

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING
VIDEOCONFERENCE

GRENADA
12th to 16th April 2021

JUDGMENTS

Case Name: **Khouly Construction & Engineering Limited**
v
Edmond Mansoor

[ANUHCVP2020/0023]
(Antigua and Barbuda)

Date: **Thursday, 15th April 2021**

Coram **for** **The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal**
delivery: **The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]

Appearances:

Appellant:	Ms. Lisa John-Weste holding papers for Mr. Anthony Astaphan, SC
Respondent:	Dr. David Dorsett

Issues: **Civil appeal – Appellate approach to review of findings of fact – Contract law – Implied term – Breach of implied term of building contract – Whether trial judge erred in upholding an implied contractual term to carry out the works under the contract in a professional and workmanlike manner using proper skill and care – Whether implied term conflicts with express terms of the contract – Whether trial judge erred in relying on or attaching weight or too much weight to the Schamber report in coming to her decision on the counterclaim – Whether trial judge erred in her approach to and evaluation of the expert evidence in determining whether the respondent had**

discharged the burden of proving cracks, leaks and damage were caused by poor workmanship on the part of the appellant in breach of the implied term – Causation – Requisite standard of proof – Balance of probabilities – Approach of appellate court to issue of causation – Whether the judge erred when she gave judgment on the appellant's claim – Whether contractual rates or market rates to be applied to extras on quantum meruit basis – Applicability of principle of subjective devaluation – Whether respondent/counter-appellant can rely at this stage on principle of subjective devaluation

Result/ Order:

Held: dismissing the appeal and affirming the orders made by the trial judge at paragraph 132(2) of the judgment save that the order at sub-paragraph (d) awarding 100% liability against the appellant for damage done to the interior of the building is varied to 50%; dismissing the counter appeal and affirming the order made by the trial judge at paragraph 132(1) of the judgment; and ordering 75 percent of the respondent's costs of the appeal to be paid by the appellant and the appellant's costs of the counter appeal to be paid by the respondent, such costs to be assessed by a judge of the High Court, if not agreed within 21 days, that:

1. Where the evidence before the court below is largely documentary, the unique position of the trial judge in assessing the credibility of witnesses and the weight to be attributed to their evidence is of less significance than it would be in cases decided on the basis of mostly oral evidence. However, the restraint required of an appellate court in cases involving the findings of fact by the trial court is not overcome by the view of an appellate court that it is suitably situated to make the decision under review. The appellant must therefore demonstrate that the trial judge was plainly wrong in her approach to and assessment of the evidence and her application of it to the issues before her for determination; that she came to a wrong conclusion on the applicable law; that she omitted relevant evidence from her consideration and assessment; or that there was no

evidence before the trial judge from which she could properly have reached the conclusions that she did; or that, on the evidence, the reliability of which it was for her to assess, her decision was plainly wrong.

Ming Siu Hung and others v J F Ming Inc and another [2021] UKPC 1 applied; Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5 considered; Re B (A Child) [2013] UKSC applied Watt (or Thomas) v Thomas [1947] AC 484 considered; Rawle Hannibal v The BVI Health Services Authority [2019] ECSCJ No.394 (delivered 13th December 2019) considered; Yates Associates Construction Company Ltd v Blue Sand Investments Limited [2016] ECSCJ No. 63 (delivered 20th April 2016) considered.

2. Where contract documents do not contain any provision which speaks directly to the skill and standard of care and workmanship required of the contractor in the execution of the works, but confers an obligation to carry-out the building works in accordance with the drawings and specifications, the law will imply into the building contract a duty to use reasonable skill and care and to execute works in a good and workmanlike manner. This is especially so in circumstances where the contractor has held themselves out as possessing the necessary skills to carry out the works and to complete the building in accordance with the drawings and specifications. However, any term implied by the court must not conflict with the express terms of the contract. In the instant matter, the contract documents provided that the building works were to be effected in accordance with the approved drawings and specifications and evinced the appellant's understanding of these documents and its agreement or obligation to construct the building in accordance with them and with the project manual. However, the contract documents did not set out or indicate the standard of workmanship required under the contract.

Johnson v Unisys Limited [2001] 2 WLR 1076 applied; Marks and Spencer plc v BNP Paribas Services Trust Company (Jersey) Limited and another [2015] 3 WLR 1843 considered.

3. The trial judge was correct to imply into the contract between the appellant and the respondent a term that the appellant, in its execution of the building works and any specific instructions provided to it by the owner or his agent as to a method and quality of construction of or as to the materials to be used or finishes to be achieved in relation to a particular aspect of the contracted building works, would carry out the said works in a workmanlike manner using proper skill and care. Such an implied term does not contradict but supplements and is consistent with the express obligations of the appellant under the contract. However, implying such a term into the contract does not carry with it a general obligation on the appellant to use 'international industry standards' or 'international best practices' or any obligation to comply with the building codes or regulations of some other country, which obligations can only apply where the contract documents expressly so stipulate or such a term arises thereunder by necessary implication having regard to the nature of the works being carried out or other germane surrounding circumstances. The critical question for determination in this case is whether the appellant, as contractor, had complied with its obligation to execute the building works in accordance with the contract, the project manual and the drawings and specifications provided to it, and in accordance with any instructions provided to it by the respondent or his agent, and whether, in doing so, the appellant used or employed proper skill and care commensurate with industry standards recognised in Antigua and Barbuda.

4. An expert witness is not, strictly speaking, the witness of any particular party to the proceedings, but is an independent witness required to provide an unbiased opinion on a specific matter or question in issue in order to assist the court in its determination of the issues before it. A party who wishes to rely on the evidence of an expert or put into evidence in the matter before the court the report of an expert witness, is required by rule 32.6 of the Civil Procedure Rules 2000 ("CPR") to first seek and obtain the court's permission and the general rule is that permission must be sought at a case management conference.

However, a judge has a discretion to grant such permission at any stage of the litigation, where he is satisfied that there are cogent and persuasive reasons for doing so in the interest of justice. Whether the court will permit a single expert witness or whether the court will permit each party to produce and to rely on the evidence of separate experts, is a matter to be decided by the court taking into account all the circumstances of the matter, including, the nature and complexity of the claim, the issue or issues upon which expert evidence may be of assistance to the court's determination of the claim, and the costs to the parties associated with obtaining expert evidence.

Part 32 of the Civil Procedure Rules 2000 applied.

5. It is a fundamental principle that whether expert evidence is to be accepted is a question of fact for the trial judge. A critical aspect of the credibility of the expert and hence the weight to be attached to his opinions and conclusions, is whether they are explained and reasoned. Mere assertions or 'bare ipse dixit' carries little weight. An expert's evidence must be considered by the trial judge together with all the other evidence before the court which the judge has accepted. A challenge to a trial judge's decision to admit and to rely on expert evidence must be assessed being mindful that decisions as to the admissibility of expert evidence and the weight to be attached to that evidence, are fact-sensitive matters involving an evaluative exercise on the part of the trial judge. In this case, the appellant's criticisms of the respondent's expert witness, Mr. Schamber, falls short of satisfying the threshold for warranting appellate interference with the trial judge's decision. It cannot be said that the statement in the Schamber report as to his company's willingness to be of further assistance, if requested, or any other statement in the said report, crossed the line so as to lead to Mr. Schamber not being an independent expert capable of giving an unbiased or independent opinion to the court, or that he was in some way tainted as an expert witness as to the matters contained or addressed in his report, which matters all related to roofing issues. Further, it is wholly unsustainable to ground any

objection to the admissibility of the Schamber report on the fact that the said report was rendered on the letterhead of his firm or organisation. If this was a disqualifying factor in this matter or if this, by itself, pointed conclusively to a lack of independence, then all the experts whose reports were admitted into evidence by the lower court, would be likewise tainted. It was therefore open to the judge, and she was correct, not to reject the Schamber report purely on the basis of the opinions or conclusions which he reached not being those of an independent and unbiased witness.

Rule 32.4 of the Civil Procedure Rules 2000 applied, Kennedy v Cordia (Services) LLP [2016] UKSC 6 considered; Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft (1976) (3) SA 352,371 considered; Yates Associates Construction Company Limited v Blue Sand Investments Limited [2016] ECSCJ No. 63 (delivered 20th April 2016) considered; Rawle Hannibal v The BVI Health Services Authority [2019] ECSCJ No. 394 (delivered 13th December 2019) considered.

6. A court's approach to the issue of causation must not be sterile, academic, or viewed purely through the prism of a methodical consideration of the sequencing or chronology of historical events or facts. The court must approach this issue of causation in the round and in a practical and common-sense way, taking all relevant circumstances into account, including the sequence of certain events, when determining whether the particular loss or damage suffered by a claimant was as a result of or was sufficiently 'causally' connected to the actions or omissions of the defendant, whether such actions or omissions sound in contract or tort. However, this does not mean that a trial judge ought to ignore or to entirely discount, in an appropriate case, the importance to the issue of causation of the historical or chronological events or other relevant factors and whether they point either to liability or no liability on the part of the defendant/contractor for the claimant's loss. Equally so, a court should not ignore or discount, in an appropriate case, an intervening factor or event of evidential significance not caused

by the defendant (be it an act of God or the act of some third party) which may tend to establish or to point decisively to a causal connection with the alleged loss suffered by the claimant and to no liability for such loss on the part of the defendant. In an appropriate case, these factors, taken individually or collectively, when viewed or assessed in a practical or common-sense way, may be determinative of the issue of causation and hence of liability. Further, in considering the issue of causation, a trial judge must not lose sight of where the burden of proof lies, to the requisite standard in a civil case, and whether the evidence led by the claimant, when properly assessed against the other accepted evidence in the case for its quality, cogency and weight, satisfies the burden and standard of proof that some breach or actionable wrong in law was suffered and, that such breach or wrong was caused by an act or omission of the defendant.

Weld-Blundell v Stephens [1920] AC 956 applied;
Jones v Livox Quarries Ltd [1952] 2 QB 608 applied.

7. In this instant case, it is apparent that several of the respondent's expert witnesses had sight of the drawings and/or were privy, in the preparation of their respective reports, to certain written instructions given by the respondent to the appellant as to the manner in which certain works were to be carried out by the appellant. This is apparent from the reports of Messrs. Conway, Workman and Sobers. It cannot be said that the fact that other experts did not note or record, in their report, that they had sight of the drawings or instructions, renders the evidential value of their report entirely useless. This is especially so where they were sufficiently apprised of and reviewed the historical photographs of the works done by the appellant (as in the case of Mr. Schamber); or where, as stated in their report, they did not seek to address compliance by the appellant with design specifications, but sought, as professionals, to assess the works actually done by the appellant (as in the case of Messrs. Walcott and Martin). Accordingly, there was not any sound basis upon which the learned judge ought to have rejected

wholesale the evidence of the respondent's experts in this case.

8. It is not accepted that the Schamber report contains bare or unsupported assertions and accordingly was of no real evidential value or that the trial judge ought to have given no weight to it or to his evidence at trial. The trial judge was correct to have considered the Schamber report in the context of the CSE report of Mr. Chris Conway and the Workman report in determining whether the appellant had carried out defective work or poor workmanship in its construction of the roof system, especially the vaulted or hip roofs and whether such works were the cause of cracks and leaks and resulting damage to the interior of the main building.

9. The appellant was required under the contract to construct the roofs in accordance with the details provided to it in the respondent's letter dated 20th April 2009 and to do so using proper skill and care of an experienced contractor. This included an obligation to do so in accordance with accepted industry standards for the placement of waterproofing subsurface or underlay. Accordingly, it was open to the trial judge, on the evidence, to find, as she did, that the appellant had failed to exercise proper skill and care in the placement of the aluminum foil subsurface underlay or protection barrier in the construction of the roofs, by incorrectly stopping it at the inside of the exterior masonry wall instead of extending it to the outer edge of the exterior wall. Further, it was open to the trial judge to accept the expert evidence and opinion of Mr. Schamber that this poor workmanship on the part of the appellant in the construction of the hip roofs was a likely cause of the ingress of water into the interior of the building and resulting staining and damage. However, the trial judge erred in finding that the appellant had, in relation to the concrete hip roofs, breached the implied duty to use proper skill and care by failing to comply with international standards for the installation of the tiles and or failing to comply with the installation requirements of the concrete tile manufacturers, there being no evidence that such instructions were provided to or brought to the

attention of the appellant, the said tiles having been selected and bought by the respondent. In all the circumstances, there is no basis for disturbing the judge's award of 50% liability for the cost of remedial repairs to the roofs and the stairs to the south of the building at paragraph 132 (2)(a) of the judgment.

10. The learned judge having erred in finding that the appellant had, in relation to the concrete hip roofs, failed to comply with international standards for the installation of the tiles and or failed to comply with the installation requirements of the concrete tile manufacturers, erred in assessing the appellant's liability for damage to the interior of the main building from leaks to the hip roofs and through cracks in the walls of the master bedroom at 100%. It is clear that full blame ought not to be attributed to the appellant for damage caused to the interior of the main building from leaks relating to the hip roof or the flat roof. With respect to the flat roofs there was no evidence of leaks but of ponding of water due to a lack of appropriate fall in the finished roof, which defect the appellant had agreed to remedy as recommended by Mr. Conway in the CSE report. Accordingly, the trial judge's findings and award of 100% liability against the appellant at paragraph 132 (2)(d) of the judgment, is set aside and 50% liability substituted.

11. The trial judge did not err in her overall approach to and evaluation of the expert evidence in determining whether the respondent had discharged the burden of proving that the cracks and or damage to the stairs to the south (front) of the building, to the floor of the garage and the open area next to the front steps, storage areas and north basement floor and to the retaining walls were caused by poor workmanship on the part of the appellant in breach of the implied term. The trial judge was sufficiently seised of the relevant evidence relating to each of these items of defective or poor workmanship and was entitled to make the findings of liability which she did on the respondent's counterclaim at sub-paragraph (c) of paragraph 132 (2) of the judgment, which findings are accordingly affirmed. Likewise, there is no basis upon which to disturb the judge's finding and apportionment of liability for the professional fees

incurred by the respondent at paragraphs 129, 131 and 132 (2)(e) of the judgment.

12. Where the contract does not specify an agreed rate or rates to be applied to the valuation of any extras or variations in the works, the court must proceed to assess the value of the extras and any variations on a quantum meruit basis. In the absence of any cogent evidence of market rates, the best indication of the reasonable rates applicable to the extras or variations is the evidence of the rates used by the parties in arriving at the sums in the original contract and which had been agreed to and paid by the owner. The trial judge had before her in evidence the valuation of Mr. Gardner, an expert witness relied on by the appellant, and the costings arrived at by Mr. Sanjay Amin of BCQS relied on by the respondent. Accordingly, in arriving at an award of EC\$588,288.65 on the appellant's claim, it was open to the trial judge, and she was correct in accepting, the Gardner report as to the amounts due to the appellant for the original works completed under the contract and for the extras and variations, after deducting the appropriate or reasonable sums for savings or deductions due to the respondent.

13. The respondent's challenge to the award made by the trial judge in favour of the appellant, based upon the principle of 'subjective devaluation', was not foreshadowed in either his grounds of appeal or in written submissions, nor was any such argument put to the learned judge below. It is not, therefore, open to the respondent to now rely, for the first time, on this criticism of the trial judge's decision as a basis for setting aside the award made by the judge on the appellant's claim. Accordingly, the said award at paragraph 132(1) of the judgment is affirmed

Case Name:

Novel Blaze Limited (in liquidation)

v

Chance Talent Management Limited

**[BVIHCVAP2020/0006]
(Territory of Virgin Islands)**

Date: Friday, 16th April 2021

Coram for **The Hon. Dame Janice M. Pereira, DBE, Chief Justice**
delivery: **The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal**
The Hon. Mde. Louise Esther Blenman, Justice of Appeal

Appearances:

Appellant: Mr. Robert Nader

Respondent: Mr. Grant Carroll

Issues: Civil appeal — Insolvency law — Appeal against order appointing liquidators over company — Locus standi — Whether respondent had standing to apply for appointment of liquidators over appellant — Whether respondent was a secured creditor within meaning of section 9(2) of Insolvency Act, 2003 and was therefore disqualified from making an application to appoint liquidators over respondent — Section 162 of Insolvency Act, 2003 — Whether learned judge erred in exercising discretion to appoint liquidators over appellant — Costs — Whether circumstances of appeal warrant departure from general rule that unsuccessful party should pay costs — Whether costs award should be made against non-party

Result/Order: Held: dismissing the appeal; awarding Chance Talent its costs in the lower court to be paid by Novel Blaze and assessed by a judge of the Commercial Court, if not agreed within 21 days; and awarding costs on the appeal to Chance Talent against Novel Blaze to be assessed by a judge of the Commercial Court at no more than two-thirds of the costs below, if not agreed within 21 days, that:

1. The general rule is that the words in a statute must be interpreted and given effect in keeping with their natural and ordinary meaning. This is so

particularly where the words of the statute are clear and unambiguous. At the heart of this appeal is the interpretation of section 9(2) of the Insolvency Act which provides that a creditor is a secured creditor of a debtor if it has an enforceable security interest over an asset of the debtor in respect of its claim. The central question therefore is whether, in keeping with the settled principles of statutory interpretation, Chance Talent is a secured creditor within the meaning of section 9(2) of the Insolvency Act, and is therefore disqualified from pursuing an application to wind up Novel Blaze.

Smith v Selby [2017] CCJ 13 (AJ) applied; Joseph Cadette v Saint Lucia Motor and General Insurance Co. Limited [2021] ECSCJ No. 472 (delivered 22nd February 2021) followed.

2. The natural and ordinary meaning of the words ‘security interest over the assets of the debtor’ in section 9(2) of the Insolvency Act mean that a creditor will be a secured creditor if it holds a security interest over the assets of the debtor, only. To argue that section 9(2) was intended to apply to security interests held over assets of a third party is an impermissible overextension of the clear words of the statute. A security interest held over the assets of a debtor’s subsidiaries is simply not a security held over the assets of the debtor. When applied to this case, the effect of section 9(2) is that Chance Talent will only be a secured creditor if it holds an enforceable security interest over the assets of Novel Blaze. On the plain words of the section, there is no basis upon which to conclude that Chance Talent is a secured creditor of Novel Blaze, given that the security interest held by Chance Talent is not over assets of Novel Blaze, but is over the assets of its subsidiaries, Rich Kirin and Big Wealth. The learned judge’s reasoning and conclusion on this point therefore cannot be impugned.

Section 9(2) of the Insolvency Act, 2003 Act No. 5 of 2003 interpreted; Re Swiber Holdings Ltd [2018] SGHC 180 applied; Re Plummer (1841) 1 Phillips 56 41 E.R 552 applied; White v Davenham Trust [2011]

EWCA Civ 747; Ex parte West Riding Union Banking Co. (1881) 19 Ch D 105 distinguished.

3. The court has a discretion under section 162 of the Insolvency Act to appoint liquidators over a company on the ground of insolvency. In order for this Court to interfere with the learned judge's decision to appoint liquidators over Novel Blaze, it must be demonstrated that the decision exceeded the generous ambit within which reasonable disagreement is possible and is therefore blatantly wrong. It is clear that the judge exercised his discretion to wind up Novel Blaze having found that the company was insolvent within the meaning of the Act and having determined further that there would not be any straight-forward remedy which Chance Talent could pursue to realise its debt. In the totality of circumstances, there is no discernible error in principle that was committed by the learned judge. Therefore there is no basis upon which this Court can interfere with the judge's exercise of discretion to wind up Novel Blaze.

Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 applied.

4. It is the law in relation to a winding up application, as with any court proceedings, that the question of costs is always at the discretion of the court. The general position is that the costs of a company that is the subject of liquidation proceedings, for participating in a winding up application, are to be paid by the company as an expense in the liquidation. The court, however, has the power to depart from this general position and order that the company's costs are to be paid by some non-party who is connected to the liquidation where, in the circumstances, it is just to do so. Critically, the basic principles of natural justice require the party seeking such an order, against a non-party, to give notice of its application and the evidence in support of the application, to the person against whom the order is sought. While it is true that the opposition to Novel Blaze's winding up application and its appeal were commenced as a result of instructions given by Mr. Sun, in his capacity as director of Novel Blaze, his

powers as a director to issue those instructions have not been challenged by Chance Talent. Furthermore, there is no evidence that Mr. Sun was given notice by Novel Blaze of its intention to seek an order for costs against him, as a non-party. Therefore, in the circumstances, it would not be in the interests of justice to make an order for costs against Mr. Sun, and accordingly there is no proper basis to depart from the general rule that costs should be awarded to the winning party (Chance Talent) against the unsuccessful party (Novel Blaze).

Re Humber Ironworks Co (1866) LR 2 E Q 15 applied; Re Bostels Ltd [1967] 3 All ER 425 applied; Re A Company (No.004055 of 1991) [1991] 1 WLR 1003 applied; Re Aurum Marketing Ltd (in liquidation) [2000] 2 BCLC 645 applied.

APPLICATIONS AND APPEALS

Case Name:

**Prudence Etha Lewis
v
Rawl Nicholas Lewis**

**[GDAHCVAP2020/0020]
(Grenada)**

Date:

Monday, 12th April 2021

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal
[Ag.]**

Appearances:

Appellant: Mr. Benjamin Hood

Respondent: Ms. Jasmin Redhead

Issues:

Civil appeal – Application to vary the order of the single judge – Whether judge erred in awarding the parties an equal share in the matrimonial property –

Whether judge had sufficient evidence before him to properly exercise his discretion in awarding each party a 50% share in the matrimonial property – Stay – Principles guiding the grant of a stay

Type of Order:

Oral decision

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. The application to vary the single judge's order refusing a stay is dismissed, there being no merit for varying the said order.**
- 2. The applicant shall bear the costs of the application for stay, fixed in the sum of \$750.00 to be paid on or before 27th April 2021.**

Reasons:

The Court having heard the submissions of the applicant and respondent was of the view that there was no merit in the application to vary the order of the single judge refusing a stay.

Case Name:

[1] Jeanette Farray

[2] Ashley Simon

[3] Mary Farray

v

[1] Emerald Stewart

(The Administrator in the Estate of Virginia Stewart)

[2] Hermione Stewart

[GDAHCVAP2020/0021]

(Grenada)

Date:

Monday, 12th April 2021

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal
[Ag.]**

Appearances:

Applicants: Mr. Henry Paryag

Respondents: Mr. Ruggles Ferguson

Issues:

Civil appeal – Application for leave to appeal –
Application for stay of execution

Type of Order:

Oral decision

Result/Order:

IT IS HEREBY ORDERED THAT:

1. The application for leave to appeal is refused.
2. The application for a stay is refused.
3. Costs awarded to the respondents in the sum of \$750.00 to be paid by the applicants on or before 27th April 2021.

Reason:

The Court has heard the submissions of the applicants by counsel, Mr. Henry Paryag and for the respondent Mr. Ruggles Ferguson in relation to the application for a stay and Mr. Paryag in relation to the application for leave to appeal the order of the judge below which was in terms of an enforcement order in respect of the judgment debt in this matter.

The Court was of the unanimous view that the application for leave to leave discloses no grounds which have realistic prospects of success on appeal. The leave to appeal is accordingly refused. As a consequence there is no basis on which the Court may grant a stay of the said order. The application for the stay was also therefore accordingly refused.

Case Name:

Lyndon Lewis

v

**The Grenada Public Service Co-operative
Credit Union Limited**

**[GDAHCVAP2020/0011]
(Grenada)**

Date: Monday, 12th April 2021

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

Appearances:

Appellant:	Ms. Karen Samuel
Respondent:	Ms. Celia Edwards, QC with her Mr. Zuriel Francique

Issues: Interlocutory appeal – Applicability of part 66 of the Civil Procedure Rules 2000 – Whether learned judge erred in dismissing an application by the applicant seeking to deem the claim a mortgage claim under CPR Part 66 – Costs – Whether the learned judge erred in awarding costs against the appellant

Type of Order: Oral decision

Result/Order: IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.
2. The respondent shall provide a certificate of truth by refiling the answers filed on 14th October 2016 in response the appellant's request for information, together with the certificate of truth by no later than Monday 29th April 2021.
3. Costs to be paid to the respondent, fixed in the sum of \$2000.00 to be paid on or before Monday, 17th May 2021.

Reasons: The appellant has brought this appeal against the decision of the learned judge in which she dismissed the appellant's application seeking to have the claim brought for repayment of a debt or debts due to the

respondent Cooperative Credit Union by the appellant, classified as a mortgage and therefore a claim falling to be proceeded with pursuant to Part 66 of the Civil Procedure Rules 2000 which deals with mortgage claims. The learned judge, on 24th April 2018, gave her decision in relation to the appellant's application. By the said decision, she refused the application to treat or to declare that the claim fell under Part 66 of the CPR and she made a costs award in the sum of \$1000.00. In her reasons the learned judge stated:

[1] The claim is for a debt that was created under a simple contract/loan agreement and it is not a specialty debt.

[2] In the statement of claim the claimant relies on a loan agreement between the parties which loan agreement is exhibited and wherein it stated:

"AS COLLATERAL SECURITY for this note said borrower has deposited with the said Credit Union: Regular shares of applicant, mortgage on 10,000 sq ft of land with building thereon located at Mt. Home. St. Andrew and a bill of sale on the vehicle."

[3] The mortgage is a collateral security. I am satisfied with my conclusion on the basis of the following:

[4] In *Barclays Ltd Bank v Beck* [1952] 1 All ER 549 at 552-533, [1953] 2 QB 47 at 54 by Denning LJ points out the distinction between specialty debts and simple contract debts:

"If they are created under and by virtue of a deed, they are specialty debts from their commencement, but if they are created by a simple contract outside a deed, they remain simple contract debts even though there is a deed in existence which gives collateral security for them. The distinction is clearly shown by considering the difference between a mortgage debt to a building society and a charge to a bank to secure a running account. The mortgage debt to a building society is created under and by virtue of a deed and is a specialty debt from its commencement, but a future debt on a running account is a debt created by

parol and it remains a simple contract debt even though the customer has previously given a charge to secure it which includes a covenant under seal. The future debt on running account is not created under the deed. It may be that it would never have been created but for the deed, but that is a different thing. It only means that the deed is collateral security for its repayment.”

She went on further in the case of Midland Bank Ltd v Stamps [1978] 3 All ER 1, where Donaldson J made the point that: ‘the fact that the moneys claimed by the bank are secured by a mortgage is wholly irrelevant in the context of the bank’s claim’. This Court endorses that dictum here, because in this case the credit union has merely sued on the loan agreement with the appellant.

This Court also recites the dictum of Schiemann LJ in National Westminster Bank Plc v Kitch [1996] 1 WLR 1316 at page 1322 of the judgment where he made the point: “I confess I reach this conclusion with satisfaction” and that is where he was differing from the statement made by Donaldson J in Midland Bank v Stamps although Donaldson J in rendering his decision clearly was not relying on the statement he had made. But he nonetheless said: ‘I confess I reach this conclusion with satisfaction’. There seems to be no reason in principle why, if a bank chooses not to rely on a mortgage in an action, that action should be classified as a mortgage claim and the Court is of the same view that there is no reason in principle why if a bank chooses not to rely on a mortgage in an action such as this case here where they are not relying on their mortgage that the action should be classified as a mortgage claim. Therefore, this Court agrees with the reasoning of the learned judge. The Court does not consider that she committed any error in coming to the conclusion that Part 66 of the CPR was not applicable to the claim.

The Court was also of the view that the costs ordered by the learned judge are in the discretion of the judge given that the respondent was successful on the application, it follows therefore that there is no basis

for this Court to interfere with the judge's costs award which she made in favour of the respondent.

Case Name:

**Reynold Benjamin
(Trading as R.C. Benjamin & Co.)
v
Dorset Charles
(Trading as WorldWide Watersports)

[GDAHCVAP2020/0019]
(Grenada)**

Date:

Monday, 12th April 2021

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal
[Ag.]**

Appearances:

**Appellant: Mr. Benjamin Hood
Respondent: In person**

Issues:

Civil appeal – Application to vary order of single judge

Type of Order:

N/A

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. The applicant shall serve the respondent with the notice of application, order of the single judge, written submissions, and other documents in support of the application and shall thereafter file with the court an affidavit evidencing service.**
- 2. The application will thereafter be considered at a later date or the next sitting of the Court, whichever is earlier.**

Reason: The Court noted that the respondent has not been served with the notice of application filed on 9th January 2021 seeking to set aside the order of the single judge made on 15th December 2020 and therefore it was necessary to direct service.

Case Name:

**Grenada Investment Development
Corporation
v
Sonia Roden**

**[GDAHCVAP2020/0015]
(Grenada)**

Date: Monday, 12th April 2021

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

Appearances:

Appellant:	Ms. Karen Samuel
Respondent	Mrs. Deborah Mitchell

Issues: Civil appeal – Application for summary judgment – Application to strike out claim under court’s management powers – Whether learned judge erred in exercise of judicial discretion – Parts 15.2 and CPR 26.3 of the Civil Procedure Rules 2000 – Whether judge erred in dismissing application made pursuant to Parts 15.2 and 26.3 of the Civil Procedure Rules 2000

Type of Order: Oral judgment

Result/Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.
2. The appellant shall pay to the respondent costs fixed in the sum of \$1500.00 to be paid on or before Monday, 17th May 2021.

Reasons:

This appeal raises the question as to whether the learned judge erred in dismissing the appellant's application made pursuant to Part 15.2 of the Civil Procedure Rules 2000 ("CPR") which deals with summary judgments and CPR 26.3, under the case management powers of the court which allows the court to strike out a statement of case or a claim on various grounds such as abuse of process or where the claim does not disclose any reasonable basis for bringing the claim or disclosing no cause of action.

One of the complaints made by the appellant is that the learned judge failed to treat with the application as a challenge to the jurisdiction of the court on the basis as put forward by the appellant that the claim was in effect a claim for unfair dismissal and therefore a claim in respect of which, on the authority of the case of Indra Williams v Casepak Company (Grenada) Ltd Claim No. GDAHCV 2017/0463 (delivered 25th and 30th May 2018, unreported) the court would have no jurisdiction to try. As pointed out to counsel for the appellant, the application was not grounded as a challenge to the court's jurisdiction under CPR Part 9.7 or a challenge to court as not being the appropriate forum under the same Part 9 of the CPR. Rather, it was a challenge under which the appellant sought to strike out the claim for amongst other things, abuse of process or alternatively, for summary judgment.

The Court has reviewed the decision of the learned judge in the court below, dated 28th October 2020 and recites, quite extensively from, paragraphs 6-9 of that decision as follows:

"6. The application before the court comprises both factual and legal issues. The defendant is

in essence urging the court not to exercise its jurisdiction on issues of fact and law which the defendant has not deployed in a defence. As indicated above, the claimant's claim as pleaded appears to be based on a breach of an employment agreement. A defendant is required to plead all the facts on which the defendant relies on in a defence (CPR 10.5). In my view, the facts deposed in the defendant's affidavit and submissions in support of the application are all matters which should be pleaded in a defence.

7. The authorities in relation to striking out are replete and need not be restated. The striking out of a statement of case has been described as one of the most powerful weapons in the court's case management armory and should only be deployed as a tool of last resort, unless the consequences can be justified. The striking out of a claim at this preliminary stage even before a defence is filed is sparingly used as the court is reluctant to drive out a claimant from the judgment seat without being given an opportunity to deploy its case.

8. The defendant is asking the court to conduct a mini trial on facts which have not been properly pleaded in defence. The claimant is her claim has alleged breach of a contract from which she has suffered loss. The court will require more detailed analysis of the facts before making a determination as to whether or not the defendant is entitled to the declarations sought in the application. This can only be done after the facts have been properly distilled in pleadings and disclosure. A party's defence should not be deployed in an application to strike out.

9. Having reviewed the statement of claim, the application, written submissions with authorities and also hearing the parties on their competing arguments, I am of the view that the application to strike out or for summary dismissal of the claimant's

statement of claim should be refused. The striking out of a claim is used in plain and obvious circumstances. The court is not of the view that the claimant's claim falls within this category."

Having reviewed the pleadings in this matter together with the decision arrived at by the learned judge and having regard to the principles governing appellate intervention with the exercise of a discretion exercised by a judge in the court below, those principles being trite as set out in Michel Dufour and others v Helenair Corporation Limited and others (1995) 52 WIR 188 and Peter Toussaint and others v Martine Johnson SLUHCVP2018/0024 (delivered 16th September 2020, unreported), the Court is of the view that there is no basis on which it may be said that the learned judge erred in the exercise of the discretion entrusted to her in refusing the application to strike out the claim or for summary judgment on the said claim.

Case Name:

[1] Dolette Cyr Bartholomew
[2] Shem Pierre
(In their capacity as Administrators in the
Estate of Peter Oscar Bartholomew,
Deceased)

v

[1] Kenton Hazzard
[2] Edward Gibson
[3] Shaun Gannes
[4] Roddy Felix
[5] Wendel Sylvester
[6] Attorney General

[GDAHCVAP2020/0008]
(Grenada)

Date:

Tuesday, 13th April 2021

Coram: The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellants:	Mr. Derick Sylvester and Ms. Hazel Hopkin
Respondents:	Mrs. Karen Reid-Ballantyne and Mr. Adebayo Olowu

Issues: Civil appeal – Expert evidence – Whether master erred in refusing the appellant’s application to appoint expert witness

Type of Order: Oral judgment

Result / Order: IT IS HEREBY ORDERED THAT:

1. The appeal is allowed.
2. The order of the learned master is set aside and is substituted with the order of this Court to the effect that Dr. Hubert Daisley Jr. is appointed as an expert witness in assessment hearing.
3. Each party shall bear its own costs on the appeal and in the court below.

Reason:

This is an appeal against the decision of a learned master dated 30th July 2020 where the master, based on an application, to have Dr. Hubert Daisley Jr. appointed as an expert in the field of forensic pathology, refused to grant the application. The appellant is aggrieved by the decision of the learned master and has appealed. The appellant and respondent have filed written submissions and has also advanced oral submissions.

The Court having regard to the enunciation of Lord Briggs in the decision of Bergen v Evans [2019] UKPC 33, particularly in relation to the pronouncements as to the court's approach to the circumstances where the Board found that Dr. Hendrickson was permitted to provide evidence and as such ought to be treated as an expert witness. Further, the Court placed particular reliance paragraphs 45 and 46 of the decision of the board in the case of Bergen v Evans. The Court also took into account the fact that this is a matter in which there was a bifurcation of the trial and that Dr. Daisley has provided expert evidence before the learned judge in this matter on the question of causation and liability and was cross examined at length by the learned Solicitor General at that time and importantly, there was no objection to Dr. Daisley adducing the evidence and the parties importantly had agreed and settled the list of documents which included his reports.

In those circumstances, the Court was of the unanimous view that the learned master erred in the exercise of her discretion in refusing to appoint Dr. Hubert Daisley Jr. as an expert in the field of forensic pathology.

Case Name:

National Water and Sewerage Authority

v

Giselle Ferguson-Sayers

[GDAHCVAP2017/0006]

(Grenada)

Date:

Tuesday, 13th April 2021

Coram: The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant:	Mr. Benjamin Hood with Ms. Dennies Burris
Respondent:	Ms. Karen Samuel

Issues: Civil appeal – Findings of fact – Approach of appellate court to judge’s findings of fact – Whether judge erred in finding that there was an agreement that the appellant will build and pay for the retaining wall in the respondent’s property – Assessment of damages – Whether there was sufficient evidence before the judge to assess damages

Type of Order: Oral judgment

Result/Order: IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed and the orders made by the learned trial judge are affirmed.
2. Costs of the appeal to the respondent in the sum of \$11,252.00 being two-thirds of the amount awarded in the lower court.

Reasons:

The respondent is the owner of property adjacent to the Perdmontemps main road in Grenada. The appellant is the public authority responsible for water and sewerage in Grenada. In May 2010, the appellant carried certain road works on the Perdmontemps main road. The works included laying underground water pipes along the side of the road adjacent to the respondent's property. Not long after the completion of the road the works, the respondent carried out certain construction activities on her property which involved excavating the land on her property.

Subsequently, there was a landslide on the respondent's property that required remedial work. The work included digging a drain, erecting a retaining wall in the area of the slippage and backfilling the area between the retaining wall and the main road. The parties entered into discussions about the responsibility for the remedial work and how it was to be carried out. The discussions resulted in correspondence between the parties' lawyers. By letter dated 25th March 2011 ("the letter") the respondent's lawyer, Ms. Kim George, wrote to the appellant's lawyers, Ms. Shireen Wilkinson. Ms. George summarised the discussion between the parties. The letter reads:

"We write further to the meeting held at NAWASA's office to confirm that the unsatisfactory state of the land on our client's the northern boundary will be remedied in two phases as follows:

1. By backfilling a portion from the water level on our client's house extending approximately six feet towards the road.
2. The material for backfilling and the costs of laying the same will be borne by your client.
3. That the remainder of the land being the portion from the backfilled area to the road level will be retained within a two month's period at most in accordance with drawings prepared by your client and accepted by ours.

4. That drawings will be submitted for our client's consideration prior to construction and the parties will meet again if necessary to work towards a mutually acceptable method of retention.
5. That at the time of retention our client's will, at their own expense, construct a drain approximately forty feet long 16 inches deep by 2 feet wide between the backfilled portion and the retained portion.

Kindly sign the enclosed copy of this letter as evidence of agreement to the above stated terms.

Yours respectfully,

Kim George"

The letter was signed, agreeing to the terms, by Ms. Shireen Wilkinson, the lawyer for the appellant.

Much of the debate in the trial and in this appeal centered around the proper interpretation of the letter in the context of the discussions between the parties and the surrounding circumstances. The main issue at the trial was who was responsible for erecting and paying the costs of constructing the retaining wall. The learned trial judge found that it was the appellant's responsibility and the appellant was in breach of the agreement by not erecting the wall. The judge accordingly awarded general damages for breach of contract in the sum of \$5,000.00 and special damages in the sum of \$107, 517.36, the latter being the estimated costs of constructing the wall.

The trial judge also dismissed the appellant's counterclaim which was premised on the respondent's failure to retain the backfill behind the wall. The judge also ordered the appellant to pay the respondent's costs in the sum of \$16,877.00. The appellant was dissatisfied with the learned judge's decision and appealed to this Court. The notice of

appeal lists eight grounds of appeal which were reduced to the following two issues:

1. Whether the learned judge erred in finding that there was an agreement that the appellant will build and pay for the retaining wall in the respondent's property.
2. Whether there was sufficient evidence before the judge for him to assess damages.

The agreement

Learned counsel for the appellant, Mr. Benjamin Hood, did not dispute the trial judge's finding that the letter could constitute an agreement between the parties, even though it was sent without prejudice. His position is that:

1. There was no consideration passing between the parties to support the existence of an agreement.
2. If there was consideration the judge erred in interpreting the correspondence to mean that responsibility for constructing the wall was the appellant's.
3. In any case, the alleged agreement was incomplete because there are still issue relating to the method of retention of the wall to be settled by the parties.

Consideration

On the issue of consideration, the Court accepts the submission of learned counsel for the respondent, Ms. Karen Samuel that the agreement set out in the letter is supported by consideration. In subparagraph 2 of the letter, the appellant must bear the cost of backfilling the wall and in subparagraph 5 of the letter, the respondent will construct a drain between the backfilled portion of the land and the retained portion. This is valuable consideration.

The Court also finds that in settlement agreements of this kind mutual promises and forbearances made

and given by the parties, though not expressed in the written document go towards the issue of consideration. The Court is satisfied that the agreement contained in the letter was supported by consideration.

Responsibility for the wall

The learned judge who had full conduct of the trial and observed the witnesses giving their evidence and reviewed the documents and correspondence, was satisfied that subparagraph 3 and 4 of the letter casts responsibility for the wall on the appellant, as they were responsible for drawing and preparing the plans and specifications, and then retaining them. The respondent's role was limited to approving the plans. The judge's finding is set out at paragraphs 64 and 65 of the judgment. It reads:

“64. The letter did not express whether it was the claimant or the defendant was to be responsible for the retention of the claimant's land.

65. However, the fact that the stipulation that the drawings were to be submitted to the claimant before construction would have indicated to a reasonable onlooker that retention was not intended to have been undertaken by the claimant. There would have been no need for the stipulation that she will see the drawings. Before the retention commenced the parties intention had been that the claimant was the one responsible for retention. If she was the one to undertake retention she would not have reasonably been expected to do it without being in possession of the drawings. It was only because she was not the one intended to have undertaken the retention and there would have been the need for this stipulation that the claimant should first be showed the drawings before the retention was undertaken.”

That, in the Court's opinion, is a clear finding by the judge and based on the conduct of the parties and

how they framed their intention in the letter that it was the responsibility of the appellant to construct the retaining wall and be responsible for the costs of construction. The Court adopts the judge's findings and finds no reason to interfere with it.

Incomplete contract

Mr. Hood's final point on the existence of the contract is that, even if there was an agreement in principle for the appellant to construct the retaining wall at its own costs, the agreement was incomplete and therefore unenforceable because paragraph 4 required the parties to "work towards a mutually accepted method of retention". The Court does not accept this submission. The judge found and the Court agrees that the appellant was responsible for building and paying for the construction of the retaining wall and the method of retention was a detail and did not detract from the agreement that been reached.

Damages

The appellant submitted that there was insufficient evidence before the judge for him to assess damages and that he erred in awarding special damages based on the estimate of \$107,017.36 to construct the wall. The essence of this submission is that the estimate produced by Cardpro and Associates was expert evidence and therefore the respondent required leave from the trial judge, under rule 32.6 of the Civil Procedure Rules 2000, to admit the estimate and to rely on it in the assessment of damages. This Court does not agree with this submission. The estimate is not expert evidence, it was just an estimate. Further, it was admitted into evidence at the trial without objection and it was not challenged on cross-examination. The appellant did not put in evidence to contradict the estimate. The estimate was the only evidence before the judge to assist him in making an award to cover the costs of erecting the wall.

In the circumstances, the judge was entitled to rely on the estimate and make the award of damages that he made and there is no basis to interfere with the judge's award. The Court relies, as did the trial judge,

on the case of Grant v Motilal Moonan Ltd. (1988) 43 WIR 372.

Case Name:

John Redhead

v

The Queen

**[GDAHCRAP2015/0006]
(Grenada)**

Date:

Tuesday, 13th April 2021

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Mr. Ruggles Ferguson

Respondent:

Mr. Christopher Nelson with him Mr. Brendon LaTouche

Issues:

**Criminal Appeal – Murder – Appeal against sentence
– Whether sentence was manifestly excessive –
Guilty plea – Whether the learned judge erred in not
finding that the aggravating factors outweighed
mitigating factors**

Type of Order:

Oral decision

Result/Order

IT IS HEREBY ORDERED THAT:

The appeal is allowed to the limited extent that the sentence imposed of 25 years be reduced by the time spent by the appellant on remand, a period of approximately two years and nine months.

Reason:

The appellant, John Redhead was indicted on 16th April 2013 on a single count of murder, having been committed to stand trial for the said offence as a result of a paper committal at his election, as he was entitled to do.

The appellant appeared before a learned judge of the High Court on 16th April 2015 and pleaded guilty to the offence of murder. This was done after the learned judge had been invited to and did conduct a sentence indication hearing at which, as the record discloses, the learned judge gave a sentence indication of a maximum of 25 years.

On 5th May 2015, the learned judge having received a psychological evaluation report, and social enquiry report on the appellant, conducted a sentencing hearing. The appellant was sentence to 25 years imprisonment to begin from the date of sentence. The learned judge also ordered the appellant to undergo a combination and supportive psychological treatment for the duration of his incarceration, as recommended by the psychologist in his evaluation report.

The written decision of the learned judge on sentencing, dated 16th April 2015, forms part of the record of appeal in this matter. At the time of his sentencing, the appellant had been on remand from the date of his arrest on 27th July 2012 to 16th April 2015, a period of approximately 2 years and 9 months.

The appellant has appealed the sentence of 25 years imprisonment. The appellant relies on 10 grounds of appeal. However, the gravamen of the appeal is that the sentence imposed by the learned judge of 25 years imprisonment, in the circumstances of this case, is excessive and the learned judge ought to have imposed a lesser sentence.

In the main, the appellant argued that: (i) the learned judge failed to give the appellant any or any proper reduction for the fact that he had pleaded guilty at the first opportunity, it having been his intention to do so from as early as the paper committal for the said offence; (ii) the learned judge erred in not taking into account, in accordance with the applicable principles,

the time of approximately 2 years and 9 months, spent by the appellant on remand awaiting trial and sentencing; (iii) the learned judge having properly identified the aggravating and mitigating factors failed to apply or to properly apply these factors when reasoning to and in arriving at the sentence of 25 years which sentence she had indicated as a maximum sentence; and (iv) the learned judge did not give sufficient weight or consideration to the mitigating factors applicable to the appellant when deciding on a sentence of 25 years.

Time spent on remand

In his address to the Court, the learned Director of Public Prosecutions Mr. Christopher Nelson, QC who appeared for the respondent, on the issue of the learned judge failing to take into account the time spent by the appellant on remand, was at pains to point to any compelling or any extenuating factors that would make it appropriate for the learned judge to depart from the well-established principles that such time spent in prison must be taken into account once the appropriate sentence had been determined by the court. See Romeo DaCosta v The Queen [2011] CCJ 6 (AJ) at paragraphs 17 and 18. In the end, Mr. Nelson was only able to point this Court to what the learned judge said at paragraph 50 of her decision. In the Court's view paragraph 50 does not and cannot apply to the issue of whether time spent on remand ought to be taken into account and does not address in any way a basis for departure from the general rule. Accordingly, this ground of appeal succeeds. It is pellucid, that the learned judge having addressed in her decision the correct principles, either did not take into account the time the appellant spent on remand or failed to address this when she gave her decision on the appropriate sentence.

Guilty plea

An accused person who pleads guilty to an offence is entitled to some discount in his or her sentence. This is usually on a one third reduction or percentage but that is not a hard and fast rule of universal application to all cases. Generally, the earlier an accused takes

the step to plead guilty, the greater the extent of the credit or reduction in sentence, which can run from one tenth to one third, in the discretion of the sentencing court. In this matter, the learned judge seemed to have settled on one fourth as the extent of the reduction if she was so minded. However, the learned judge approached the issue of sentence in the round when reasoning to her decision and did not enter upon or conduct a mathematical or more forensic assessment. This is one of the criticisms of the judge's approach made by Mr. Ferguson, learned counsel for the appellant. In this Court's judgment, there is some force in this criticism.

Conclusion

Having heard counsel, for the appellant and the learned Director of Public Prosecutions, for the respondent, the Court was satisfied that in some respects there is room to validly criticise the learned judge's approach in the way in which she reasoned to her conclusion on what the appropriate sentence ought to have been. The Court was persuaded that in all the circumstances of this case, taking into account the aggravating and mitigating factors, the sentence of 25 years was not perverse or manifestly excessive. In this regard, the Court has taken into account the entire decision of the learned judge and in particular, paragraphs 28-32, 35-36 and 45-50. The Court is also mindful of the decision of this Court in Rudolph Lewis v The Queen SVGHCRA2009/0016 (delivered 16th April 2012, unreported) and Jay Marie Chin v The Queen ANUHCRA2012/0005 (delivered 5th April 2017, unreported) where the Court found that a sentence of 25 years on a charge of murder, was an appropriate sentence.

Case Name:

**Ryan Morris
v
The Commissioner of Police**

**[GDAMCRAP2020/0004]
(Grenada)**

Date:

Tuesday, 13th April 2021

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Mr. Anselm A. Clouden

Respondent:

Mr. Howard Pinnock

Issues:

Criminal appeal – Application to withdraw appeal

Type of Order:

Oral decision

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. The application to amend the grounds of appeal is granted.**
- 2. Leave is granted to the appellant to withdraw the appeal and the appeal is accordingly dismissed.**

Reason:

Counsel for the appellant made an application to withdraw the appeal and there was no objection by the respondent.

Case Name:

The Attorney General of Grenada

v

[1]Shorn Braveboy

[2]Lettisha Lessey Braveboy

[GDAHCVAP2019/0015]

(Grenada)

Date:

Wednesday, 14th April 2021

Coram:

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

The Hon. Mr. Mario Michel, Justice of Appeal

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

Appearances:

Appellant:

Mr. Darshan Ramdhani, QC, Ms. Dia Forrester, Mrs. Sabrita Khan-Ramdhani and Ms. Caryn Adams

Respondents:

Mrs. Melissa Modeste-Singh

Issues:

Interlocutory appeal – Enforcement of judgment debt – Application to adduce fresh evidence – Principles of fresh evidence – Fresh evidence in relation to payment of debt – Whether fresh evidence would have an important influence on the evidence of the case – Exercise of Court’s discretion– Whether the court’s discretion was properly exercised given the material non-disclosure or omission concerning the substantial payment of judgment debt – Whether Court would have exercised discretion differently if not deprived of relevant information which would have influenced the exercise of its discretion – Whether the court having regard to the circumstances ought not to allow the appeal – Constitutionality of section 21(4) of the Crown Proceedings Act – Constitutionality of rules 50.2(3) and 59.7 of the Civil Procedure Rules 2000 – Section 8(8) of the Constitution of Grenada – Right to a fair hearing – Whether section 21(4) of the Crown Proceedings Act and 50.2(3) and 59.7 of the Civil Procedure Rules breaches section 8(8) of the Constitution – Whether judge erred in law by declaring section 21(4) and rules 50.2(3) and 59.7 of the Civil Procedure Rules 2000 as unconstitutional

Type of Order:

Oral decision

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The application to adduce fresh evidence is granted, including the evidence adduced by the respondent.**
- 2. The appeal is allowed.**
- 3. The declarations and orders by Smith J dated 12th July 2019 declaring that section 21(4) of the Crown Proceedings Act and that rules 50.2(3) and 59.7 of the Civil Procedure Rules 2000 are unconstitutional, are set aside.**
- 4. No order as to costs.**
- 5. Reasons for decision to be given by the court at a later date.**

Reasons:

In relation to the application to adduce fresh evidence, the Court is of the view that the subject matter which engages the Court and the very foundation of the application which was before the court below was an application to enforce a judgment or judgments which was said to be an outstanding judgment debt, it follows therefore that this information, now disclosed with the documents would have been of great relevance to the issue in the court's consideration, having regard to the fact that the court was dealing with an enforcement of a judgment debt on an ordinary claim when the issue of the constitutionality of section 21(4) of the Crown Proceedings Act and the Civil Procedure Rules 2000 in parts 50.2(3) and 59 were raised.

The evidence clearly shows that at the time, when the Court of Appeal, in May 2018, considered the question as to whether to allow trial on the constitutional issues raised, the judgment debt plus interest had been fully paid. Upon review of those documents now disclosed, the Court noted that in respect of the 1st respondent, Shorn Braveboy, the total debt inclusive of interest would have been fully satisfied by 13th January 2018, before the Court of Appeal engaged in the matter in May 2018. This then left the interest payment in respect of the judgment creditor, the 2nd respondent Lettisha Lessey Braveboy of \$863.00 interest to be satisfied.

The Court is therefore of the view that had the Court known of those factual circumstances, as they then existed, with regard to enforcement which was being sought and the fact that the debt had been substantially paid by May 2018 and in one case completely paid, it is highly doubtful that the Court would have ordered the trial of the constitutional issues. The Court, on the authority of many judicial pronouncements is of the view that this is a very important jurisdiction in terms of the constitutional jurisdiction, which should not be engaged lightly but only in relation to real issues that actually arises in relation to where one alleges a breach or some intended breach of one's constitutional fundamental rights. The Court, therefore had no hesitation in holding that, in the circumstances of this case, the

said documents should be admitted and the Court accordingly allows their admission into evidence in respect of the matter.

Further, in relation to the substantive appeal, the Court, having read the submissions by both sides and having listened to counsel on behalf of the appellant, Mr. Ramdhani and Ms. Modeste-Sign the Court, was of the view that the appeal should be allowed and the declarations by Smith J should be set aside.

Case Name:

Molton Matthew

v

The Queen

**[GDAHCRAP2016/0022]
(Grenada)**

Date:

Thursday, 15th April 2021

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, 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. Herricia Willis

Respondent:

Mr. Howard Pinnock

Issues:

Criminal Appeal – Application for leave to appeal to the Privy Council – Withdrawal of application

Type of Order:

Oral decision

Result/Order:

IT IS HEREBY ORDERED THAT:

Leave is granted to the appellant to withdraw his application for conditional leave to appeal to the Privy Council as this Court does not have jurisdiction to

entertain the application, the application is accordingly dismissed.

Reasons:

The Court noted that pursuant to section 104 of the Constitution of Grenada special leave is needed to appeal against sentence. Accordingly, the appeal was withdrawn.

Case Name:

**John Regis
v
Commissioner of Police
[GDAMCRAP2020/0005]
(Grenada)**

Date:

Thursday, 15th April 2021

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, 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:	Mr. Henry Paryag
Respondent:	Mr. Howard Pinnock

Issues:

Criminal appeal – Application to amend grounds of appeal to include appeal against conviction – Section 80(3) of the Criminal Procedure Code – Whether magistrate acted ultra vires in failing to consider section 80(3)

Type of Order:

Oral decision

Result/Order:

IT IS HEREBY ORDERED THAT:

1. The appellant is granted leave to amend his notice of appeal to include a ground of appeal against conviction that the appellant did not consent to the trial of the offences charged being heard together as required by section 80(3) Criminal Code, Laws of Grenada, thereby making the trial of the appellant a nullity.
2. The appellant shall file and serve written submissions with authorities in support of the appeal on or before 21st May 2021.
3. The respondent shall file and serve written submissions with authorities in response on or before 15th July 2021.
4. The appellant is at liberty to file written submissions with authorities in reply, if necessary, on or before 2nd August 2021.
5. The hearing of the appeal is adjourned to the next sitting of the Court of Appeal in Grenada during the week commencing 20th September 2021.

Reasons:

The Court was satisfied that the appellant should be granted leave to amend his grounds of appeal to include an appeal against conviction on the basis that the appellant did not consent to the trial of the offences charged being heard together as required by section 80(3) Criminal Code, Laws of Grenada.

Case Name:

**Enroy Williams
v
Commissioner of Police
[GDAMCRAP2020/0006]**

(Grenada)

Date: Thursday, 15th April 2021

Coram: The Hon. Mr. Davidson Kelvin Baptiste, 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:	No appearance
Respondent:	Mr. Howard Pinnock

Issues: Criminal appeal – Adjournment

Type of Order: Adjournment

Result/Order: IT IS HEREBY ORDERED THAT:

1. The matter is adjourned to the next sitting of the Court of Appeal in Grenada during the week commencing 20th September 2021.
2. The Registrar of the High Court shall serve a copy of this order on the appellant and shall provide proof of service thereafter.

Reasons: The Court noted that the appellant was absent from Court after having been granted bail pending appeal and that there was no evidence that the appellant was served with the notice of hearing, as such the matter was adjourned to the next sitting of the Court.

Case Name: Joel Dewsbury
v
Commissioner of Police

**[GDAMCRAP2020/0007]
(Grenada)**

Date: Thursday, 15th April 2021

Coram: The Hon. Mr. Davidson Kelvin Baptiste, 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 :	No appearance
Respondent:	Mr. Howard Pinnock

Issues: Criminal appeal – Adjournment

Type of Order: Adjournment

Result/Order: IT IS HEREBY ORDERED THAT:

1. The matter is adjourned to the next sitting of the Court of Appeal in Grenada during the week commencing 20th September 2021.
2. The Registrar of the High Court shall serve a copy of this order on the appellant and shall provide proof of service thereafter.

Reason: The Court noted that the appellant had served his sentence and was accordingly discharged from prison since the filing of his appeal. The Court also noted that there was no evidence of service of the notice of hearing on the appellant, accordingly the matter was adjourned.

Case Name: Januarius Livingston
v

The Commissioner of Police

**[GDAMCRAP2020/0008]
(Grenada)**

Date: Thursday, 15th April 2021

Coram: The Hon. Mr. Davidson Kelvin Baptiste, 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: In person

Respondent: Mr. Howard Pinnock

Issues: Criminal appeal – Theft – Housebreaking – Stealing – Damage to property – Appeal against sentence of 38 months – Sentencing guidelines – Whether sentence imposed by learned magistrate manifestly excessive – Aggravating and mitigating factors

Type of Order: Oral judgment

Result/Order: IT IS HEREBY ORDERED THAT:

1. The appeal against sentence is dismissed.
2. The sentence of the magistrate is affirmed.

Reasons: The appellant having been convicted for the offences of house breaking, theft and damage to property, appealed against his sentence on the ground that the sentence imposed was manifestly excessive. The Crown asserted that the sentence imposed was appropriate in light of the fact that appellant has committed recent offences of a similar nature, dishonesty. The Crown also argued that the sentence was well within the range permitted by the sentencing guidelines.

Having considered the magistrate's reasons for decision and how he arrived at his eventual sentence of 38 months, the Court was unable discern any error in principle, having regard to the appellant's five recent previous convictions for similar offences. In the circumstances, the Court was not of the view that the sentence imposed was manifestly excessive, there being no ground or reason to disturb the sentence imposed by the magistrate.

Case Name:

**Dwayne Lambert
v
The Commissioner of Police
[GDAMCRAP2020/0009]
(Grenada)**

Date:

Thursday, 15th April 2021

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, 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:

In person

Respondent:

Mr. Howard Pinnock

Issues:

**Criminal appeal – Stealing – Appeal against sentence
– Whether sentence imposed manifestly excessive**

Type of Order:

Oral judgment

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. The appeal is dismissed.**
- 2. The sentence of the magistrate is affirmed.**

Reasons: The appellant having pled guilty to the offences of housebreaking and stealing was sentenced to 36 months imprisonment. The learned magistrate, having regard to the aggravating circumstances surrounding the offence in that the amount stolen was in excess of \$8000.00 and that the appellant had 30 prior convictions, arrived at his conclusion having regard to the sentencing guidelines. The magistrate also paid regard to the appellants numerous convictions for kindred offences. The Court was therefore unable to discern any error in principle on the part of magistrate, therefore there was no basis to disturb the sentence imposed of 36 months.

Case Name: **Kebba Foye**
v
The Commissioner of Police
[GDAMCRAP2021/0001]
(Grenada)

Date: Thursday, 15th April 2021

Coram: The Hon. Mr. Davidson Kelvin Baptiste, 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:	In person
Respondent:	Mr. Howard Pinnock

Issues: Application to withdraw appeal

Type of Order: Oral decision

Result/Order:

IT IS HEREBY ORDERED THAT:

The appellant having indicated that he wishes to withdraw his appeal, leave is granted to the appellant to withdraw his appeal and accordingly the appeal is dismissed.

Reason:

The appellant indicated to the Court that he wished to withdraw his appeal.

Case Name:

**Randy Stanislaus
v
The Commissioner of Police
[GDAMCRAP2021/0003]
(Grenada)**

Date:

Thursday, 15th April 2021

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, 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: In person

Respondent: Mr. Howard Pinnock

Issue:

Application to withdraw the appeal

Type of Order:

Oral decision

Result/Order:

IT IS HEREBY ORDERED THAT:

The appellant having indicated that he wishes to withdraw his appeal, leave is granted to the appellant to withdraw the appeal, and accordingly the appeal is dismissed.

Reason: The appellant indicated to the Court that he wished to withdraw his appeal.

Case Name: Lester Barry
v
The Commissioner of Police
[GDAMCRAP2021/0002]
(Grenada)

Date: Thursday, 15th April 2021

Coram: The Hon. Mr. Davidson Kelvin Baptiste, 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: Mr. George Prime
Respondent: Mr. Howard Pinnock

Issues: Criminal Appeal – Intentional and unlawful harm – Appeal against conviction – Fair trial – Right to be heard – Ex-parte hearing – Sections 2(d)(e) and 82 of Constitution of Grenada – Judicial exercise of discretion – Whether magistrate erred in exercise of discretion to hear matter ex-parte – Absence from hearing

Type of Order: Oral judgment

Result/Order:

IT IS HEREBY ORDERED THAT:

The appeal is dismissed and the sentence of the magistrate is affirmed.

Reasons:

In this matter, the appellant was convicted and sentenced in his absence. He asserts his constitutional right to have been present and to be heard. However, it is common knowledge the right to be heard is not an absolute right and the defendant, by his conduct can lose the right to be heard.

In this case, the appellant had attended previous hearings on the matter and it was adjourned to a date which he was aware of. By way of letter, counsel for the appellant wrote to the magistrate to indicate that he would be absent from state and requested an adjournment. However, that letter cannot be treated as an adjournment as it was merely a request for an adjournment. It was the clear duty of the appellant to have appeared in court on the day in question or alternatively inform the court that he had to be in another place. Had he informed the court of that situation the magistrate would not have found himself in the position where, in the record, he said the defendant is not present and I have not been given any excuse for his absence. Therefore, the material before the magistrate was such that he had a clear discretion to proceed to hear the matter in absence of the appellant, which he proceeded to do. He did not err in doing so accordingly, there is no basis on which this Court can interfere with his decision.

Case Name:

Dannel Bonaparte

v

The Queen

**[GDAHCRAP2019/0007]
(Grenada)**

Date: Thursday, 15th April 2021

Coram: The Hon. Mr. Davidson Kelvin Baptiste, 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. Sabrita Khan-Ramdhani

Respondent: Mr. Howard Pinnock holding papers for Ms. Chrisan Greenidge

Issues: Criminal appeal – Application for adjournment

Type of Order: Adjournment

Result / Order: IT IS HEREBY ORDERED THAT:

1. At the request of counsel for the appellant, the application for an adjournment is granted.
2. The appellant shall file and serve written submissions with authorities on both the application for leave and the appeal on or before 31st May 2021.
3. The respondent shall file and serve written submissions with authorities in response on or before 31st July 2021.
4. The appellant is at liberty to file and serve written submissions with authorities in reply on or before 31st August 2021.

Reasons: The matter before the Court is an application, by counsel for the appellant, for an adjournment based on illness. The Court noted that counsel did not provide a medical certificate in support of her application for an adjournment, However, having heard from counsel, and there being no objection to the application by counsel for the respondent, the

Court was satisfied that the adjournment should be granted in the circumstances and that directions ought to be given for the progression of the matter.

Case Name:

**[1] Shankar Khushalani
[2] Mina Khushalani
(Trading as DIVINE Apartments)**

v

**Lindsay Mason
(Trading as Tropical Home Designs
Architectural & Construction Services)**

**[GDAHCVAP2016/0017]
(Grenada)**

Date:

Thursday, 15th April 2021

Coram:

**The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

Appellants:

Mr. Ruggles Ferguson

Respondent:

Mr. Derick Sylvester and Ms. Hazel Hopkin

Issues:

Civil appeal — Breach of construction contracts — Appellate court review of trial judge's findings of fact — Restraint by appellate court in interfering with trial judge's findings of fact, evaluation and inference from facts — Whether learned judge properly and fairly assessed the evidence — Privity of contract — Whether the judge learned erred in determining that privity of contract was inapplicable in the totality of circumstances

Type of Order:

N/A

Result/Order:

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name:

**Grenada Rice Mills Limited
v
Grenada Marketing and National Importing
Board**

**[GDAHCVAP2015/0002]
(Grenada)**

Date:

Thursday, 15th April 2021

Coram:

**The Hon. Mde. Louise Esther Blenman, Justice of
Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

Appellant:

**Mr. Dickon Mitchell and Mr. Anselm B. Clouden, Ms.
Skeeta Chitan and Mrs. Crystal Braveboy-Chetram**

Respondent:

Ms. Lisa Taylor

Issues: Civil appeal – Without prejudice rule – Whether without prejudice rule must be pleaded – Whether it was open to learned judge to hold that the respondent’s letter was privileged –Whether negotiations were ongoing when letter was sent to appellant – Whether letter amounted to an admission by respondent of monies owed to the appellant – Appellate court’s interference with trial judge’s finding of fact – Trial judge’s assessment of credibility of witnesses –Whether learned judge misconstrued appellant’s case – Whether learned judge erred and misdirected herself in holding that there was no agreement for the respondent to purchase rice from the appellant

Type of Order: N/A

Result / Order: IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name: Donna Marcelle Lusan
v
The Public Service Commission

[GDAHCVAP2019/0010]
(Grenada)

Date: Friday, 16th April 2021

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Louise Esther Blenman, Justice of Appeal

Appearances:

Appellant: Mr. Benjamin Hood

Respondent: Ms. Maurissa Johnson and Ms. Linda Doland

Issues: Civil Appeal – Interlocutory appeal – Whether the learned judge erred in removing the respondent, the Public Service Commission as a party to the proceedings

Type of Order: Oral Judgment

Result/Order: IT IS HEREBY ORDERED THAT:

- 1.The appeal is dismissed.
- 2.There is no order as to costs following Part 56 of the Civil Procedure Rules 2000.

Reasons: The issue in this appeal was whether the learned judge erred in removing the respondent, the Public Service Commission, as a party to the proceedings. Having reviewed the claim and the affidavit evidence filed in support and having read and the heard the submissions of counsel for the parties, the Court could find no fault in the decision of the learned judge in removing the Public Service Commission as a defendant to the proceedings as the evidence clearly disclosed no justiciable issue and certainly no one under the Constitution as between the appellant and the respondent. In the Court’s view, on the evidence, as the matter stood, it was open to the learned judge to exercise his case management powers under the rules and in accordance with part 19 of the Civil Procedure Rules 2000 to remove the Public Service Commission as a party to the proceedings.

Case Name: Richardson Donald
v
[1] Anthony Charles
[2] Donna Charles
[GDAHCVAP2019/0012]

(Grenada)

Date: Friday, 16th April 2021

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Louise Esther Blenman, Justice of Appeal

Appearances:

Appellant: Dr. Francis Alexis, QC

Respondents: Mr. Dickon Mitchell, Ms. Skeeta Chitan and Ms. Crystal Braveboy-Chetram

Issues: Civil Appeal – Appeal against findings of fact – Whether excavation caused sheer cliff to be exposed – Liability to remedy damage caused by excavation – Construction of retaining wall along common boundary line – Whether retaining wall ought to be constructed along boundary line – Whether sheer cliff face constitutes boundary line or whether it forms part of the appellants property – Where does common boundary line then fall

Type of Order: Directions

Result/Order: IT IS HEREBY ORDERED THAT:

1. A licensed land surveyor, namely Mr. Andrew Alleyne, licensed land surveyor and in event that he is unable to undertake the assignment, then Mr. David Abraham licensed land surveyor to conduct a site visit of the lands in respect of which the parties share a common boundary and this site visit must take place in the presence of the parties and thereafter the licensed land surveyor shall take such steps as will enable him to depict on a survey plan the common boundary line between the properties.
2. The licensed land surveyor shall also take such steps to enable him to depict on the said survey plan the location of the sheer cliff face existing between

the properties in relation to the common boundary line of the properties of the parties.

3. The licensed land surveyor shall produce the said survey plan and file the same with the Court, and provide a copy to each party by no later than Wednesday, 30th June 2021.

4. Thereafter the Court shall thereafter determine the matter.

5. The Court will make provisions for costs of the licensed land surveyor upon determination of the matter.

Reason:

Having heard the parties, the Court was of the view that it was necessary to obtain a survey plan depicting the common boundary line between the parties, since this was crucial to the disposal of the appeal.