

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

VIDEOCONFERENCE

COMMONWEALTH OF DOMINICA

Monday 25th April 2022 – Friday 29th April 2022

PANEL 1

APPLICATIONS AND APPEALS

Case Name:

Joseph Roberts

v

Elick Edwards

[DOMMCVAP2016/0004]

(Commonwealth of Dominica)

Date:

Monday, 25th April 2022

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Sydney Bennett QC, Justice of Appeal [Ag.]**

Appearances:

Appellant: **Mr. Peter Alleyne**

Respondent: **Mr. Glen Ducreay**

Issues:

**Application to strike out appeal - Absence of appellant at
status hearings - Appellant's failure to prosecute appeal
- Appeal filed 1st June 2016 - Notice of appeal filed out
of time with no extension of time being sought or granted**

Type of Order:

Oral Decision

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The notice of appeal filed on 1st June 2016 is struck out.**

2. No order as to costs
3. The order of the learned magistrate is affirmed.

Reason:

This was an application before the Court by the respondent to strike out the notice of appeal which had been filed on 1st June 2016 seeking to appeal the decision of the learned magistrate which was made on 25th January 2016, on the basis that the appellant had failed to comply with the provisions of CPR 62.12 and 62.13, in that, the appellant had failed to file the record of appeal and also to file submissions.

The Court considered the matter, heard counsel on both sides and noted that the notice of appeal was filed outside of the prescribed time, with there being no application for an extension of time. The Court further noted that the appellant had not taken any steps to progress the appeal in any way. The Court also took judicial notice of the fact that Dominica had been affected by severe weather, including storms, which would have affected the operation of the registry of the high court in Dominica, but also noted that this would have been some years ago.

Despite several status hearings being conducted by the court office, no steps were taken by the appellant to seek leave of the Court in relation to the notice of appeal being filed out of time and no steps were taken at all in relation to progressing the appeal.

In those circumstances, the Court was of the view that the appellant had not sought to have the appeal properly before the Court and to prosecute the appeal.

Case Name:

Annette Turney
V
[1] Josian Nixon
[2] Jason Nixon (as the personal representative
of the estate of Giraud Nixon)
[3] Tutil St. John
[4] Rosie St. John

**[DOMHCVAP2021/1003]
(Commonwealth of Dominica)**

Date: Monday, 25th April 2022

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Sydney Bennett QC, Justice of Appeal
[Ag.]

Appearances:

Applicant: Mr. Mark Douglas

Respondents: No appearance

Issues: Application for leave to appeal - Whether the learned judge erred in holding that the undisputed, indefeasible certificate of title of Giraud Nixon issued in 1921 did not have the legal effect of precluding the right and title of Tutil St. John obtained in 1977 by re-registering the same parcel of land - Whether the learned judge erred in law by failing to take into account that the applicant, as the successor in interest to Giraud Nixon's estate, could rely upon the indefeasibility of her late father's registered title to assert a claim for entitlement to ownership of the subject land against a subsequent first title registration of the same land where the previous title for the same land has not been cancelled - Whether the learned judge erred in law in holding that to maintain ownership of a parcel of land, the registered proprietor of a parcel of land under the Title by Registration Act is required to plead and eventually prove at a trial a claim of fraud against an individual who obtains title - Whether the learned judge erred in law in striking out the applicant's statement of claim - Whether the learned judge erred by failing to take into account that the respondent's claim to ownership of the subject land was precluded on the grounds of res judicata and abuse of process where a judgment had been entered on 30th July 1981 in the high court of justice, and never appealed, against the respondent and in favour of the applicant, declaring that the applicant is the owner of the subject land - Whether a party who asserts a claim to ownership of registered land, a claim which the high court dismissed over 40 years ago and was never appealed, may assert in a

proceeding of the high court forty years later, as defence to a claim to ownership of the same parcel of land against the prevailing party in the prior action

Type of Order:

Oral Decision

Result / Order:

IT IS HEREBY ORDERED THAT:

1. Leave to appeal the decision of the learned judge dated 27th October 2021 is granted.
2. The applicant shall file a notice of appeal within 21 days of the date of this order.

Reason:

This was an application for leave to appeal against the decision of the court below dated 27th October 2021. The Court reviewed the judgment of the court below and the application for leave to appeal. The Court was of the view that, having read the judgment and having reviewed the proposed grounds of appeal, that leave to appeal should be granted to the applicant.

Case Name:

Mathis Alson Woodman

V

The State

**[DOMHCRAP2016/0006]
(Commonwealth of Dominica)**

Date:

Monday, 25th April 2022

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Sydney Bennett QC, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mrs. Zena Moore-Dyer with Mrs. Gina Dyer Munro

Respondent:

**Ms. Sherma Dalrymple, Director of Public Prosecutions
[Ag.] with Ms. Daina Matthew**

Issues:

Rape - Incest - Indecent Assault - Appeal against conviction - Sentence of 15 years' imprisonment for rape, 7 years' imprisonment for incest and 2 years' imprisonment for indecent assault to run concurrently - Whether the indictment, conviction and sentences are erroneous in law as the offences of rape, incest and indecent assault all arise out of the same facts and circumstances - Whether the learned judge misdirected herself on the law and/or failed to direct or adequately direct the jury as to the law as regards the ingredients of the charges of incest, rape and indecent assault and as such created confusion in the minds of the jury and deprived the appellant of a fair trial and a fair chance of an acquittal - Whether there was an abuse of process where there had been a multiplicity of charges - Consent - Section 12 of the Sexual Offences Act No. 1 of 1998, laws of Dominica - Alternative verdict/offence - Whether the convictions for rape and incest should be set aside - Whether the learned judge misdirected herself on the facts and law - Whether the proviso should be applied in respect of rape - Whether a miscarriage of justice occurred- Whether the learned judge misdirected the jury and/or failed to adequately direct the jury on the law and the application of the evidence as it relates to the recent complaint - Whether the verdict was unsafe and unsatisfactory - Section 28 of the Sexual Offences Act - Whether the learned judge failed to direct the jury on the issue of corroboration as it related to the matter - Whether the learned judge failed to give the jury proper directions as to the burden of proof

Type of Order:

N/A

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name:

**Peter Winston
v
Dianne Telemaque
[DOMHCVAP2012/0017]
(Commonwealth of Dominica)**

Date:

Monday, 25th April 2022

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Sydney Bennett QC, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Mrs. Gina Dyer Munro with Mrs. Zena Moore-Dyer

Respondent:

**In person
Mr. Peter Alleyne, Legal aid clinic, holding a watching
brief**

Issues:

Assessment of damages - General damages - Damages for loss of amenities - Whether the learned judge erred in assessing damages for loss of amenities by finding that the appellant/claimant had not specifically pleaded loss of amenities - Quantum of damages for loss of amenities - Whether the sum of EC \$40,000.00 awarded by the learned judge as damages for loss of amenities unreasonably low - Damages for future loss of earnings - Whether the learned judge erred by treating future loss of earnings as having to be specifically pleaded and proven - Whether the sum awarded for future loss of earnings inordinately low - Discount to cater for contingencies of life - Whether the 10% discount made by the judge on the amount awarded for future loss of earnings to cater for the contingencies of life was unreasonable - Interest on damages - Whether the learned judge erred by failing to grant interest on general damages for pain and suffering/loss of amenities from the date of service of the writ to the date of trial at the statutory rate of 5% - Whether the learned judge erred by

failing to award interest on special damages form the date of the accident until the date of trial

Type of Order: **Adjournment**

Result / Order: **[Oral delivery]**

IT IS HEREBY ORDERED THAT:

The matter is adjourned to Tuesday 26th April 2022 at 9:00 am.

Case Name: **Peter Winston**
v
Dianne Telemaque

[DOMHCVAP2012/0017]
(Commonwealth of Dominica)

Date: **Tuesday, 26th April 2022**

Coram: **The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal**
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Sydney Bennett QC, Justice of Appeal [Ag.]

Appearances:
Appellant: **Mrs. Gina Dyer Munro with Mrs. Zena Moore-Dyer**

Respondent: **In person**

Issues: **Assessment of damages - General damages - Damages for loss of amenities - Whether the learned judge erred in assessing damages for loss of amenities by finding that the appellant/claimant had not specifically pleaded loss of amenities - Quantum of damages for loss of amenities - Whether the sum of EC \$40,000.00 awarded by the learned judge as damages for loss of amenities unreasonably low - Damages for future loss of earnings - Whether the learned judge erred by treating future loss**

of earnings as having to be specifically pleaded and proven - Whether the sum awarded for future loss of earnings inordinately low - Discount to cater for contingencies of life - Whether the 10% discount made by the judge on the amount awarded for future loss of earnings to cater for the contingencies of life was unreasonable - Prejudgment interest on damages - Whether the learned judge erred by failing to grant interest on general damages for pain and suffering/loss of amenities from the date of service of the writ to the date of trial at the statutory rate of 5% - Whether the learned judge erred by failing to award interest on special damages from the date of the accident until the date of trial - Whether a claim for prejudgment interest must be specifically plead - Failure by claimant to specifically plead prejudgment interest

Type of Order: N/A

Result / Order: [Oral delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name: Peter Winston
v
The Police

[DOMMCRAP2013/0011]
(Dominica)

Date: Tuesday, 26th April 2022

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Sydney Bennett QC, Justice of Appeal [Ag.]

Appearances:
Appellant: In person

Respondent:	Ms. Daina Matthew with Mrs. Sherma Dalrymple, Director of Public Prosecutions [Ag.]		
Issues:	Driving without a licence - Magisterial appeal against conviction - Reasons for decision from magistrate unavailable - Section 146 of the Magistrate's Code of Procedure Act Chapter 4:20		
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 Director of Public Prosecutions [Ag.] had conceded the appeal on the ground that the magistrate had provided no reasons for the decision. Furthermore, the magistrate no longer resided in Dominica and would be unavailable to provide reasons for the decision.		
Case Name:	Ronald Vidal v The Government of the Commonwealth of Dominica [DOMHCVAP2013/0010] (Commonwealth of Dominica)		
Date:	Tuesday, 26th April 2022		
Coram:	The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mr. Sydney Bennett QC, Justice of Appeal [Ag.]		
Appearances:	<table border="0" style="width: 100%;"> <tr> <td style="width: 35%;">Appellant/Respondent:</td> <td>No appearance</td> </tr> </table>	Appellant/Respondent:	No appearance
Appellant/Respondent:	No appearance		

Respondent/Applicant: Ms. Tameka Burton with Mrs. Vanica Sobers-Joseph

Issues: Application to strike out appeal - Appellant's failure to file skeleton arguments within time stipulated by Civil Procedure Rules 2000 - Appellant's noncompliance with directions given at status hearing - Appellant's failure to file record of appeal after notice of availability of transcript made - Appellant's failure to prosecute appeal

Type of Order: Oral decision

Result / Order: IT IS HEREBY ORDERED THAT:

The notice of appeal filed by the appellant on 1st May 2013 is struck out for want of prosecution.

Reason: This was an application to strike out the notice of appeal filed on 1st May 2013. The notice of availability of the transcript was made on 29th September 2014. The appellant has failed to comply with the directions made on 4th February 2019 at the status hearing where he was ordered to file the record of appeal and submissions in accordance with part 62 of the Civil Procedure Rules 2000.

The Court considered the judgment of the learned judge and grounds of the appeal as contained in the notice of appeal and noted that there was little prospect of success of the appeal and that there was an inordinate delay on the part of the appellant in progressing the appeal and prosecuting this matter. The appeal was struck out in the circumstances.

Case Name: Ronel Desiree
v
The Police

[DOMMCRAP2021/0002]

(Commonwealth of Dominica)

Date: Tuesday, 26th April 2022

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Sydney Bennett QC, Justice of Appeal [Ag.]

Appearances:

Appellant/Applicant:	Mrs. Cara Shilingford-Marsh
Respondent:	Mrs. Sherma Dalrymple, Director of Public Prosecutions [Ag.] and Ms. Daina Matthew

Issues: Application for the appeal to be allowed - Application for an extension of time to file the notice of appeal - Whether there is a valid appeal before the Court

Type of Order: Oral decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The application for an extension of time to file the notice of appeal is granted.
2. The notice of appeal filed 26th January 2021 is deemed duly filed.

Reason: The Court considered the application before it for an extension of time and that there was no objection to the extension by the respondent. In the circumstances, the Court was of the view that the extension of time to file the notice of appeal ought to be granted.

Case Name: Ronel Desiree
v
The Police

**[DOMMCRAP2021/0002]
(Commonwealth of Dominica)**

Date: Tuesday, 26th April 2022

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Sydney Bennett QC, Justice of Appeal [Ag.]

Appearances:

Appellant: Mrs. Cara Shilingford-Marsh

Respondent: Mrs. Sherma Dalrymple, Director of Public Prosecutions [Ag.] and Ms. Daina Matthew

Issues: Criminal appeal - Possession of cannabis - Whether the sentence was manifestly harsh - Section 105 of the Magistrates Code of Procedure Act, Chap 4:20, Laws of Dominica - Section 16(2) of the Drugs (Prevention of Misuse) Act, Chap 40:07, Laws of Dominica - Whether the default period of imprisonment imposed by the magistrate was proper in law

Type of Order: Oral judgment

Result / Order: IT IS HEREBY ORDERED THAT:

1. The appeal is allowed.
2. A sentence of time served is substituted.

Reason: The Court considered the submissions made by counsel for both the appellant and the respondent on appeal. The Court was mindful of the clear provision of section 105 of the Magistrates Code of Procedure Act, Chap 4:20 Laws of Dominica (“the Code) which set out a fixed scale to be followed where a period of imprisonment may be imposed by a magistrate under the Code or “any other Act” in respect of the non-payment of any sum of money adjudged to be paid by a conviction. The Court considered further that the appellant had been fined \$30,000.00 by the learned magistrate and in default sentenced to 7 years imprisonment. Section 105 of the Code stipulates that where the sum of money adjudged to be paid exceeds \$1,000.00 then the maximum period of imprisonment capable of being imposed is 6 months.

The Court was of the view that despite the appellant being charged under section 16 (2) of the Drugs (Prevention of Misuse) Act, Chap 40:07 Laws of Dominica (“the Act”), the provisions of the Code would still apply as the Act would be considered “any other Act”. In light of the very clear wording of the Code, the Court was of the view that the 7 years imprisonment imposed in default of payment of the \$30,000.00 exceeded that which is provided for under law and accordingly the appeal ought to be allowed and a sentence of time served substituted where the appellant had served in excess of the maximum term of imprisonment to be served.

Case Name: **Frederick Baron**
v
Blaircourt Property Development Ltd.

[DOMHCVAP2015/0009]
(Commonwealth of Dominica)

Date: **Tuesday, 26th April 2022**

Coram: **The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal**
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Sydney Bennett QC, Justice of Appeal [Ag.]

Appearances:

Appellant/Applicant:	Ms. Cara Shillingford-Marsh
Respondent:	Ms. Heather Felix-Evans

Issues: **Application for consolidation of appeal No.**
DOMHCVAP2015/0009 with appeal No.
DOMHCVAP2015/0005

Type of Order: **Oral decision**

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

1. The application to consolidate appeal No. DOMHCVAP2015/0009 with appeal No. DOMHCVAP2015/0005 is granted.

Reason: There was no objection to the application by counsel for the respondent and so the Court granted the application.

Case Name:

[1] Frederick Baron
[2] Arthurton Martin
[3] Severin Mckenzie
[4] Joan Ettienne
v
Blaircourt Property Development Ltd.
[DOMHCVAP2015/0009]
[DOMHCVAP2015/0005]
(Commonwealth of Dominica)

Date: Tuesday, 26th April 2022

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Sydney Bennett QC, Justice of Appeal [Ag.]

Appearances:

Appellants: Ms. Cara Shillingford-Marsh
Respondent: Ms. Heather Felix-Evans

Issues: Trespass to property - Appellate review of trial judge's findings of fact - Whether the learned judge erred in finding that the appellants had conceded to being on the respondent's property - Whether the learned judge erred in finding that the appellants had entered onto the respondent's property - Whether the learned judge erred in finding that the appellants had entered into one of the villas - Whether the learned judge erred by failing to examine the evidence in relation to each individual appellant - Identification of appellants on property - Quality of identification evidence - Witness purportedly identifying the 4th appellant 5 years after date of alleged

trespass to property - Credibility of respondent's witnesses - Whether respondent witness' identification of 4th respondent was credible - Whether trial judge erred by failing to address the inconsistencies between the 3rd appellant's evidence and that of Renneth Alexis - Whether respondent witness' identification of 3rd respondent was credible - Whether the learned judge erred in finding that the appellants had no lawful business in connection with the respondent's property - Whether the learned judge erred in finding that the appellants were trespassers - Whether a person who enters the property of another without the intention to commit a crime enters for a lawful purpose - Implied licence to enter into private property - Whether entering unto the respondent's property to view the villas would be considered lawful business by the appellants

Type of Order: N/A

Result / Order: [Oral delivery]

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name: Ena Vidal
v
The State

[DOMMCRAP2017/0017]
(Dominica)

Date: Wednesday, 27th April 2022

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Sydney Bennett QC, Justice of Appeal [Ag.]

Appearances:
Appellant: Mrs. Gina Dyer Munro with Mrs. Zena Moore-Dyer

Respondent: Mrs. Sherma Dalrymple, Director of Public Prosecutions
[Ag.] with Ms. Daina Matthew

Issues: Handling stolen goods - Guilty plea by appellant to dishonestly receiving stolen goods - Criminal appeal against conviction and sentence - Whether the learned magistrate erred by failing to consider that the complaint as set out in the charge before the court did not disclose property stolen as required by section 44(1) of the Small Charges Act, Cap. 10:39 - Whether the appellant had the mens rea rendering her liable to be charged under section 44(1) of the Small Charges Act - Whether the appellant had the intention to dishonestly receive - Whether the complaint against the appellant was null and void - Whether the learned magistrate erred by failing to put the option to the appellant that she could object to summary trial and choose trial by judge and jury - Whether section 31 of the Theft Act, Cap. 10:33 ought to be read conjointly with section 44(1) of the Small Charges Act - Whether the sentence of 1 year imprisonment was excessive - Whether the learned magistrate failed to consider that the appellant was a first time offender - Whether the learned magistrate failed to consider the mitigating factors in determining sentence

Type of Order: Oral judgment

Result / Order: IT IS HEREBY ORDERED THAT:

1. The appeal against conviction is dismissed.
2. The appeal against sentence is allowed to the extent that the sentence of 1 year imprisonment is varied to 1 year imprisonment suspended for 1 year.

Reason: The appellant, Ena Vidal, was charged pursuant to section 44(1) of the Small Charges Act, Cap. 10:39 of the offence of receiving stolen goods. She pleaded guilty to

the charge and was sentenced by the learned magistrate to 1 year imprisonment. She appealed against both the conviction and the sentence imposed by the learned magistrate. In her notice of appeal she outlined 3 grounds, all of which were pursued on her behalf by learned counsel.

In relation to the first ground, counsel for the appellant, Mrs. Dyer, submitted that the learned magistrate erred when she failed to give the appellant the option to choose trial on indictment or summary trial. Mrs. Dyer referred the Court to section 31 of the Theft Act, Cap. 10:33 and submitted that section 44(1) of the Small Charges Act must be read conjointly with section 31 of the Theft Act, which gives an accused an option to be tried summarily or on indictment.

Having reviewed those provisions and having heard the submissions, both from Mrs. Dyer and the written submissions of the learned Director of Public Prosecutions [Ag.] on behalf of the respondent, the Court was of the view that the provisions under section 31 of the Theft Act and section 44(1) of the Small Charges Act were both very clear. Section 44 gave the learned magistrate a discretion to try the case summarily or to commit an accused person charged under section 44(1) for trial on indictment. It was not the same procedure as had been outlined in section 31 of the Theft Act. The appellant, in this case, was charged under section 44. The section did not give her an option to determine whether she should be tried summarily or on indictment. The Court therefore held that there was no merit on this ground of appeal and that the learned magistrate did not err in proceeding to exercise her discretion in the manner in which she did; to try the appellant summarily, the appellant having pleaded guilty.

In relation to ground 2, Mrs. Dyer argued that the learned magistrate erred when she found that the charge, as set out on the complaint, was lawful. She contended that the charge was deficient and the appeal ought to be allowed on that ground. The Court examined the complaint that was before the learned magistrate and whilst the Court agreed that there had been deficiencies, the Court considered the provisions of section 203 of the Magistrate's Code of Procedure Act, Cap. 4:20 which

provides that no objection can be taken, either in substance or form, in relation to any information or complaint. The Court was therefore of the view that it was within the learned magistrate's jurisdiction to make any correction that was needed in relation to the complaint. As a result, the Court found that there was no merit in this ground of appeal.

In relation to ground 3, Mrs. Dyer submitted that the sentence of 1 year imprisonment was excessive having regard to all the circumstances including the guilty plea, the mitigating factors and the fact that there were no aggravating factors in this case. The learned DPP [Ag.] conceded that the sentence was excessive and submitted to the Court that a sentence of 1 month suspended would be an appropriate sentence. The Court reviewed the decision of the learned magistrate, the reasons she gave for arriving at the sentence of 1 year and considered the submissions, both of counsel for the appellant and the respondent. The Court was ultimately of the view that the sentence of 1 year was an appropriate sentence, and the period was an appropriate period. However, having reviewed the facts of the case and all the circumstances, including the mitigating factors and the absence of aggravating factors, the Court allowed the appeal on sentence and in place of the sentence of 1 year imprisonment substituted a sentence of 1 year imprisonment suspended for 1 year.

Case Name:

Al Motors

v

SM Rentals

[DOMMCVAP2018/0007]

(Dominica)

Date:

Wednesday, 27th April 2022

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Sydney Bennett QC, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Mrs. Cara Shillingford-Marsh

Respondent: Mr. Darius Jones

Issues: Magisterial civil appeal - Contract law - Breach of contract - Whether the respondent proved on a balance of probabilities that the Toyota ECU unit sold to them by the appellant was not new - Whether the learned magistrate erred in law and in his finding of fact when he that the Toyota ECU unit was not a new one - Whether the learned magistrate erred by taking into account irrelevant factors and failing to take into account relevant factors - Whether the magistrate erred by considering indirect hearsay evidence - Whether the learned magistrate erred by ordering restitution of the Toyota ECU unit in circumstances where the ECU was damages during the passage of Hurricane Maria and while in the court's possession - Whether the learned magistrate erred by failing to inform the parties that the ECU was damaged during the passage of Hurricane Maria prior to the pronouncement of judgment - Whether the learned magistrate erred in law and contravened section 146 of the Magistrates' Code of Procedure Act, Chap 4.20, by failing to provide the appellant with reasons for the judgment recorded in writing at the time of pronouncement

Type of Order: Oral judgment

Result / Order: IT IS HEREBY ORDERED THAT:

1. The appeal is allowed.
2. The decision of the magistrate is set aside.
3. The order for restitution of the ECU is rescinded.
4. The sum of \$3,475.00, paid into court by the appellant is to be returned.
5. The respondent is to pay to the appellant the sum of \$3,200.20, the outstanding balance of the price of the ECU.
6. The respondent is to pay the appellant \$100, the cost of the returned cheque.
7. Costs of \$750.00 are to be paid by the respondent to the appellant, being the costs of the appeal.

Reason:

This appeal is against the decision of the learned magistrate to dismiss a claim for breach of a contract to purchase a Toyota ECU from the appellant. The appellant company had entered into a contract with the respondent to purchase a new Toyota ECU for a total of \$6,320.00 XCD. A deposit of \$3,100.00 XCD was paid on account and the outstanding balance of \$3,220.00 XCD was to have been paid by the respondent upon delivery of the part. Shortly prior to arrival of the part, the respondent's employees expressed dissatisfaction with the part and took steps to repair a malfunctioning device which the new part was intended to replace. On 12th December 2014, when the part arrived, those employees, Ms. Priscilla Francis and Mr. John Matthew immediately and openly expressed dissatisfaction with the part, alleging that it was used and not new. They nonetheless paid, by cheque, the outstanding balance of \$3,220.00 so as to be allowed to take possession of the part. Payment of the cheque was stopped immediately thereafter. Ms. Francis admitted on cross examination that she never had any intention of paying for the part. The part was taken to two engineers who did not issue a report. Two weeks later however, an engineer, Mr. Adler Hamlet, issued a report with a finding that the part was used and not new.

One ground of appeal was that the witness, Mr. Hamlet, was permitted to give expert evidence on the question of whether the part was new or used. Mr. Hamlet stated that there was no test that can be done to determine whether an item was new or used. More importantly, his opinion was based on his visual observation of the appearance of the top and side of the device, observations which made no use of any engineering expertise or examination of the interior or function of the device. Mr. Hamlet also expressed the opinion that having made enquiries of the manufacturer, the part was priced too cheaply to be taken to be a new part.

The Court did not find the expert evidence to be persuasive. The basis of the magistrate's decision was that he found the respondent's witnesses to be credible. There was however, extensive documentary and other evidence before the court which could have cast this evidence in a different light. There was before the court,

at the time, a chain of documents relating to the ordering of the part, invoicing for it, documents relating to the carriage, customs and packaging, all of which tended to show the ordering, transportation and receipt of the part as a new part direct from the original manufacturer. The magistrate, in his reasons, simply said that “the claimant did not provide any details of the customs transaction nor did he provide any documentation of the order”. This was clearly not true and related to a large part of the evidence before the court. It betrayed the fact that the magistrate had failed to note or take into account important documentation which could have been vital to a proper assessment of the evidence.

A court of appeal will be very cautious in reviewing a magistrate’s findings of fact, particularly where those findings of fact are based on his assessment of the credibility of witnesses appearing before him. The Court can and will, however, intervene where, based on the record, the facts are incontrovertible or where the decision is glaringly improbable or contrary to compelling inferences so that it would appear that the magistrate had failed to avail himself of the advantage of hearing the witnesses. In this case, the Court reluctantly came to the conclusion that this is one such instance. The decision could not be allowed to stand. The magistrate failed to take into account an important part of the evidence. The appeal was therefore allowed.

PANEL 2

JUDGMENT

Case Name:

John Oliver Dyrud

v

[1] Palmavon Jasamin Webster

[2] First Anguilla Trust Company Limited

[AXAHCVAP2021/0010]

ANGUILLA

Palmavon J. Webster

v

[1] John O. Dyrud

[2] First Anguilla Trust Company Limited

[AXAHCVAP2021/0011]

ANGUILLA

Date: **Wednesday, 27th April 2022**

Coram for delivery of judgment: **The Hon. Mr. Mario Michel, Justice of Appeal**
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]

Appearances:

Appellant: **Ms. Tana'ania Small Davis QC**

Respondents: **Ms. Jean Dyer**

Issues:

Interlocutory appeal – Section 268 of the Companies Act of Anguilla – Judicial discretion – Overriding objective of the Civil Procedure Rules 2000 – Part 26 of the Civil Procedure Rules 2000 – Appeal against case management orders of trial judge - Expert evidence - Part 32 of the Civil Procedure Rules 2000 - Failure to comply with Part 32 of the Civil Procedure Rules 2000 - Delay in application for appointment of expert witness - Delay in trial dates as a result of late application for appointment of expert witness - Impartiality and independence of expert witness – Whether expert evidence was necessary to determine the matter justly - Whether learned judge erred in refusing to appoint named expert witnesses - Whether learned judge had discretion to make order for the appointment of expert witness in the absence of a live application by the parties – Whether decision to make order for the appointment of expert witness was wrong for failure to consider factual and legal issues to be determined – Whether learned judge had discretion to order amendment and filing of supplemental witness statement – Costs

Result / Order:

Held: allowing ground 1 of the Dyrud Appeal and refusing grounds 2, 3, 4 and 5; and dismissing the Webster Appeal except to the limited extent stated at paragraph 129 and summarized at paragraph 141 of this judgment.; and making the directions as to costs contained in paragraph 143 of this judgment, that:

1. An appellate court must exercise restraint in appeals which challenge the exercise of judicial discretion by a lower court. Thus, for an appeal against judicial discretion to succeed, there must be some error of principle, whether of commission or omission, in the judge's identification, consideration or evaluation of the relevant factors or some error of law, which when taken, singularly or collectively, in the assessment of the appellate court, so undermines the proper exercise of judicial discretion as to transcend the generous ambit within which reasonable judicial disagreement is possible so as to be adjudged to be clearly or blatantly wrong. In respect of appeals against case management orders, the level of appellate restraint is even greater and an appellate court will be very slow to overturn on appeal, orders made or directions given by a first instance judge for the proper and efficient management of the case or proceedings.

Rule 1.1 of the Civil Procedure Rules 2000 applied; Attorney General of Montserrat et al v Geraldine Cabey MNIHCVAP2008/008 (delivered 12th January 2009, unreported) applied; Michel Dufour v Helenair Corporation Ltd and others (1996) 52 WIR 188 applied; Tawney Assets Ltd v East Pine Management Ltd et al BVIHCVAP2012/007 (delivered 17th September 2012, unreported) applied.

2. While the overriding objective is to be deployed and given effect to when seeking to interpret a rule or exercise a discretion, it cannot be relied upon to deviate from the requirements of specific provisions of the CPR. CPR 32.2 sets out the overarching duty and general parameters within which a court may, in its discretion, permit expert evidence to be deployed in civil proceedings by restricting expert evidence to that which is 'reasonably required to resolve the proceedings

justly'. CPR 32 does not empower a judge or the court to appoint one or more expert witnesses of its own initiative or in the absence of an application by one or more of the parties to do so. CPR 32.9 is unambiguous in its terms. It empowers the court or case management judge, when faced with two or more parties wishing to submit expert evidence on a particular issue, to exercise its undoubted jurisdiction to control, restrict and to approve of the type and scope of the expert evidence necessary or reasonably required to assist the court in its determination of that issue, and to direct that expert evidence be given by only one expert. It does not empower a judge or the court to make such an order absent an application by two or more of the parties referred to as "the instructing parties". In the instant matter, only one party (Ms. Webster) sought to appoint an expert witness, which application was dependent on the court granting an extension of time to make the application for the appointment of experts. The judge having dismissed the Webster Application in its entirety, there was no live application before the learned judge to appoint experts when he made the order for the appointment of a single expert witness in purported exercise of his powers under CPR 32.9. Moreover, the learned judge did not do so at a case management conference nor did he make an order dispensing with a case management conference in exercise of his powers under CPR 27.6. The learned judge had no power or discretion under CPR 32.9 to appoint an expert of his own initiative and could not do so without first following the procedure under CPR 26.2 (unless he received the consent of the parties), to which rule he, in any event, did not allude to and failed to inform himself of. These errors are such as to render this decision and the said orders and directions seriously flawed, such as to be clearly or blatantly wrong, and therefore liable to be set aside. Accordingly, the orders made, and the directions given by the learned judge at sub-paragraphs (2) to (6) of paragraph 105 of the Judgment are set aside.

Part 32 of the Civil Procedure Rules 2000 applied; Part 26 of the Civil Procedure Rules 2000 considered; Rule 27.6 of the Civil Procedure Rules 2000 considered; *Ormiston Ken Boyea et al v East Caribbean Flour Mills Limited* High Court Civil Appeal No. 3 of 2004 (delivered 16th September 2002, unreported) applied; UK Practice

Direction on Experts (PD35) distinguished; Civil Procedure The White Book Service Sweet & Maxwell, Vol. 1. considered.

3. The finding of the Court that the orders made at sub paragraphs (2) to (6) of paragraph 105 are set aside is entirely dispositive of the Dyrud Appeal challenging the learned judge's orders providing for the appointment of one professional valuer of the shares of FATCL. However, if the said decision is incorrect and the judge did have the power and discretion under CPR 32.9 to make the said orders, this Court ought to go on to consider whether the learned judge exercised his discretion properly. There is no principle of law which prohibits a court from making case management orders in a section 268 claim for the valuation of property which is in dispute, including a valuation of shares in a company which is or may be a quasi-partnership. Furthermore, the presence of fact sensitive issues in dispute does not restrict the power of the judge to make case management orders or to give directions for the appointment of an expert witness and for a particular issue or issues to be addressed by that expert. It is within the judge's case management province to manage cases justly to decide whether, in a section 268 claim, the issues as to liability and the appropriate relief should liability be established, be tried together in one trial. Accordingly, if the learned judge had a discretion to appoint an expert witness after dismissing the Webster Application and, to make the order for the appointment of one expert to value the shares in FATCL, there was nothing wrong in principle or in logic with him making the order at that stage of the proceedings and before the unfair prejudice claim was successful.

Section 268 of the Companies Act of Anguilla considered; Rule 32.9 of the Civil Procedure Rules 2000 applied; Rules 26.2, 32.8 and 32.11(1) and (2) of the Civil Procedure Rules 2000 considered; Lynwood Bell v Malcolm Hope-Ross and others AXAHCv No. 13 of 2004 considered; JF Ming Inc and another v Ming Siu Hung BVIHCMAP2016/0039 (delivered 30th June 2017, unreported) considered; Re Dinglis Properties Ltd [2020] BCLC 107 considered; Ebrahimi v Westbourne Galleries Ltd and others [1973] AC 360 considered.

4. CPR 26.1(2)(w) allows the court or case management judge to take any step, or give directions, or make any other order for the purpose of managing the case and furthering the overriding objective. CPR 29 contains the regime concerning the giving or leading of evidence before a court by witness statements, witness summaries and orally. CPR 29 is also intended to further the overriding objective of the court to deal with cases justly and to ensure, so far as practicable, that the parties are on equal footing. In the instant matter, two matters arise from the language and application of the provisions of CPR 29. Firstly, where a party to proceedings does not serve a witness statement or witness summary within the time specified by the court, that party cannot call that witness to give oral evidence at the trial unless the defaulting party has applied for and been granted relief from sanctions under CPR 26.8 or the court permits. Secondly, where a party serves a witness statement or witness summary within the prescribed time or any extended time granted by the court, that witness may give oral evidence at the trial and may be permitted by the court to amplify his or her evidence on certain issues of fact, including giving evidence in relation to new matters arising since their witness statement had been served on the other parties (CPR 29.9).

5. While CPR 29 does not expressly speak to or permit a party to file and serve a 'supplemental' witness statement or witness summary, the filing of more than one witness statement or witness summary by the same person is not expressly excluded or prohibited, although such a practice should not be encouraged as a matter of prudent and cost saving case management. In this matter, in light of the learned judge's conclusion that the Horne Witness Statement contained matters of expert opinion when no permission was sought or granted to have Mr. Horne deemed an expert witness in the proceedings, and his finding that Mr. Horne was not a sufficiently independent and impartial witness to be appointed to give expert evidence, the offending parts of his witness statement clearly could not stand. Accordingly, there is no discernible error of principle or procedure in respect of paragraph 1 of the Order of 11 th October 2021 which required those offending parts to be

redacted so as to exclude matters and expressions of expert opinion therein. However, although paragraph 2 of the learned judge's said Order granting permission to Ms. Webster to file and serve the supplemental witness statement of Mr. Horne was made without formerly extending the time for making applications and was, accordingly, irregular in light of the timelines stipulated by the December 2020 CMC Order, this was not such an error in principle that would propel an appellate court to set aside that limb of the Order made on 11th October 2021. Moreover, any perceived prejudice as a result of the exercise of the trial judge's case management powers to order the filing of a supplemental witness statement was significantly minimized by the other orders made at paragraphs 3 and 4 of the Order. In the premises, there is no basis to set aside paragraphs (1) to (6) of the said Order.

Rule 26.1(2)(w) of the Civil Procedure Rules 2000 applied;
Part 29 of the Civil Procedure Rules 2000 applied.

6. In civil litigation, expert evidence must be restricted to what is reasonably required to resolve the proceedings justly and the court is guided by four considerations in determining its admissibility. These are: i.) whether the proposed evidence will reasonably assist the court in its task of deciding the proceedings justly; ii) whether the witness has the necessary or appropriate knowledge and experience to provide the required expert evidence; iii.) whether the witness is sufficiently impartial and independent of the parties so as to render their impartial opinion and independent product; iv.) whether there is a reliable body of knowledge or experience to underpin the expert's evidence. Ultimately, when a court or judge is determining whether to admit expert evidence, regard must be had to the overriding objective of the CPR to deal with cases justly, which includes saving expense. A court will usually require the assistance of expert evidence where the valuation of property, including the valuation of shares in a company, is a matter in issue or likely to be an issue. There is no principle that expert evidence is required in every case before a finding of a departure from acceptable professional standards can be made. Where liability rests, in whole or in part, on proof of pleaded allegations of breaches of professional

or accepted standards, there will invariably be a necessity for the court to receive expert evidence as to what those standards are, whether the conduct complained of falls below or falls short of these standards and, if so, to what degree and to what level of seriousness.

7. In this case, the learned judge was of the clear view at paragraph 43 of the Judgment that the court could benefit from and would require the assistance of expert evidence in relation to which of the discretionary remedies provided for in section 268(2) of the Companies Act is better suited to meet the relationship of the parties within the corporate context of FATCL; if a buy-out is the desirable remedy, the methodology to be used to value the shares in FATCL, and the date and time at which such valuation ought to be determined. However, the judge ultimately confined the terms of his order to the issues of the valuation of the shares and the time at which such valuation is properly to be made. This order did not fully accord with his findings and conclusions at paragraph 43 of his Judgment. His failure to include in his order at paragraph 105(2) the issue of the appropriateness of the remedies or reliefs available to the court under section 268 of the Companies Act, was therefore incorrect. This conclusion, however, does not lead to this Court allowing Ms. Webster's appeal and setting aside the judge's order dismissing the Webster Application and/or her application to extend time to apply to adduce and rely on expert evidence.

Barings plc and another v Coppers; Lybrand and others [1996] EWCA Civ 1021 considered; Barings Futures (Singapore) Pte Ltd (in liquidation) v Mattar and others [2003] EWHC 2371 (Ch) considered; Liverpool Roman Catholic Archdiocesan Trustees Incorporated v Goldberg (No. 3) [2001] 1 WLR 2337 considered; Kennedy v Cordia (Services) LLP [2016] 1 WLR 597 applied; Pora v The Queen [2015] UKPC 9 at 24 considered; Young v her Majesty's Advocate 2014 SLT 21 considered; R v Gilfoyle [2001] 2 Cr App R 5 considered; Davie v Magistrates of Edinburgh (1953) SC 34 considered.

8. The Webster Application sought to appoint Mr. Horne as an expert in the stated fields. The learned judge found such evidence inadmissible due to the lack of impartiality and lack of independence of Mr. Horne to be appointed an expert witness. The Horne Witness Statement could not, in the face of that finding which was not appealed, be deemed expert evidence as to any of the areas for which the appointment of Mr. Horne was sought in the Webster Application, including matters relative to the appropriate remedies or the methodology for the assessing and valuation of the shares in FATCL, or on any other area or field of expertise pertaining to the alleged liability of Mr. Dyrud in the section 268 Claim.

9. In relation to the limb of the Webster Application which sought the appointment of Mr. Law as an expert witness, it was not alleged or pleaded by Ms. Webster that Mr. Dyrud, by his alleged conduct or failures, breached any established standards or practice applicable to licensed providers of corporate secretarial services and financial services in Anguilla. In fact, there was no pleading or affidavit evidence of any particular standard or practice, other than those set out in the applicable statutory and regulatory laws of Anguilla. In the court's opinion, the assessment of the alleged corporate governance failures and mismanagement allegations against Mr. Dyrud and whether his conduct fell below general corporate governance standards and practice and amounts to oppression or unfairly prejudicial conduct or breach of his fiduciary duties as a director of FATCL contrary to sections 97 and 268 of the Companies Act, are matters of fact and law which the court is well capable of determining. It is for the trial court to consider and find the facts from the evidence given by the parties, make the determination whether there were any breaches of fiduciary or other duties, and then determine the appropriateness of any relief. The learned judge did not err or commit any error of principle in the exercise of his discretion in respect of the issue of liability of Mr. Dyrud. The learned judge did not commit any errors of principle in the exercise of his case management powers such that would take it outside of the generous ambit within which reasonable judicial disagreement is possible and render his decision blatantly wrong.

Avondale Exhibitions Ltd v Arthur J Gallagher Insurance Brokers Ltd [2018] EWHC 1311 applied; Midland Bank v Hett, Stubbs & Kemp [1979] 1 Ch 384 applied; Re Marco (Ipswich) Limited [1994] 2 BCLC 354 applied; Caribbean Steel Company Limited v Price Waterhouse (a Firm) [2013] UKPC 18 applied.

10. CPR 32.14 lists the matters which must be included or addressed in an expert report. In this case, the Webster Application sought to treat the Horne Witness Statement, which did not comply with the applicable rules for expert reports contained in CPR 32, as an expert report. In short, the learned judge was correct to not treat it as an expert report, but purely as a witness statement, as it failed to comply with the mandatory requirements of CPR 32. Further, it was not open to the learned judge to appoint Mr. Law as an alternative expert to Mr. Horne since it was not a ground in the Webster Application that Mr. Law be treated as an expert in the fields in which Ms. Webster sought to have Mr. Horne appointed as an expert. Likewise, no such relief was sought in Ms. Webster's notice of appeal. In addition, given that the finding of the learned judge that expert evidence was not needed in the areas of expertise for which the Webster Application sought to have Mr. Law appointed has been upheld by this Court, there is no basis for setting aside the order of the learned judge dismissing the Webster Application and for this Court to make an order appointing Mr. Law as an expert in areas in which Ms. Webster originally sought to have Mr. Horne appointed.

Rule 32.14 of the Civil Procedure Rules 2000 considered.

11. The Webster Application was filed some 189 plus days after the December 2020 CMC and almost three months after the date stipulated by the December 2020 CMC Order for applications for further directions. In these proceedings, it ought to have been clear to the parties that the trial court would need to have the benefit of expert evidence on certain issues raised in the claim. Despite this, no previous application was made to appoint and to rely on expert witnesses. No such application was made at the December 2020 CMC or at the case management conference on 19th March 2021, at which a pre-trial review was fixed for 7th June 2021. It was only at the pre-trial review that Ms. Webster

indicated, for the first time, an intention to apply for permission to adduce expert evidence, and she was given by the court until 15th June 2021 to file the said application. The learned judge after hearing the application reserved his decision. It is from the date of the delivery of the Judgment that the delay in making the application and, if granted, the consequential effect on the trial dates, is to be calculated or ascertained. In the circumstances, the learned judge was correct to find that the grant of permission to rely on expert evidence at that stage of the proceedings, would affect the already set trial dates, and that the making of the application at a late stage may have the effect of defeating the purpose and intent of CPR 32 and the overriding objective of the rules. The delay in the trial dates was directly attributable to the late application.

APPLICATIONS AND APPEALS

Case Name:

**Multibank FX International Corporation
v**

- 1. Von der Heydt Invest S.A. et al**
- 2. Mex Clearing Limited**
- 3. Mex Securities S.A.R.L**
- 4. Naser Taher**

[BVIHCVAP2021/0009]

[BVIHCMAP2021/0023]

[BVIHCMAP2021/0030]

[BVIHCMAP2021/0031]

[BVIHCMAP2022/0001]

[BVIHCMAP2022/0024]

[BVIHCMAP2022/0030]

[BVIHCMAP2022/0032]

Date:

Monday 25th April 2022 - Friday 29th April 2022

Coram:

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

Appearances:

Applicant/Appellant: Mr. Hodge Malek QC and Mr. Hefin Rees QC with them Mr. Philip Hinks and Ms. Caley Wright

Respondents: Mr. Tim Penny QC with him Mr. Alexander Cook and Mr. Simon Hall

Issues:

Applications for leave to appeal - Commercial appeals - Discharge appeal - Learned judge's refusal to discharge worldwide freezing order ("WFO") - Appellate court's exercise of discretion - Ming Siu Hung and others v J F Ming Inc and others [2021] UKPC 1 - Whether the learned judge erred in the exercise of his discretion in refusing to discharge the WFO - Whether VDHI failed to demonstrate that it was entitled to a freezing injunction - Locus standi - Whether VDHI had locus standi to bring claims at the *ex parte* hearing - Whether noteholders had standing to bring a claim at an *ex parte* hearing- Whether the noteholders could bring claim in BVI to set aside Tomlin order on basis of fraud, breach of contract - Whether learned judge erred relied on irrelevant matters in concluding that VDHI had standing to seek the WFO - Fourie v Le Roux [2007] UKHL 1 - Whether the learned judge failed to satisfy the elements of the test for the grant of a freezing injunction and its subsequent re-grant - Good arguable case - Whether the learned judge was plainly wrong to conclude that VDHI had made out a good arguable case, and failed to take into account relevant material, in particular the contingent nature of the noteholders' interest, and the fact that their claims, if any, may be limited to derivative actions under Luxembourg law- Risk of dissipation - Test for risk of dissipation - Whether there is a real risk that any judgment which might be obtained at trial will remain unsatisfied if injunctive relief is refused- Whether evidentially there was a solid case of there being a risk of dissipation - Whether the learned judge was plainly wrong to rely on the factors that he did to find that there was a real risk of dissipation - Just and convenient - Whether it was just and convenient to grant the WFO at the *ex parte* hearing - Whether VDHI failed to fortify cross undertaking - Full and frank disclosure - Whether the learned judge erred in dismissing MBFX's submission that VDHI had failed to disclose arguable defences and relevant documents at the *ex parte* stage - Procedural

unfairness - Whether the learned judge erred in his case management of the claim - Disclosure appeal - Civil Procedure Rules 2000 - CPR 28.5 and 28.6 - Specific disclosure - Test for specific disclosure - Whether the subject documents were necessary for the just disposal of the application - Recusal appeal- Whether the learned judge erred in declining to refuse himself from the proceedings - Whether there existed a real possibility of apparent bias - Porter v Magill [2002] 2 A.C. 357- Whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger that the tribunal was biased - Adjournment appeal - Whether learned judge erred in his refusal of the adjournment application - Whether the learned judge failed to give any, or any proper, regard to the fact that there are appeals outstanding before the Court of Appeal - Whether the learned judge failed to have regard to the extent to which a fair trial will be jeopardised and the consequences of refusing the adjournment - Whether the learned judge failed to take into account the prejudice caused to MBFX in terms of a fair trial by refusing to grant the adjournment application – Representation appeal - CPR 21 - Whether the learned judge erred in concluding that VDHI was a fit and proper party to act as a representative - Whether the learned judge failed to consider if the representative order was justified or appropriate and should be made in all the circumstances - Whether VDHI was entitled to apply for the representative order *ex-parte* - Whether the possibility of claims by noteholders against VDHI creates a conflict of interest - Whether potential conflicts of interest make VDHI an inappropriate representative party – Substituted service - CPR 7.8 - Whether the learned judge failed to consider or give sufficient weight that an order for service by alternative method should only be made where service through the usual methods under CPR 7.8 have not been successfully adopted - Whether the learned judge was wrong to make a finding contrary to the weight of evidence that service of the Amended Ancillary Claim Form and other documents on Mr. Taher was impracticable- Application to adduce fresh evidence - Whether the Court should grant permission to MBFX to adduce the report in the appeal - Ladd v Marshall principles - Whether the report could not have been obtained with reasonable diligence for use at the trial - Whether the report is such that, if given, it would

probably have an important influence on the result of the case, though it need not be decisive - Whether the report is such as is presumably to be believed, or in other words it must be apparently credible, though it need not be incontrovertible

Type of Order

N/A

Result / Order:

1. On the application for leave to appeal the order of Jack J dated 17th December 2021 dismissing the application to recuse himself from hearing any further proceedings in these matters, and on the appeal itself, we make the following orders:
 - a. Leave is granted to the applicant/appellant to appeal against the order of Jack J [Ag.] dated 17th December 2021 by which the learned judge dismissed the application to recuse himself from hearing any further applications in the BVI High Court claims numbered 15 of 2020, 3 of 2021 and 73 of 2021.
 - b. The appeal against the judgment is allowed and the order of the learned judge dismissing the application to recuse himself is set aside.
 - c. All further proceedings in Claims No. BVIHC (COM) 2020/0215, 2021/0003 and 2021/10073 shall be heard by a different judge sitting in the Commercial Division of the High Court of the Territory of the Virgin Islands.
 - d. The award of costs in the application for leave to appeal and in the appeal is reserved.
2. On the application for leave to appeal the order of Jack J [Ag.] dated 18th March 2022 dismissing the application to adjourn the trial, and on the appeal itself, we make the following orders:
 - a. Leave is granted to the applicant/appellant to appeal against the order of Jack J [Ag.] dated 18th March 2022 by which the learned judge dismissed the application to adjourn the trial listed to commence on 11th July 2022 to the first available date after 1st January 2023.

- b. The appeal against the order is allowed and the order of the learned judge dismissing the application to adjourn the trial is set aside.
 - c. The trial of the claims numbered BVIHC (COM) 2020/0215, 2021/003 and 2021/0073 is adjourned to a date or dates to be fixed by the Registrar of the High Court during the first term of the next law year commencing in January 2023.
 - d. The award of costs in the application for leave to appeal and in the appeal is reserved.
- 3. Reasons for the Court's decisions on these 2 matters will be given in a written judgment on a date to be fixed by the court office.
- 4. Decisions on the other applications and on the other appeals are reserved.
- 5. Case management of the trial, in light of the new trial window, shall be done on an expedited basis by another judge of the Commercial Division of the High Court of the Territory of the Virgin Islands.