

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

ANGUILLA
VIDEOCONFERENCE
25th January 2021 – 3rd February 2021

JUDGMENTS

Case Name: PIC Insurance Company Ltd.
v
[1] Zona Barthley And Zorol Barthley
(Personal Representatives of the Estate of
Dr. Rolston Barthley, Deceased)
[2] Zorol Barthley

[AXAHCVAP2019/0003]
(ANTIGUA AND BARBUDA)

Date: Thursday, 28th January 2021

Coram for delivery: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Anthony Astaphan, SC with Dr. David Dorsett

Respondents: Mr. Kendrickson Kentish

Issues: Civil appeal – Company law – Dispute over ownership of shares in company – Whether judge erred in finding that respondents were the owners and/or entitled to 51% and 5% of the shares in the company - Approach of appellate court to findings of fact – Whether judge failed to properly consider sections 29, 30 and 85 of the Companies Act – Whether judge erred in failing to hold that the Board of Directors was required to assess any claim for shares to determine the fair equivalent in value of services provided by first respondent before allocating or issuing shares – Section 241 of Companies Act – Oppression remedy – Whether judge erred in declaring that

the decision of the Board of Directors to appoint an assessor to value the respondents' share and the failure of the Board to allot shares to them were oppressive or unfairly prejudicial to or disregarded the interests of the respondents

**Result and
Reason:**

Held: dismissing the appeal, affirming the judgment of Joseph-Olivetti J [Ag.], and awarding costs to the Barthleys in the sum of two-thirds of the costs awarded in the court below, that:

1. When confronted with the choice between two versions of the events leading to the establishment and operation of the company and the allocation of the shares in it, the trial judge chose (and explained why she was doing so) the version presented by the respondents over the one presented by the appellant. This was her right, and indeed her responsibility as the trier of the facts, and she would therefore have foregone her right and abdicated her responsibility if she had failed to choose between the two versions.
2. There is a long line of cases, starting from the case of Watt v Thomas in 1947 and continuing through to several cases over the years both in England and in the countries of the British Commonwealth, including cases from our own jurisdiction, where the courts have consistently pronounced on the role of appellate courts in dealing with findings of fact made by first instance courts. As recently as last year, this Court – in the Antiguan case of Flat Point Development Limited v Mary Dooley – applied Watt v Thomas in affirming the primacy of the role of the trial judge in a civil trial in resolving the factual disputes between the parties. Once the trial judge has done so and has done so based on evidence which was before her, the appellate court should not interfere with the judge's findings of fact.

Watt or Thomas v Thomas [1947] AC 484 applied; Flat Point Development Limited v Mary Dooley [2019] ECSCJ No. 116, delivered on 13th March 2019 followed.
3. Sections 29, 30 and 85 of the Companies Act do not impede the Board of Directors of the company, or the court if necessary, from allocating 51% and 5% of the shares to Dr. Barthley and Zorol Barthley respectively.

The measure of value of the services provided by Dr. Barthley against the shares allotted to him, must be what was agreed to or acquiesced in at the time by him and those who joined him as shareholders in the company. The evidence supports an agreement by or acquiescence of the shareholders to an allocation of the majority shareholding to Dr. Barthley for his incorporation, operationalisation and running of the company without any remuneration, but for the allocation of the majority shareholding to him. Though the impact of sections 29, 30 and 85 of the Companies Act on the company's ability to issue or allocate shares was not specifically addressed by the learned judge, she did not err in construing the provisions of the Act in making the determination and declaration that she did in relation to the ownership and/or entitlement of the Barthleys to the shares allocated to them.

Sections 29, 30 and 85 of the Companies Act 1995, No. 18 of 1995 considered.

4. Section 241 of the Companies Act gives the court a broad discretion to provide redress to shareholders, among other company stakeholders, for corporate conduct that has been exercised in an oppressive or unfairly prejudicial manner or in a manner that unfairly disregards their interests. In fashioning an oppression remedy under this section, the court should be guided by four principles. Firstly, the oppression remedy must be a fair way of dealing with the situation. Secondly, any order made should go no further than necessary to rectify the oppression. Thirdly, any order may serve only to vindicate the reasonable expectation of shareholders, among other stakeholders. Fourthly, the court should consider the general corporate law context in exercising its remedial discretion.

Sections 241 of the Companies Act 1995, No. 18 of 1995 considered; Wilson v Alharayeri 2017 SCC 39 applied; BCE Inc. v 1976 Debentureholders 2008 SCC 69 applied.

5. In this case, the Barthleys sought section 241 relief based on their reasonable expectation that they were the majority shareholders of the company and their assertion of unfair treatment by the Board as it relates

to their shareholding. In light of the judge's finding that the Barthleys were entitled to 51% and 5% of the shares of the company and their inability, without an order from the court, to preclude the Board from undermining their shareholding, and upon application of the principles set out in Wilson v Alharayeri, the learned judge was entitled to determine that the decision of the company to appoint an assessor and its refusal to allot shares to the Barthleys were oppressive or unfairly prejudicial to or disregarded the interests of the Barthleys, contrary to section 241 of the Companies Act.

Sections 241 of the Companies Act 1995, No. 18 of 1995 considered; Wilson v Alharayeri 2017 SCC 39 applied; BCE Inc. v 1976 Debentureholders 2008 SCC 69 applied.

Case Name:

R.G Investments Inc.

v

Comptroller of Customs and Excise

[SLUHCVAP2020/0001]

(Saint Lucia)

Date:

Friday, 29th January 2021

Coram for
delivery of
judgment:

**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: Mr. Leslie Prospere

Respondent: Mr. George K. Charlamagne

Issues:

Civil Appeal — Customs (Control and Management) Act, Cap 15.05 of the Revised Laws of Saint Lucia — Evidence Act, Cap 4.15 of the Revised Laws of Saint Lucia — Forfeiture and Condemnation of Container and Goods — Whether High Court had jurisdiction to

determine claim by Comptroller for condemnation and forfeiture having regard to section 137 of Customs (Control and Management) Act — Date of seizure of container and its contents by Comptroller and whether purported seizure of consignment was premature and unlawful — Whether learned judge failed to analyse or properly analyse effect of sections 48, 50 and 51 of Evidence Act in determining whether there were objectively ascertainable facts to ground Comptroller's decision to seize container — Whether learned judge failed to properly consider the requirements of sections 55(1) and (2) of Evidence Act in permitting respondent to rely at trial as admissible evidence on documents which respondent obtained during investigations and erred in considering section 55(3) of the said Act — Whether appellant was entitled to immediate release of declared goods — Whether appellant was entitled under the rules of natural justice and procedural fairness to receive copy of 'seizure report' from Comptroller — Whether Comptroller was empowered under section 130(5) of Customs (Control and Management) Act to stipulate payment of a restoration fee as a penalty or condition for release of container and its contents — Whether Comptroller breached rules of natural justice by failing to provide appellant with explanation of legal authority to stipulate payment of restoration fee as condition for release of container and its contents and by terminating administrative proceedings and commencing condemnation and forfeiture proceedings — Whether appellant entitled to release of undeclared goods upon tendering payment of sum assessed as custom duties thereon — Whether judge erred in interpretation of section 131(1)(b) of Customs (Control and Management) Act by determining that entire contents of container were liable to forfeiture and condemnation — Whether judge erred in finding that appellant made untrue declaration rendering goods liable to forfeiture and whether Comptroller was entitled to condemnation and forfeiture of container and its entire contents in all the circumstances of the case

Result and Reason:

Held: allowing the appeal in part only to the extent that the judge's order condemning as forfeited the declared goods is set aside; ordering that the declared goods in container identified by Number GESU 480661-6 listed on Bill of Lading No. SMLU 477392A be released from seizure forthwith by the Comptroller to the appellant; affirming the judge's order to the extent that the container identified by Number GESU 480661-6 and the undeclared goods therein not listed on Bill of Lading No. SMLU 477392A be condemned as forfeited to the Comptroller of Customs; ordering the appellant to

pay the respondent two-thirds of its costs in the appeal, which costs shall not exceed two-thirds of the prescribed costs in the High Court, and two-thirds of its prescribed costs in the High Court, that:

1. Section 136 of the Customs Act provides for any person who disputes the amount of duty demanded by a Customs Officer to pay the said amount and, within 3 months of paying the disputed amount, by notice in writing setting out the grounds upon which the amount is disputed, to require the Comptroller to reconsider the amount of duty demanded. Section 138 provides for a right of appeal against the decision of the Comptroller under section 136. Accordingly, it is clear that the jurisdiction of the Customs Appeal Commissioners appointed under section 137 of the Customs Act relates only to issues concerning the amount of duty demanded by the Comptroller and/or the legal justification for charging the disputed duty. The jurisdiction of the Customs Appeal Commissioners does not relate to disputes concerning any failure to declare goods or the making of a false declaration under section 113 of the Customs Act, which is the gravamen of the claim made by the Comptroller against the appellant in the High Court.

Sections 113, 136, 137 and 138 of the Customs (Control and Management) Act, Cap. 15.05 of the Revised Laws of Saint Lucia considered.

2. The claim in this matter does not concern an issue as to the quantum of any 'duty', as defined in the Customs Act, assessed or demanded by a Customs Officer or by the Comptroller. The restoration fee imposed by the Comptroller during administrative proceedings is not a 'duty' chargeable or imposed under the Customs Act. The restoration fee is a sum which the Comptroller required the appellant to pay, in addition to the duties assessed on the undeclared goods, pursuant to his powers under section 130(5) of the Customs Act, and as a condition or penalty for the release of the container and the goods therein to the appellant without proceeding to condemnation and forfeiture. There is no provision of the Customs Act which provides for a right of appeal to the Customs Appeal Commissioners from the exercise by the Comptroller of his functions or powers under section 130(5). Accordingly, the jurisdiction of the Customs Appeal Commissioners was not engaged, and the learned

judge had jurisdiction to determine all issues relating to the Comptroller's claim for condemnation and forfeiture of the container and its contents.

Sections 136(1), 136(2), 137, 138, 130(4), 130(5) and paragraph 5 of Schedule 4 of the Customs (Control and Management) Act, Cap. 15.05 of the Revised Laws of Saint Lucia considered; The Attorney General of Saint Lucia et al v Vance Chitolie, Saint Lucia Civil Appeal No. 14 of 2003 distinguished.

3. There is no basis upon which the learned judge's finding as to the effective date of the seizure can or ought to be disturbed. In determining the effective date of the seizure, the learned judge had regard to the distinction between 'seizing' and 'detaining' the container and correctly determined that the seizure was effectuated when the Notice of Seizure was issued by the Comptroller on 13th April 2017 following the completion on 12th April 2017 of a more thorough examination of the container and its contents.

Econo Parts Ltd. v The Comptroller of Customs and Excise SLUHCV2014/0309, (delivered 10 th May 2017, unreported) applied; Rambally Blocks Limited v The Comptroller of Customs and Excise SLUHCV2014/0100, (delivered 18th March 2019, unreported) applied.

4. The exception to the hearsay rule under section 55(3) of the Evidence Act is not a stand-alone one but is qualified by the provisions of sub-sections (1) and (2) of section 55. Accordingly, the requirements of subsections (1) and (2) must be satisfied in addition to the requirements under subsection (3), in order for the documents to be admissible into evidence in the proceedings. The learned judge erroneously did not consider the requirements of subsections (1) and (2) of section 55 when determining the admissibility of the documentary evidence relating to the Makita goods in the container. Moreover, the learned judge failed to appreciate that the respondent had led no evidence whatsoever capable of satisfying any of the conditions in section 55(2) and in those circumstances had failed to bring these documents within the exception to the hearsay rule in section 55(3). In the circumstances, the learned judge erred in admitting the Makita documents into evidence. However,

notwithstanding the inadmissibility of the Makita documents as evidence, the Comptroller had, at the time of seizure on 13th April 2017, sufficient objectively ascertainable evidence upon which to forfeit the container and its contents where the appellant had presented to Customs an untrue or false declaration, in breach of section 113(1)(a) of the Customs Act. This rendered the undeclared goods liable to forfeiture pursuant to the said provision.

Econo Parts Ltd v The Comptroller of Customs and Excise SLUHCV2014/0309, (delivered 10th May 2017, unreported) applied; Paul Hackshaw v St. Lucia Air and Sea Ports Authority SLUHCV2008/827 (delivered 6th April 2017, unreported) considered; sections 55(1), (2) and (3) of the Evidence Act Cap 4.15 of the Revised Laws of Saint Lucia applied.

5. The learned judge erred when she failed to properly construe the relevant words of section 131(1)(b) and erred in concluding that the seizure of the entire contents of the container (both the declared and undeclared goods) was lawful. Sub-paragraphs (a) and (b) of section 131(1) of the Customs Act are to be read disjunctively and not conjunctively. The effect of this is that a thing which was 'mixed with' or 'packed with' or 'found with' an item liable to be seized and forfeited, may be forfeited under sub-paragraph (b), whether any other thing found is liable to be forfeited under sub-paragraph (a). Furthermore, under section 131(1)(b), the 'other thing' need not be identical to or of the same nature as the goods liable to be forfeited. Section 131(1)(b) of the Customs Act, properly construed, applies to circumstances where the 'other thing' is liable to forfeiture, because it has been used or put in such a way in relation to the goods liable to forfeiture, as to be intermeddled with them. This is a question of fact to be determined based upon the particular circumstances of each case. In coming to her conclusion on this issue, the learned judge made no findings of fact necessary to underpin such a conclusion. It is therefore open to this Court to consider this issue afresh. There was no evidence before the learned judge to the effect that the 'declared goods' were somehow so inextricably linked with the 'undeclared goods' or to their carriage, concealment or handling, or that they were in any way used in the commission of the breaches of the Customs

Act by the appellant, as to satisfy the requirement that they were 'found with' the 'undeclared goods' and to therefore also be liable to forfeiture pursuant to section 131(1)(b). As a matter of fact and law, the 'declared goods' were never liable to be forfeited by the Comptroller, whether pursuant to section 131(1)(b) of the Customs Act or otherwise. Accordingly, the said goods were wrongly seized and forfeited by the Comptroller, and the learned judge's decision to the contrary is set aside.

Sections 131(1)(a) and (b) of the Customs (Control and Management) Act, Cap. 15:05 of the Revised Laws of Saint Lucia considered; *Travell v Commissioners of Customs and Excise* (1997) 162 JP 181 considered; *Commissioners of Customs and Excise v Jack Bradley (Accrington) Ltd and Another* [1958] 3 All ER 487 distinguished; *R v Uxbridge Justices, Ex Parte Webb* (1998) 162 JP 198 at page 206 distinguished; *R (on the application of Sissen) v Newcastle-upon Tyne Crown Court* [2004] EWHC 1905 (Admin) distinguished; *Grenada Electricity Services Limited v Isaac Peters* Grenada High Court Civil Appeal No. 10 of 2002 (delivered 28th January 2003, unreported) applied; *Beacon Insurance Company Limited v Maharaj Bookstore Limited* [2014] UKPC 21 applied.

6. The Comptroller, having embarked upon administrative proceedings, pursuant to his powers under section 130(5)(a) of the Customs Act, was under a duty to act fairly, reasonably and proportionately in arriving at a sum to be paid for the release of the container and the undeclared goods, which includes informing the appellant of the contents of the seizure report or providing a summary of its contents or of the results of the investigation into the alleged breaches. In circumstances where the contents of the seizure report were made known to the representatives of the appellant by the Assistant Comptroller during the meeting on 30th May 2017 and where the representatives of the appellant were apprised by the investigating officers of the results of the investigations conducted by Customs into the alleged breaches of the Customs Act during the investigations, the failure of the Comptroller to provide the appellant with a copy of the seizure report did not constitute a breach of the principles of fairness or to act reasonably.

Sections 125 and 130(5)(a) of the Customs (Control and Management) Act, Cap. 15.05 of the Revised Laws of Saint Lucia considered; R v Commissioners of Customs and Excise Ex parte Tsahl (1989) Times, 12 December considered.

7. In circumstances where the appellant disagreed to the payment of the restoration fee and took no further steps to continue or to reopen the administrative proceedings with the Comptroller or to commence proceedings for judicial review to challenge the legal authority of the Comptroller to stipulate \$30,000 as the restoration fee, the Comptroller was entitled to terminate the administrative proceedings and proceed to instruct the Attorney General to institute condemnation and forfeiture proceedings against the appellant relating to the undeclared goods. Furthermore, the learned judge was correct in finding that the legality and reasonableness of the restoration fee cannot be challenged by the

appellant by way of its defence in these proceedings for condemnation and forfeiture of the undeclared goods. For the appellant to seek to mount such a challenge by way of its defence in these proceedings amounts to using the process of the court for a purpose and in a way that is not permissible.

Sections 125 and 130(5) of the Customs (Control and Management) Act, Cap. 15.05 of the Revised Laws of Saint Lucia considered; Mark v Minister of Home Affairs [2008] SC (Bda) 5 Civ (6 February 2008) considered; Myran Norder v Jacqueline Mannix ANUHCVP2015/0034 (delivered 16th February 2017, unreported) considered; Section 17 of the Eastern Caribbean Supreme Court (Saint Lucia) Act Cap 2.01 of the Laws of Saint Lucia distinguished.

8. The Comptroller was fully empowered under section 130(5)(a) of the Customs Act to stipulate the payment of a sum of money (not exceeding the value of the goods) for the release of the goods seized and liable to forfeiture. The fact that part of the sum stipulated is referred to as a restoration fee, which is not a term to be found in section 130(5)(a), does not lead to the conclusion that the Comptroller acted without authority or exceeded his authority under the Act.

Section 130(5)(a) of the Customs (Control and Management) Act, Cap. 15.05 of the Revised Laws of Saint Lucia applied.

9. Under Paragraph 5 of Schedule 2 of the Customs Act, once the appellant failed to give notice within the requisite period claiming that the goods or certain of them are not liable to forfeiture, the goods seized were deemed to have been condemned as forfeited. In light of this provision, the learned judge was correct in so far as her finding and order related to the undeclared goods.

Paragraph 5 of Schedule 2 of the Customs (Control and Management) Act, Cap. 15.05 of the Revised Laws of Saint Lucia applied.

Case Name:

Reniston Limited

v

Nedlands Overseas Inc.

BVIHCMAP2020/0016

(The Territory of the Virgin Islands)

Date:

Wednesday, 3rd February 2021

**Coram for
delivery of
judgment:**

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]**

Appearances:

Appellant: Ms. Daisy Bovingdon

Respondent: No appearance

Issues:

Commercial appeal — Contractual Interpretation — Decision of learned judge refusing to give effect to contractual interest clause contained in guarantee agreement — Whether learned judge erred in concluding that rate of interest imposed by contractual interest clause was an unenforceable penalty — Whether contractual interest clause constituted a secondary obligation under guarantee

agreement — Costs — Whether fixed costs regime applies in proceedings before the Commercial Division of the High Court — Rule 69B.10 of the Civil Procedure Rules 2000 — Whether learned judge required to make costs award giving effect to indemnity costs clause in guarantee agreement

Result and Reason:

Held: allowing the appeal; finding that Reniston is entitled to contractual interest on the judgment sum of US\$2,124,205.04 in accordance with the terms of clause 4.1 of the Guarantee; setting aside the costs order of the learned judge; and ordering that Reniston's costs in the court below and on appeal are to be assessed by the court below, with the costs on appeal not exceeding two-thirds of the costs below, that:

1. A contractual provision will only fall within the purview of the penalty rule if it is a secondary contractual obligation, being a contractual obligation liable to be performed only where a primary contractual obligation has been breached. In determining whether a clause amounts to a secondary obligation, the court must examine the substance of the provision and determine its nature against the wider context of the contract. Once it is shown that a contractual obligation is a secondary obligation, the court must determine whether it imposes a detriment which is out of proportion to any legitimate interest of the innocent party in the enforcement of the primary obligations under the contract.

Printing and Numerical Registering Company v Sampson (1875) L.R. 19 Eq. 462 considered; Philips Hong Kong Ltd. v Attorney General of Hong Kong (1993) 61 BLR 41 considered; Cavendish Square Holding BV v Talal El Makdessi [2015] UKSC 67 applied; Dunlop Pneumatic Tyre Co. Ltd v New Garage and Motor Car Co. Ltd. [1915] AC 79 applied; Bridge v Campbell Discount Co. Ltd. [1962] AC 600 considered.

2. In this case, the determination of whether clause 4 is a secondary obligation turns on the interpretation of the Guarantee Agreement, which ought to be construed without reference to the loan agreement. It is clear that clause 4 of the Guarantee Agreement is not a secondary obligation but a conditional primary obligation and thus does not fall within the scope of the penalty rule. This is because it merely requires the payment of interest to Daferson/Reniston by Nedlands following SZAG's breach of the loan agreement, circumstances which do not amount to a breach of the

primary obligations as between the parties to the Guarantee, Daferson/Reniston and Nedlands. Accordingly, the learned judge erred in concluding that clause 4 was a secondary obligation and that the penalty rule was engaged.

Export Credits Guarantee Department v Universal Oil Products Co and Others [1983] 2 All ER 205 applied; Philip Bernstein (Successors) Ltd v Lydiate Textiles Ltd [1962] CA Transcript 238 considered; Re B (children) (relocation to UAE: Enforceability of charge over property and issues of wardship) [2017] 1 All ER 1099 considered; Andrews v Australia and New Zealand Banking Group Ltd (2012) 247 CLR 205 considered.

3. An appellate court ought not to interfere with a judge's costs order unless it is shown that the judge was plainly wrong in the exercise of his or her discretion. Under rule 69B.10 of the Civil Procedure Rules 2000, the fixed costs regime is disapplied from proceedings before the Commercial Division of the High Court. It was therefore not open to the learned judge to award costs utilising the fixed costs regime. Accordingly, the learned judge's costs award was plainly wrong and must be set aside.

Rules 69B.10 to 69B.14 of the Civil Procedure Rules 2000 considered; Michel Dufour et al v Helenair Corporation Ltd. et al SLUHCVAP1995/0004 (delivered 12th February 1996) followed; Friar Tuck Ltd et al v International Tax Authority BVIHCVAP2017/0003 (delivered 12th March 2019) followed.

4. The learned judge was not required to make a costs award on the basis of clause 5(d) of the Guarantee. This is because no such claim for costs had been made in Reniston's claim in the court below. Further, and in any event, clause 5(d) does not in any way purport to fetter or dictate the basis upon which the court in its discretion is entitled to award costs. The learned judge therefore retained the discretion to determine the incidence and quantum of costs in the proceedings.

APPLICATIONS AND APPEALS

Case Name: Steve Munroe dba Anguilla Electric Center
v
DCK International LLC
[AXAHCVAP2020/0018]
(Anguilla)

Date: Monday, 25th January 2021

Coram: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, QC Justice of Appeal [Ag.]
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]

Appearances:

Appellant: Ms. Tonaë-Simpson-Whyte instructed by Astaphan Chambers

Respondent: Mr. Carlyle Rogers

Issues: Civil appeal – Application to be removed from the record as legal practitioner for the respondent

Type of Order: Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:
The application for counsel on record for the respondent to be removed as legal practitioner for the respondent is granted.

Reason: This was an application by Mr. Carlyle Rogers, to be removed as legal practitioner on record for the respondent. The application and supporting documents were served on the respondent at its registered office. The application was also served on the appellant through his counsel. The Court was satisfied that the application ought to be granted, having satisfied the requirements of rule 63.6 of the Civil Procedure Rules 2000.

Case Name: Steve Munroe dba Anguilla Electric Center
v
DCK International LLC

**[AXAHCVAP2020/0018]
(Anguilla)**

Date: Monday, 25th January 2021

Coram: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, QC Justice of Appeal [Ag.]
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]

Appearances:

Appellant: Mrs. Tona Simpson-Whyte instructed by Astaphan Chambers

Respondent: No appearance

Issues: Civil appeal – No appearance by respondent

Type of Order: Oral Judgment

Result: IT IS HEREBY ORDERED THAT:

1. The appeal is allowed and the orders of Master Ricardo Sandcroft made on 5th November, 2020 are set aside save and except for the order refusing the application of the respondent / 1st defendant for an extension of time within which to file its defence.
2. Costs to the appellant in the sum of \$1,500.00.

Reasons: This was an appeal against the order of Sandcroft M [Ag.] made on 5th November 2020. The respondent to the appeal was served with notice of the hearing but did not appear to answer to the appeal.

Counsel for the appellant Ms. Tona Simpson-Whyte made application for the appeal to be allowed. The Court having considered the grounds of appeal, record of appeal and the submissions of the appellant in support of the appeal, was of the view that the appeal should be allowed, and the orders of the master set aside, save and except the order of the learned master refusing the application by the respondent for an extension of time to file a defence.

Case Name: Jamila Aliena William
v

**Commissioner of Police
[AXAMCRAP2015/0002]
(Anguilla)**

Date: Monday, 25th January 2021

Coram: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, QC Justice of Appeal [Ag.]
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Kendrickson Kentish

Respondent: Ms. Erica Edwards

Issues: Civil appeal – Oral application by counsel to be removed from the record as legal practitioner for the appellant – Application for adjournment by appellant

Type of Order: Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The application for Mr. Kendrickson Kentish to be removed from the record as legal practitioner for the appellant, who does not object to the application of Mr. Kentish, is granted.
2. At the request of the appellant, with no objection by the respondent, the hearing of the appeal is adjourned to the next sitting of the Court of Appeal for Anguilla during the week commencing 26th July 2021.

Reason: This Court was informed by the appellant, Ms. Jamila William, that she no longer wished to have Mr. Kendrickson Kentish (her counsel on record) appear on her behalf for the appeal, and that she was in the process of retaining another lawyer to appear on her behalf. Mr. Kentish made an oral application to be removed from the record as legal practitioner for the appellant. The appellant indicated her non-objection to the application and applied to the Court for an adjournment of the appeal, for her to finalise arrangements with her new lawyer. The respondent did not object to the application by the appellant for an adjournment. The Court was satisfied that the applications by Mr. Kentish to be removed from the record,

and by the appellant for an adjournment of the appeal, should be granted in the circumstances.

Case Name: **Sanphers Trading & Industry Limited**
v
Moke International Limited
[AXAHCVAP2020/0014]
(Anguilla)

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

Coram: **The Hon. Mr. Mario Michel, Justice of Appeal**
The Hon. Mr. Gerard St. C. Farara, QC Justice of Appeal [Ag.]
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]

Appearances:
Appellant: **Mr. Thomas Astaphan, QC with Mrs. Tona Simpson-Whyte**
Respondent: **Ms. Tara Carter**

Issues: **Interlocutory appeal – Application to strike out statement of claim on basis of there being no reasonable ground for bringing the claim – Whether learned judge erred in dismissing application to strike – Claim for infringement of trademark – Sections 12 and 36 of the Trademarks Act – “Use” of a registered trademark without registered owner’s consent – Interpretation of word “use” in sections 12 and 36 of Trademarks Act – Whether appellant’s offering for hire of vehicles bearing the mark “MOKE” was capable of amounting to an unauthorized “use” of trademark and therefore a trademark infringement – Whether learned master applied wrong test in determining strike out application pursuant to rule 26.3(1)(b) – Whether learned master erred in law by characterizing and treating the appellant’s application as being an application for summary judgment under Part 15 of the Civil Procedure Rules 2000 rather than a strike out application pursuant to rule 26.3(1)(b)**

Type of Order: N/A

Result / Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:
Judgment is reserved.

Case Name: [1]Jenny Lindsay
[2]Jenny Lindsay & Associates
v
Harriet Carty, Representative of the Estate of
Thomas Edward Carty
[AXAHCVAP2015/0007]
(Anguilla)

Date: Monday, 25th January 2021

Coram: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, QC Justice of Appeal [Ag.]
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]

Appearances:

Appellants:	Mr. Stephen Singh
Respondent:	Mr. Kendrickson Kentish holding papers for Ms. Navine Fleming

Issues: Civil appeal – Application to vary discharge or revoke the order of a single judge – Application to strike out notice of appeal

Type of Order: Adjournment

Result / Order: IT IS HEREBY ORDERED THAT:

1. Counsel for the appellants, Mr. Stephen Singh, undertakes to on or before 25th March 2021, effect service on the chambers of Ms. Navine Fleming, the record of appeal filed on 2nd May 2017, and the appellant's skeleton arguments filed on 17th May 2017.
2. The hearing of the application to vary, discharge or revoke the order of a single judge of this Court, and the application to strike out the notice of appeal, are

adjourned to the next sitting of the Court of Appeal for Anguilla during the week commencing 26th July 2021.

Reason:

Before the Court was an application by the appellants to vary, revoke or discharge the order of a single judge, and an application by the respondent to strike out the appeal. Counsel for the appellants, Mr. Stephen Singh, sought an adjournment of the applications in order to effect service on the respondent of the record of appeal and the appellants' skeleton arguments.

Case Name:

[1] National Bank of Anguilla (Private Banking and Trust) Limited (In Administration)
[2] Caribbean Commercial Investment Bank Limited

v

[1] Chief Minister of Anguilla
[2] Attorney General of Anguilla
[3] Gary Moving (In his capacity as Receiver of National Bank of Anguilla (In Receivership) and Caribbean Commercial Bank (Anguilla) Limited (In Receivership)
[4] Eastern Caribbean Central Bank

[AXAHCVAP2020/0001]
(Anguilla)

Date:

Tuesday, 26th January 2021

Coram:

The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Gerard St. C. Farara, QC, Justice of Appeal [Ag.]
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]

Appearances:

Appellants: Mr. Ronald Scipio, QC with Mrs. Eustella Fontaine and Ms. Yanique Stewart

Respondents: Dr. Francis Alexis, QC with Mrs. Nakishma Rogers Hull for 1st and 2nd respondents
Mr. Paul Dennis, QC with him Mrs. Nadine White-Laing and Ms. Navine Fleming for the 3rd and 4th respondents

Issues: Interlocutory appeal – Judicial review – Appeal from refusal of leave to seek judicial review of decision for implementation of resolution plan by respondents to protect depositors in the financial crisis – Whether learned judge erred in refusing application for leave to seek judicial review of decision to implement resolution plan – Whether Chief Minister of Anguilla and Attorney General were properly parties to intended judicial review claim – Whether there was a prospect of success in intended judicial review claim against the Chief Minister and Attorney General – Whether learned judge took into account irrelevant factors in determining application for leave for judicial review – Whether learned judge wrongly characterized appellants as offshore companies or offshore subsidiaries rather than incorporated companies — Costs – Rule 56.13(6) of Civil Procedure Rules 2000 – Whether learned judge erred in making costs order against unsuccessful applicants in court below without finding that applicants acted unreasonably in applying for leave to seek judicial review

Type of Order: N/A

Result / Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:
Judgment is reserved.

Case Name: Barnes Bay Development Limited (In Liquidation)

v

[1] Starwood Capital Group (Starwood Capital Group Global LP.)

[2] SOF-VIII-Hotel II Anguilla Holdings LLC

[3] Bradford Korzen

[4] Kor Duo Investment Partners LP

[5] Kor Duo II LLC

**[AXAHCVAP2020/0015]
(Anguilla)**

Date: **Wednesday, 27th January 2021**

Before: **The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]**

Appearances:

Appellants: **Mr. William Hare with him, Mr. Alex J. Richardson**

Respondents: **Mrs. Tana'ania Small-Davis with her, Mr. D. Michael Bourne**

Issue: **Interlocutory Appeal – Application by respondents to strike out claim, set aside leave to serve out of the jurisdiction and for declaration that High Court has no jurisdiction – Rule 26.3(1)(b) and (c) of the Civil Procedure Rules 2000 – Whether learned judge erred in striking out claim on the basis that it discloses no reasonable cause of action and is an abuse of process – Rule 7.7 of Civil Procedure Rules 2000 – Application to set aside service under rule 7.3 – Whether learned judge erroneously applied principles of striking out claim rather than principles in relation to application to set aside leave to serve out of jurisdiction – Whether learned judge erred in making alternative order that the claim be stayed and service set aside on the basis that Anguilla is not the appropriate forum for trial of the claim – Sale of property by appellant to second respondent through public auction pursuant to second respondent's powers of sale as charge under the Registered Land Act of Anguilla – Propriety of sale – Whether learned judge erred in concluding that sale of property conformed with Anguillian law – Whether sale of property was conducted in bad faith thereby rendering the manner of sale unlawful and in breach of fiduciary duties – Whether learned judge erred in concluding that res judicata and issue or cause of action estoppel arose in the circumstances of the case**

Type of
Result /
Order:

Adjournment

Result /
Order:

IT IS HEREBY ORDERED THAT:

The hearing of the appeal is adjourned to Wednesday, 3rd
February 2021 at 9:00am.

Case Name:

Ian Hope-Ross

v

- [1] Martin Dinning
- [2] Hudson Carr
- [3] Shawn Williams
- [4] Robert Miller
- [5] Eastern Caribbean Central Bank

[AXAHCVAP2020/0005]

Consolidated with:

- [1] Christopher Liss
- [2] Kathy Liss
- [3] Yellow Wood house Ltd.
- [4] Tirdeo Dharamraj
- [5] Summer Breeze Ltd.
- [6] Ocean Investment
- [7] North Eastern Insurance Services
- [8] Nivek Limited
- [9] Ermanno Galli
- [10] Sunil Pishu Khatnani
- [11] Martin Oliver
- [12] Ian Gurr
- [13] Rendezvous Tour Company Ltd.
- [14] William Dorsey
- [15] Dotty Dorsey

- [16] Longwall Investments N.V.**
- [17] DWS Group Limited**
- [18] Jurgen Kurt Schwirtlich**
- [19] Winchester Corp. Limited**
- [20] Dr Ahmet Baydar**
- [21] Teri Baydar**
- [22] Kenneth R. Lang**
- [23] Tomaz Slivnik**
- [24] Monique Baussan**
- [25] Richard Holubowicz**
- [26] Little Bay Venture Capital Ltd**
- [27] Kevin Gavin**
- [28] Lena Gavin**
- [29] Daniel Gavin**
- [30] Darlene Spicer**
- [31] Marie Theresa Robert**
- [32] Mary Van Den Berg**
- [33] Robert Horvath**
- [34] Danielle Horvath**
- [35] Roach Merle**
- [36] Judett Black**
- [37] Dr. Catherine Vuala**
- [38] Josette Sophia Peterson**
- [39] International Mortgages Ltd.**

v

- [1] Martin Dinning**
- [2] Hudson Carr**
- [3] Shawn Williams**
- [4] Robert Miller**
- [5] Eastern Caribbean Central Bank**

[AXAHCVAP2020/0006]

Consolidated with:

- [1] Satay Limited**
- [2] United Duty Free Concessionaries Ltd.**
- [3] Helen Bayer Constable, Patrick Constable**

- [4] and Walter Bayer II.**
- [5] Helen Bayer Constable, Teresa Bayer and**
- [6] Walter Bayer II**
- [7] Cadiz Holdings Ltd**
- [8] Chantal Cloutier**
- [9] CMS Management Ltd**
- [10] David Crowley**
- [11] D.N.A. Patents, Inc**
- [12] dCipher Inc.**
- [13] Vodaco Limited**
- [14] DIAMONT COMPANY N.V.**
- [15] Duna Holding Limited**
- [16] Equipment Leasing Ltd**
- [17] Van Veen Caribbean Holdings**
- [18] Jason Freeman**
- [19] HBM(Anguilla) Ltd**
- [20] Heidi Hobgood**
- [21] Hope-Ross and Thompson**
- [22] Ihatsu Fudosan Capital Limited**
- [23] Sean Kennelly**
- [24] A & A Limited**
- [25] Edouard Ledee**
- [26] Anthony Marini**
- [27] Mars Exploration Inc**
- [28] Lisa Marshall**
- [29] Latin Retreats**
- [30] Dominique Noire**
- [31] Frank Oliviero**
- [32] Colin Percy**
- [33] Francis Raineau**
- [34] NECOL Limited**
- [35] RHINO LLC**
- [36] FSC Management Attorney LLC**
- [37] Canon Limited**
- [38] Sunny Days Management Corporation**
- [39] Synetics Capital Corp Limited**
- [40] Glenys Taillon**
- [41] TSS LLC**

- [42] Robert Velasquez
 - [43] Annette Krabbe
 - [44] Simon Drake
 - [45] John Michael Victory
 - [46] Lorraine Tyson
 - [47] Stephen Joseph Cavagnaro
 - [48] Gary Charkham
 - [49] Sunshine Properties Limited
 - [50] Laura F. E. Van Hoeve
 - [51] Vanita Mirchandani
 - [52] Sharron Yuan-Sam
 - [53] Gillian Looser
 - [54] Angela Tyler
 - [55] The Little Ship Company Ltd
 - [56] Jerri-Lyn Zimmerman
 - [57] Raymond Longbottom
 - [58] Manning Kong
 - [59] Pamela Yee Lawrence
 - [60] Isabelle Patry
 - [61] Maria Ines Almeida
 - [62] Marlam Ltd.
 - [63] Darline DeStephens
 - [64] Holly Haven,Ltd
 - [65] Habib Jiha
 - [66] Menavia Langlais
 - [67] Hiroko Yoshida
- v
- [1] Martin Dinning
 - [2] Hudson Carr
 - [3] Shawn Williams
 - [4] Robert Miller
 - [5] Eastern Caribbean Central Bank

[AXAHCVAP2020/0007]
(Anguilla)

Date: Thursday, 28th January 2021

Coram: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]

Appearances:

Appellants: Mr. Ian Benjamin, SC with Ms. Rayana Dowden

Respondents: Mr. Paul Dennis, QC with Mrs. Nadine Whyte-Laing and Ms. Navine Fleming

Issues:

Interlocutory appeal – Appeal against order striking out appellants’ claim forms and statements of claim – Claims for breach of fiduciary duty, breach of trust and negligence for monies owed to appellants as creditors – Whether learned master erred in exercise of discretion to strike out claim forms and statements of claim – Whether claim forms and statements of claim disclosed reasonable ground for bringing claim – Whether learned master failed to properly apply legal test for striking out claims – Whether learned master failed to properly consider all the circumstances in concluding that respondents could not owe a duty of care and/or fiduciary duties to the appellants – Whether learned master erred in principle in concluding that the respondents, as persons in control of offshore banks, could not have owed a duty of care and/or fiduciary duties to the appellants who were both depositors and creditors of the banks

Type of Order:

N/A

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:
Judgment is reserved.

Case Name:

[1] The Anguilla Electricity Company Ltd
[2] Harold Ruan, Chairman
[3] Dawnette Gumbs, Director

v

The Attorney General
[AXAHCVAP2020/0008]
(Anguilla)

Date:

Friday, 29th January 2021

Before: 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:

Appellants: Mr. Frank Walwyn and Mr. Chesley Hamilton and Mr. Carlisle Rogers

Respondent: Mr. Dwight Horsford, Attorney General and Ms. Erica Edwards and Mr. Sasha Michael Courtney

Issue: Civil Appeal – Capacity as directors versus capacity as individuals – Academic appeals – Whether in the circumstances any order made on this appeal would have any practical effect or result between the parties – Costs – Whether the Court of Appeal ought to overturn the costs order of the court below

Type of Result / Order: Oral judgment

Result / Order: IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.
2. There shall be no order as to costs in the court below or on appeal.

Reason: The Court, having heard the parties in this appeal, was of the unanimous view that in the exercise of its discretion the Court hereby declined to entertain this appeal as the subsequent events rendered the matters sought to be addressed moot. The complaint was one made against the company Anguilla Electricity Corporation Limited (“ANGLEC”) and its board of directors as it related to the affairs of ANGLEC through its board in respect of the government of Anguilla as a member or shareholder of ANGLEC. The orders made by the learned judge below all related to the affairs of ANGLEC save the order as to costs.

At the time that the appeal was launched ANGLEC was the first appellant and two members of the board were the second and third appellants. Following the holding of the Annual General Meeting for ANGLEC, the second and third appellants were not re-elected as directors of ANGLEC. Also, on 19th June 2020 ANGLEC wholly discontinued the appeal against the orders made by the learned

judge. These events left the second and third appellants seeking to pursue the appeal in respect of orders which would not impact them in respect of their rights or obligations in respect of ANGLEC, or as directors of ANGLEC, or in their personal capacities or in respect of the government of Anguilla as shareholder of ANGLEC. In Ya'axche Conservation Trust v Wilber Sabido (Chief Forest Officer) and others [2014] 85 1 WIR 264, the Court of Appeal of Belize held that whilst the general principle was that academic appeals would not ordinarily be entertained there was no absolute rule to that effect. Whether an academic appeal would be entertained was a matter within the discretion of the court to be decided on the particular facts of the case. Further, a distinction was to be drawn between disputes concerning private law rights between private parties and public law cases. While it may be useful and in the public interest to hear an appeal, even though the subject matter is considered moot or academic, the instant appeal does not fall within that category and accordingly there were no compelling reasons why this Court ought to exercise its discretion to hear this appeal.

In respect of costs, having heard the respondent who accepted that the appropriate order in the court below and on this appeal should be no order as to costs, the Court accordingly orders that there shall be no order as to costs in the court below or on this appeal.

Case Name:

Elmoalis Ltd

v

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

Date:

Friday, 29th January 2021

Before:

**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: Mrs. Sherma Blaize Sylvester

Issue: 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

Type of Result / Order: N/A

Result / Order: IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name: Barnes Bay Development Limited (In Liquidation)
v
[1] Starwood Capital Group (Starwood Capital Group Global LP.)

[2] SOF-VIII-Hotel II Anguilla Holdings LLC

[3] Bradford Korzen

[4] Kor Duo Investment Partners LP

[5] Kor Duo II LLC

**[AXAHCVAP2020/0015]
(Anguilla)**

Date: Wednesday, 3rd February 2021

Before: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]

Appearances:

Appellants: Mr. William Hare and Mr. J. Alex Richardon

Respondents: Mrs. Tana'ania Small-Davis and Mr. D. Michael Bourne

Issue: Interlocutory Appeal – Application by respondents to strike out claim, to set aside leave to serve out of the jurisdiction, for a declaration that High Court has no jurisdiction, to strike out name of first respondent and for a stay of proceedings – Rule 26.3(1)(b) and (c) of the Civil Procedure Rules 2000 – Whether learned judge erred in striking out claim on the basis that it discloses no reasonable cause of action and is an abuse of process – Rules 7.7, 9.7 and 9.7A of Civil Procedure Rules 2000 – Whether learned judge erroneously applied principles of striking out claim rather than principles in relation to application to set aside leave to serve out of jurisdiction – Whether learned judge erred in making an alternative order that the claim be stayed and service set aside on the basis that Anguilla is not the appropriate forum for trial of the claim – Sale of property by appellant to second respondent through public auction pursuant to second respondent's powers of sale as charge under the Registered Land Act of Anguilla – Propriety of sale – Whether learned judge erred in concluding that sale of property conformed with Anguillian law – Whether sale of property was conducted in bad faith thereby rendering the manner of sale unlawful and in breach of fiduciary duties – Whether learned judge erred in concluding that res judicata and issue or cause of action estoppel arose in the circumstances of the case

Type of Result / Order: Oral judgment

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is allowed.
2. The matter is remitted to the court below to be reheard by a different judge.
3. The appellant shall have its costs on the appeal to be assessed if not agreed within 30 days.

Reason:

The Court was unpersuaded that the learned judge was treating with this application as one in relation to service outside of the jurisdiction. The Court was of the unanimous view that given all that the learned judge said in his judgment, he did not approach the application as one on the basis of striking out the claim. He makes that clear in several paragraphs throughout the judgment and he makes it plain again in his conclusions, where he applied rule 26.3(1)(b) and (c) of the Civil Procedure Rules 2000. On that basis, after striking out the claim, the learned judge also found that the claim is stayed and the service of the claim form is set aside. The Court was of the view that it was not clear that he approached this application in terms of applying the principles that would guide him in relation to an application to set aside an order to serve out of the jurisdiction but rather, he approached the determination of the application on the basis of whether the claim must be struck out.

It is pellucid that the test on a strike out application is different from the test which is applied when one considers the various limbs to be addressed by the Court in dealing with whether service of the claim form out of the jurisdiction should be set aside.

In relation to the striking out of a claim, one must take the pleaded case as it stands on the pleadings as true and to determine whether or not any cause of action is disclosed on the pleaded case. That is distinct from where a judge is considering the matter of a serious issue to be tried on the merits in respect of the first limb that is applied when one is dealing with the question of whether or not service of a claim form out of the jurisdiction should be set aside. That test, as referred to by counsel for the respondent, is the test applicable to a summary judgment and would engage a judge in looking at the evidential basis to see whether or not the claim is one that is sustainable on its merits. In this appeal, counsel for the respondents allege that the judge dealt with all the arguments placed before him in relation to determining whether there was a serious issue to be tried. That may be the case, but having regard to the judgment, this Court

cannot find that that is in fact what happened. This gave rise to the concern of how to treat with this appeal. In the circumstance the Court concluded that the appeal should be allowed on the basis that the judge erred in the approach he took to the application, and treated it as an application for striking out and applied the incorrect principles to a strike out application instead of treating with it as one under Part 7 or indeed Part 9 of the CPR to a large extent. Although the judge deal at the end with the question of forum and the fact that he considered a US Court was the more appropriate jurisdiction. Even there this Court does not see the kind of analysis that is required in relation to engaging the principles. So the Court is concerned that the appropriate approach and the appropriate disposal of this appeal is to allow it and to remit the application that was made in the court below to be reheard by a different judge on the merits which would be in fairness to all sides. The Court was of the view that the appellant should have its costs on the appeal to be assessed if not agreed within 30 days.