. It relied on *Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 1 WLR 798* and the Privy Council decision in *Pell Frischmann Engineering Limited v Bow Valley Iran Limited [2009] UKPC No. 20 of 2009*, which summarised the jurisdiction to grant Wrotham Park damages. The Court was of the view that these cases were not germane to the matters at hand.

The learned judge reasoned in a paragraph 13 and 14 of her judgment that damages would not be an adequate remedy to the respondent. The judge's judgment and the appellant's appeal focused on the respondent's submissions on the adequacy of damages in disputes involving interests in land. The appellant argued that the judge's finding is wrong as hangars are chattels and the judge was wrong to equate chattel to land in her analysis as to the adequacy of damages. The respondent rejected the assertion that the hangars are chattels and stated that there was no evidence to support that assertion.

The respondent submitted that the threatened eviction was an interference with its right to possession of the leased premises which was not a matter that could simply be compensated in damages. The respondent highlighted that the leased premises consisted of hangars and related facilities which had a

specialised character and unique location relative to its business operations and therefore damages would be inadequate.

Further, the respondent contended that the case law on adequacy of damages in cases involving land is not focussed on whether or not the disputed possessory interest relates to a structure that is fixed to the land. The Court agreed that the principle to be extracted from the case law is that due to the unique character and special features of land, disputes involving property interest merit special treatment when considering adequacy of damages and there is a strong presumption that damages would not be adequate. This principle is clearly applicable to the leased premises whether or not the hangars are fixed to the land.

This principle can be seen in *Nunes*, where the Jamaica Court of Appeal stated that in the context of a contract for the sale of land, damages have traditionally not been regarded as an adequate remedy on the basis that each piece of land is unique. A similar observation was made in *Geddes Meyer v Kehvin Dickinson* [2019] ECSCJ No 349. The court stated that as a general rule, each parcel of land is considered to have unique features and an award of damages would not be sufficient remedy for the purchaser and thus the law considers that the purchaser cannot obtain a satisfactory substitute.

The Court was of the view, as advanced by the respondent, that this principle is applicable to the consideration adequacy of damages in the context of an interim injunction or its continuation, seeking to restrain threatened eviction from leased premises. The judge's reasoning and finding that damages would be inadequate is consistent with the applicable law. It is also in consonant with the statutory basis underpinning the jurisdiction to grant an injunction ordained in section 24 of the Supreme Court Act, that, is whether it would be just or convenient.

Section 24 of the Supreme Court Act, confers a very broad discretion on the court to grant an injunction. The locus classicus on the application of the section is Lord Diplock's speech in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. It has been recognised that the speech contains guidelines for the exercise of the courts discretion and is not intended to fetter the broad discretion given by the statute: *R v Secretary of State for Transport, ex p. Factortame Ltd*. [1991] 1 AC 603 at 671 - 674.

The second stage in the approach recommended by Lord Diplock is to ask “whether damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay them.” if so, “no interlocutory injunction would normally be granted.” These guidelines should not be treated as fettering the broad discretion conferred by section 24. The statutory jurisdiction is not formally limited by considerations such as whether damages are recoverable or the extent of any such damage : *Smithkline Beecham plc v Apotex Europe Ltd. [2003] EWCA Civ 137 , paragraph 14.*

The primary obligation of a party is to perform the contract. The requirement to pay damages in the event of a breach is a secondary obligation. The rule that an injunction should not be granted where damages would be an adequate remedy should be applied in a way which reflects the substantial justice of the situation, that is the basis of the jurisdiction under the statute.

The primary commercial expectation would be the parties will perform their obligations. The Court accepted that an injunction may in an appropriate case be granted even where the loss caused by a threatened breach would not sound in damages. That’s an instance of the court refusing to allow a mechanistic application of the “damages an adequate remedy “ rule to prevent the victim of a breach from being able to enforce compliance with the primary obligation under the contract : *AB v CD [2014] EWCA Civ paras 27 and 29.* While at paragraph 32, in an application for interim relief, Ryder LJ favoured the re-casting of the question to be asked thus: “Is it just in all the circumstances that a [claimant] be confined to his remedy in damages?”

The Court was not of the view that the learned judge erred in respect of her conclusion that damages would not be an adequate remedy. Further, in all the circumstances, the refusal to continue the injunction would be unjust as it would allow the appellant to circumvent the pending legal proceedings by evicting the respondent, while the respondent was challenging his eviction in court proceedings. This ground was accordingly dismissed.

Ground 4 alleged that the learned judge erred in holding that the balance of convenience favoured the respondent and that the status quo should be maintained. No proper bases have been advanced in support of that ground. The respondent asserted that it continues to pay the monthly rent to the appellant for the leased premises which it has occupied since 2014 and there is no evidence of any financial loss being suffered by the appellant as a result of the continuation of the

interim injunction until matter is determined. The Court accordingly found no merit in this ground. There was no doubt that the balance of convenience favours the grant of the injunction and the status quo should be maintained until determination of the trial.

The appellant had not demonstrated that the learned judge erred in the exercise of her discretion in continuing the injunction until the determination of the substantive claim at trial.

Case Name:

Cliff Williams

v

Mary John

**[ANUHCVP2019/0002]
(ANTIGUA & BARBUDA)**

Date:

Friday 21st May 2021

Coram:

The Hon. Dame Janice M. Pereira, DBE, Chief Justice

The Hon. Mr. Paul Webster, Justice of Appeal

The Hon. Mr. Gerard Farara, QC, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Sylvester Carrott

Respondent: Mr. Wendel Robinson

Issues:

Application to strike out notice of appeal – Whether time ran for the filing of the notice of appeal while the court office was closed during the pandemic – Whether appellant ought to have applied to the court for an extension of time to file the notice of appeal – Adjournment – Whether in the circumstances the appellant ought to be granted an adjournment to produce further evidence to the court

**Type of
Order:**

Oral decision

**Result/
Order:**

IT IS HEREBY ORDERED THAT:

- 1. The application to strike out the notice appeal is refused.**
- 2. The notice of appeal served on 10th November 2020 is deemed as having been timely served.**

3. The appellant shall pay costs to the respondent fixed in the sum of \$750.00 in relation to the late service of the notice of appeal, those costs to be paid no later than Friday, 4th June 2021.

Reason:

On the application to strike out the notice of appeal on the basis that the notice of appeal was filed out of time, as well as the second limb that the notice was served out of time and not in accordance with the Civil Procedure Rules 2000 are in relation to the question whether the appeal was filed timely, the Court ruled that the notice of appeal was in time, having regard to the fact that:

1. The judgment of the appeal was delivered on 5th March 2020 this would have given to the intended appellant until at least 20th April 2020 for filing his appeal, it being an ordinary appeal which would have attracted a time limit of forty two (42) days under the rules.
2. Having regard to the fact that the notice of the Registrar of the court in Antigua and Barbuda having regard to the covid-19 pandemic set out in that notice that time cease to run for the purposes of the Civil Procedures Rules as between the period 2nd April to 25th May 2020. The appellant filed his appeal on 12th May and therefore having regard to when time ceased to run under the notice of the registrar his appeal would have been timely filed and so, is not deemed to be out of time by virtue of that notice, which caused the time cease to run during that period.
3. In relation to the service of the notice of appeal that was served on the 10th November 2020 that was also outside the time for service, the Court did not consider that it would be a proportionate response to strike out the notice of the appeal on that basis and would accordingly would deem the service of the notice of appeal on the 10th November 2020 as having been timely served.

The appellant was ordered to pay costs to the respondent fixed in the sum of \$750 in relation to the late service of the notice of appeal and those costs are to be paid no later than 4th June 2021.

Case Name:

**Police Service Commission
v
Wendell Glenroy Robinson**

**[ANUHCVP2020/0026]
(ANTIGUA & BARBUDA)**

Date:

Friday 21st May 2021

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

Appearances:

Appellant: Dr. David Dorsett

Respondent: Ms. Cara Shillingford-Marsh and Mr. Wayne Benjamin Marsh

Issues: Civil appeal – Academic claims - Whether the claim is wholly academic and should be struck out – Whether the learned judge erred in ruling that the claim is not entirely an academic claim – Whether the learned judge erred in not having ordered the respondent to discontinue the claim - Whether the learned judge erred in dismissing the appellant’s application to strike out the claim

Type of Order: Oral judgment

Result/Order: IT IS HEREBY ORDERED THAT:
1. The appeal by the Police Service Commission in this matter is dismissed.
2. No order as to costs.

Reason: This is an appeal by the Police Service Commission against the order of learned judge of the High Court made on 30th June 2020 by which the learned judge dismissed the appellant’s application made by notice of application filed on 26th November 2019 seeking an order that the respondent file a Notice of discontinuance of its claim before the High Court within seven (7) days failing which that matter would stand dismissed.

The reasons for the learned judge’s decision are set out in some detail in the order of the court dated 30th June 2020. The central ground upon which the appellant’s rely in support of their application was that the claim in the court below had become an academic claim by virtue of the termination of the respondent by the Police Service Commission as commissioner of police for Antigua and Barbuda. For the reasons which have been developed and amplified during the course of the oral submissions in this matter, the Court was not satisfied that the learned judge erred in making a determination that the claim below had become an academic claim. Accordingly, in the circumstances, the Court considered that the appeal was without merit and ought to be dismissed.

During the course of oral argument Dr. Dorsett, learned counsel for the appellant, invited the Court to exercise its powers and jurisdiction pursuant to *section 33 of the Eastern Caribbean Supreme Court Act of Antigua and Barbuda, Cap 143 Laws of Antigua & Barbuda* and to give certain directions relating to the two claims pending before the High Court of justice. This was a new matter raised by Dr. Dorsett as he readily conceded, however the Court did not consider in the circumstances of this matter that this court ought to exercise its powers under *section 33 of the Eastern Caribbean Supreme Court Act* and to make directions or any directions along the lines sought by Dr. Dorsett. Accordingly, the Court respectfully declined to do so. The Court noted in passing that this does not prevent either of the parties from seeking appropriate directions in the High Court in relation to these matters.

Case Name: Police Service Commission
v
Wendell Glenroy Robinson
[ANUHCVP2021/0007]
(ANTIGUA & BARBUDA)

Date: Friday 21st May 2021

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

Appearances:

Appellant: Dr. David Dorsett and Mr. Jared Hewlitt

Respondent: Mr. Lawrence Daniels

Issues: Civil appeal – Application to strike out constitutional motion - Application to treat first hearing of the matter as trial - Whether the learned judge conflated procedures in respect of the applications – Judicial review – Whether the learned judge erred in treating the matter as a judicial review application – Whether the learned judge treated the first hearing as trial of judicial review application - Whether the learned judge erred in granting the reliefs sought

Type of Order: Oral judgment

Result/Order: IT IS HEREBY ORDERED THAT:

1. The appeal is allowed.

2. The decision of the learned judge is set aside.
3. The matter is remitted to the court below for the rehearing of both the application to strike and the oral application for treating the first hearing as the trial of the claim, by a different judge on their merits and the application to strike must be heard first.
4. No order as to costs.

Reason:

This is an appeal against the decision of learned judge of the High Court made on 24th March 2021. The respondent by way of fixed date claim form filed on 29th June 2020 sought certain administrative orders and Constitutional relief under sections 105 and 119 of the constitution of Antigua and Barbuda, with respect to the termination of his employment by The Police Service Commission.

The day the matter came on for hearing on 10th November 2020, the appellant at around 8:30 am, filed an application to strike out the respondent's Fixed Date Claim on the ground that it disclosed no cause of action. Counsel for the appellant indicated that section 105 (1) of the Constitution of Antigua and Barbuda does not vest or endow the respondent with any rights in which to ground a constitutional claim. The respondent by way of an oral application on the same day, urged the Court to deal with the first hearing of the claim as the trial of the claim (if it is not defended or it considers that the claim can be dealt with summarily) as provided by rule 27.2(3) of the Civil Procedure Rules 2000 ("CPR"). The court, having been placed in an invidious position by virtue of the timing of both applications, sensibly did not treat with the matter on that day and gave directions to the parties for the filing of submissions; and fixed a date for the subsequent hearing of both applications.

The matters for determination before the court were: whether the strike out application should be acceded to; and whether the first hearing should be the trial of the matter.

When the matter came on for hearing, the learned trial judge states that there was no proper application to strike out as there is no affidavit in support of the application. Further, at paragraph 6 of the court's judgment, the learned trial judge finds that the applicant/respondent's request for constitutional redress must fail. At paragraph 24 of the judgment the learned judge concludes that the applicant/respondent brought himself under the ambit of rule 56 (2) of the CPR. The judge's findings are that the applicant/respondent: (i) has locus standi; (ii) has an arguable case; and (iii) the applicant has been adversely affected by the actions of The Police Service Commission. At paragraph 15 of the judgment, the learned judge treated the matter before the

court as a judicial review application and then granted the reliefs sought, in the absence of an application for permission to commence judicial review proceedings and leave for judicial review.

In determining whether the matter is really a judicial review application, the court ought to look at the kind of reliefs sought; and when one looks at the kind of reliefs that were sought in the constitutional motion, it is still in substance a constitutional motion and not a judicial review application.

There seems to be some conflation of procedures. The judge seemingly converted the matter before the court into judicial review. The respondent in his submission contended that he was not seeking judicial review but seeking administrative orders which was permissible without necessarily seeking judicial review on the authority of *The Attorney General et al v D. Gisele Issac ANUHCVP2015/0014 (delivered 11th March 2016, unreported)*. Nonetheless even if that was being done, there would have still been need for a trial of some sort and not whereby the decision is given on the basis that it is converted to judicial review. This was done where the first stage of permission for leave had not yet been dealt with and the court went on further to proceed to judgment on the claim without actually having decided that the court will embark on this course albeit in a summary way. There was still need for a trial one way or the other; and for the parties to be advised that this is the course of action the court has adopted, and this is what will happen in relation to this trial in the absence of a defence.

Strike out application.

There was no rule or affidavit evidence in the strike out application, for the simple reason that an application to strike out a claim is normally one where it may be that the claim discloses no viable cause of action and that would be expressed on the pleaded case.

Rule 11.8 of the CPR is very clear, the applicant need not give evidence to support an application unless it is required by a court order, a practise direction or a rule. Therefore, when the learned judge ultimately in her decision said that the application was defective because there was no supporting affidavit, the learned judge was not correct.

As a matter of principle, where there is a strike out application, the application ought to be addressed by the court first. The learned judge seemed to have dismissed the strike out application out of hand on the basis that it was not supported by evidence on affidavit without going to the merits of the application. That is in essence what the learned judge stated at paragraph 12 of her judgment in relation to the application to strike out the claim. The court states:

“... no Affidavit in Support of Application to have matter struck out was filed. The Notice of Application to strike out must be served on the other side in accordance with Rule 11.11 (1) (a) and (b). However this was not done. In fact the Application was filed on the portal at 8:30 am on the morning of 10th November, 2020 ...”

Further at paragraph 13 the learned trial judge states:

“It is the Court’s view that 1) the application to strike out claim form application is first in time fails as this application is not properly before the Court and is dismissed ...”

The application to strike out and the oral application were the things which engaged the court at the time of the first hearing. The learned judge ought to have dealt with the strike out application first and make a determination of that application, rather than proceeding to treat the matter as a judicial review application; then to have treated the first hearing as trial of the matter; and to further grant the applicant relief. The judge also erred in dismissing the strike out application on the basis that there was no supporting affidavit evidence, when in fact the court ought to have treated with that application to the fullest extent and make a determination on that application first. Further, no party is told before this decision was given that the court has decided to treat the first hearing as the trial. It came in the actual decision granting the relief and dealing with the entire claim without any party knowing that the court has taken the actual decision to treat with it summarily.

The learned judge would have had to take a decision and then inform the parties that this is the course the court is adopting, that step was not taken. Unfortunately, what happened is the learned judge, which one can assume from the court’s decision, just dealt with everything all together without anyone having an opportunity to really engage on that decision to conduct a trial albeit summarily.

What part 27 of the CPR in relation to Fixed Date Claim does not do is to take a course which is tantamount to default judgment. The court still has to conduct a trial and the parties must be aware before the court actually grants relief, that the court is going to engage on that process. Those are the things which went awry in relation to the way this claim was handled.

What has happened is really a conflation of procedures which should not have happened, and the court cannot sanction that procedure where by because it would clearly fly in the face of principles of natural justice and the right to be heard in relation to (a) the application to strike and the steps which ought to be taken from that albeit the end results.

What was not open for the learned judge to do was to conflate those steps; and secondly once having concluded that the claim in relation to the constitutional reliefs failed, then to seek to as it were categorize the claim as a Judicial Review claim and then proceed as if leave had been granted and proceed further to then determine the claim all at the same time. Those were discrete and separate steps which ought to be taken and considered on their merits each step of the way. Those were the errors which occurred, and this court will not be able to sanction that other than to set aside the decision and to remit those two applications to be heard to the court below before a different judge.

Both applications should be heard; however, the application to strike out must be heard first on its merits and similarly the respondent's oral application and whether or not that should be acceded to, again, must be determined on the merits of the matter as it stands.