

THE EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

MONTSERRAT
VIDEOCONFERENCE
22nd to 26th June 2020

JUDGMENTS
St. James Club Antigua
v
Sundry Workers

[ANULTAP2018/0005]
(Antigua and Barbuda)

Date:	Friday, 26 th June 2020
Coram for delivery of judgment:	The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal The Hon. Mde. Louise Esther Blenman, Justice of Appeal The Hon. Mde. Maragaret Price-Findlay, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Mr. Hugh Marshall
Respondents:	Ms. Asheen Joseph
Issues:	Collective bargaining agreement — Abuse of process — Law of agency — Scope of authority of a sole bargaining agent under the Antigua and Barbuda Labour Code — Whether the Industrial Court failed to properly consider and apply the provisions of the Antigua and Barbuda Labour Code, the Collective Bargaining Agreement and the law of agency — Whether the Industrial Court erred in law in finding that the Antigua and Barbuda Workers' Union needed to consult with the respondents — Striking out — Implied agency — Agent's authority to bind the principal — Whether a settlement is a bar to future litigation
Result and Reason:	Held: dismissing the appeal; discharging the stay of proceedings in the Industrial Court granted on the 31 st July 2018; remitting the matter to the Industrial Court; and making no order as to costs, that:

1. The authority of a sole bargaining agent under the Labour Code is generally limited to those powers stipulated therein as the Labour Code creates a statutory agency. The ABWU acted outside of its statutory powers, in excess of its authority as a sole bargaining agent and outside of its mandate contained in the Collective Agreement. The ABWU had no authority to purport to bind the respondents to terms of a settlement procured by the ABWU, to which the respondents have not agreed.

Antigua and Barbuda Labour Code Cap 27, Laws of Antigua and Barbuda, 1975 applied.

2. In order for the Industrial Court to find that there was an implied agency between the respondents and the ABWU in addition to, or apart from the statutory agency, there would have needed to have been evidence before the court for it to make such a finding. It would not be appropriate, in a striking out application, for the Industrial Court to consider the evidence concerning whether or not there was an implied agency, as that exercise should be done at a trial. There is therefore no basis to interfere with the exercise of discretion of the trial judge to dismiss the application to strike out the respondent's reference as the ABWU acted outside of the scope of its statutory agency and there was no evidential basis to make a finding as to an implied agency.

Combulk Pty Limited v TNT Management Pty Limited [1993] 41 FCR 59 considered; Armagas Limited v Mundogas S.A. [1987] LRC (Comm) 311 considered; CRJ Services Limited v Lanstar Limited (trading as CSG Lanstar) [2011] EWHC 972 (TCC) considered; Bowstead and Reynolds on Agency, 21st edn., (Sweet & Maxwell, 2018) applied.

3. While a settlement and release, in proper form, would be a bar to future litigation, this Court need not consider whether the purported settlement contained in the letter dated 26th April 2016, from the ABWU to the appellant, was a bar to future litigation as the Industrial Court made no findings on that issue. Furthermore, in light of the Courts disposition in relation to the question of whether the ABWU could bind the respondents to an agreement which was made without their input, the consideration of whether the proceedings in the Industrial Court are barred is now

moot.

Case Name:

The Attorney General

V

[1] McKenzie Frank

[2] Trevor Walker

[ANUHCVP2018/0006]

(Antigua and Barbuda)

Date:

Friday, 26th June 2020

**Coram for
delivery of
judgment:**

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mde. Maragaret Price-Findlay, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Mr. Anthony Astaphan SC, with him Mrs. Carla Brookes-Harris, Deputy Solicitor General and Dr. David Dorsett

Respondents:

Mr. Justin L. Simon QC with him Mr. Sylvester Carrott

Issues:

Interlocutory appeal – Whether learned judge erred in dismissing application to strike out constitutional claim – The Barbuda Land Act – Whether Barbuda Land Act changed the regime in relation to the control and ownership of land in Barbuda – Whether the respondents established a right of property in lands in Barbuda by virtue of their status as Barbudans as defined in the Barbuda Land Act – Section 3(1) of Barbuda Land Act – Whether learned judge erred in determining the meaning of “ownership in common” by relying on the meaning in the Registered Land Act – Section 9 of the Constitution of Antigua and Barbuda Order 1981 – Protection from deprivation of property – Whether the rights to property enjoyed by Barbudans by virtue of their status as Barbudans amounts to an interest in or right to or over property protected by the Constitution – Whether such rights or interests were compulsorily acquired or taken by virtue of the Paradise Found (Project) Act, 2015

**Result and
reason:**

Held: allowing the appeal; and making the orders set out in paragraphs 81 and 82 of the judgment, that:

- 1. The jurisdiction to strike out should be used sparingly and only in plain and obvious cases where, even assuming the facts alleged to be true, the statement of case does not disclose a legally recognisable claim against the defendant. This jurisdiction may be exercised even in relation to constitutional claims but an application to strike out such claims should be particularly scrutinised. In the instant case, the respondents' statement of case does not support, and even if supplemented by further information, is incapable of supporting the conclusion that they had a personal right of property in the leased land which they allege have been compulsorily acquired by virtue of the Paradise Found Act other than for a public purpose and without compensation and therefore should be struck out.**

CITCO Global Custody NV v Y2K Finance Inc BVIHCVAP2008/0022 (delivered 19th October 2009, unreported) followed; Ingraham and Others v Ginton and Another (2006) 69 WIR 20 applied.

- 2. The Land Act sets out the functions, duties and powers of the Barbuda Council with respect to land administration and development of land in Barbuda and empowers the Council to grant leases for major developments. The Act essentially established the principle that the Crown holds the legal title to lands in Barbuda, for and on behalf of "the people of Barbuda", a defined class of people. It does not, however, operate to transfer ownership or entitlement in lands in Barbuda to Barbudans. This is further reinforced by section 5(2) which expressly precludes private ownership of land in Barbuda. Instead, the legislation was primarily concerned with altering the powers and prerogatives of Antigua and Barbuda's central government and the Barbuda Council in relation to each other with regard to the beneficial ownership and control of land in Barbuda.**

Section 5 and Part IV of The Barbuda Land Act, Act No. 23 of 2007 applied; Section 18 of the Barbuda

Local Government Act, Cap 44 of the Laws of Antigua and Barbuda applied; The Attorney General v The Barbuda Council (2002) 65 WIR 93 considered.

3. The term “owned in common” as contemplated by the Land Act is conceptually different to that of section 102 of the Registered Land Act, which is a restatement of the common law concept of co-ownership. Under the Land Act, “ownership in common” encompasses the collective right of the Barbudan people, exercised through the Barbuda Council, to control of the administration, development and use of the land and to be consulted on and consent to major developments of land on the island. An individual Barbudan under the Act must apply to the Council for permission to use the land in relation to which he or she is described as a co-owner. Prior to obtaining the grant of a right of occupation, individual Barbudans cannot deal with their interest in the land even in transactions between each other and even after obtaining such grant, their ability to deal with their property is restricted. The Land Act created or confirmed the existence of beneficial interests in the land to which the legal title held by the Crown was subject, such beneficial interests vested not in individual Barbudans, but in the people of Barbuda as a defined class. This is a lesser interest than that which is enjoyed by an owner in common under the Registered Land Act or at common law which both contemplate ownership of land by co-owners who are entitled to immediate use and possession of the whole as an incident of such co-ownership. Accordingly, the learned judge erred in concluding that the term “owned in common” in section 3(1) of the Land Act must be interpreted consistently with that of the meaning accorded in the Registered Land Act.

Sections 7, 8, 11(2) and section 4 of the Second Schedule of The Barbuda Land Act, Act No. 23 of 2007 applied; Section 3(2) and 102 of the Registered Land Act, Cap. 374 of the Laws of Antigua and Barbuda considered.

4. Section 9 of the Constitution protects against the

compulsory taking of property of any description and an interest or right to or over property of any description, except where certain conditions are satisfied. This section can only be properly invoked where property rights already exist and such rights have been compulsorily taken possession of or acquired. In the instant case, even if a generous and purposive interpretation were given to section 9, the rights accorded to Barbudans solely by virtue of that status do not constitute an interest in or right over property since they have no immediate entitlement to use, possess or deal with their interest in such property without permission. Therefore, though within the Constitutional context, a right to exclusive use of land can constitute an interest in or a right to or over property, such an interest or right does not exist until permission is granted. The respondents have made no claim to entitlement of any immediate right to use or occupy any portion of the leased lands and so their statement of claim discloses no personal entitlement to an interest or right which was compulsorily acquired without compensation by the Paradise Found Act. Accordingly, they have no locus standi to pursue a claim for relief under section 9 of the Constitution.

Section 9 of The Antigua and Barbuda Constitution Order 1981, Cap. 23 of the Laws of Antigua and Barbuda applied; *Attorney General of the Gambia v Momodou Jobe* (1985) LRC (Const.) 556 applied; *Belfast Corporation v OD Cars Limited* [1960] 2 WLR 148 applied.

Per Michel JA:

5. The Paradise Found Act by virtue of sections 3, 4, 5 and 6 explicitly disappplies the provisions of the Land Act which authorises the Barbuda Council to grant exclusive rights to Barbudans to occupy lands in Barbuda and to lease lands that form part of the Paradise Found project. While it is not inconceivable that this disapplication could affect project lands to which exclusive rights of occupation and/or leasehold interests had already been granted, it is inconceivable that it would not

affect project lands with respect to which no such rights and/or interests were granted. Therefore, where the respondents had not been granted exclusive rights to occupy and/or lease any part of the project lands, they could have had no interest in, or right to, or over, project lands, which interests or rights were capable of being compulsorily acquired by the Government, and for which they would be entitled to compensation.

Section 9 of The Antigua and Barbuda Constitution Order 1981, Cap. 23 of the Laws of Antigua and Barbuda applied; Sections 3, 4, 5 and 6 of the Paradise Found (Project) Act, Act. No. 21 of 2015 applied.

6. On the question of the constitutionality of the disapplying provisions, these sections do not offend section 31(2) of the Land Act which requires an amendment of the Constitution before any amendments can be made to the Act without the prior consent of the Council and the Barbudan people. However, there was no such amendment of the Land Act by the Paradise Found Act but only a disapplication of specific provisions. The effect of the disapplication is that, although the specific provisions of the Land Act are not revoked and remain applicable to other land in Barbuda, they cannot be applied to the leased lands. Accordingly, there are no constitutional hindrances arising from sections 3, 4, 5 and 6 of the Paradise Found Act which could advance the respondents' position as to any compulsory acquisition of their property by the Government.

Sections 3, 4, 5 and 6 of the Paradise Found (Project) Act, Act. No. 21 of 2015 applied.

APPLICATIONS AND APPEALS

Case Name:

Mildred Kirwan

V

Neville Kirwan

**[MNIHCVAP2020/0002]
(Montserrat)**

Date: Tuesday, 23rd June 2020

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Applicant/Respondent:	Ms. Chivone Gerald
Respondent/Appellant:	Mr. Warren Cassell holding for Mr. Lawrence Daniels

Issues: Application for extension of time to appeal – Notice of appeal filed more than 8 years after delivery of judgment – Whether threshold requirements satisfied for grant of an extension of time — Length of delay and whether delay excusable – Whether there was a realistic prospect of success on the appeal – Prejudice to parties

Type of Order: Oral decision

Result/Order: IT IS HEREBY ORDERED THAT:

1. The application for leave to appeal out of time against the judgment of Redhead J dated 19th January 2012 is dismissed.
2. The notice of appeal filed on 10th February 2020 is a nullity having been filed out of time and without leave of the Court to do so and is accordingly struck out.
3. Costs to the respondent, Neville Kirwan, in the agreed sum of \$2,000.00.

Reason:

The Court has before it a document titled notice of appeal filed on 10th February 2020. If one takes the document to its word, then it is a notice of appeal filed out of time without the court's permission. Therefore, the notice of

appeal would have been filed out of time and no permission was granted so it is a nullity. If the court were to be generous and treat the document titled 'notice of appeal' as an application for an extension of time to appeal then the problem is that nowhere in the application is there any mention of the threshold requirements for an extension of time. In the notice of appeal, there is no statement as to the extent of the delay in filing the notice of appeal, which delay was one of nearly 8.5 years. There is no good reason given for the delay which is the second requirement. There is only a far-fetched statement in paragraph 11 of the applicant's affidavit to the effect that they had difficulties retaining an attorney in Montserrat and had to travel to Antigua to secure the services of an attorney. This is far-fetched because it is supposed to explain a delay in excess of 8 years to file a notice of appeal or even to apply for an extension of time within which to appeal and this is notwithstanding the fact that the applicant has been to the court on this matter on several occasions since the judgment of Redhead J in January 2012 and in the process had no less than 5 attorneys representing her at different times in these proceedings. There is no basis on which to accept this as a good reason for filing an application for an extension.

There is also nothing to suggest that there is any chance of the appeal succeeding if the extension were granted – not in the notice of appeal, affidavit or skeleton argument in support. There are simply no arguments that there is a chance of success. This Court has also discerned no chance of success on this appeal as it essentially challenges findings of facts by the trial judge. In terms of the 4th requirement of the prejudice to the respondent if the extension of time is granted, one only has to consider the prejudice to anyone of having a judgment of the court declaring you to be the sole owner of a house in which you live and 8.5 years later the person you battle with is now seeking to go back to the court to challenge your ownership of the same house after this matter has been before the High Court and Court of Appeal for almost 9 years.

In these circumstances, this Court sees no basis on which to, way past the 12th hour, grant an extension of time to appeal a nearly 8.5 year old judgment. The application in so far as there was one for an extension of time to appeal

the judgment of Redhead J dated 19th January 2012 is dismissed. The notice of appeal in so far as it is properly so called filed on 10th February 2020 is a nullity. Accordingly, the notice of appeal is struck out. Costs to the respondent, Mr. Neville Kirwan in the sum of \$2,000.

Case Name:

Keston Riley

V

[1] The Attorney General

[2] Director of Public Prosecutions

[MNIHCVAP2020/0003]

(Montserrat)

Date:

Tuesday, 23rd June 2020

Coram:

The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal

The Hon. Mde. Louise Esther Blenman, Justice of Appeal

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant:

Mr. Warren Cassell

Respondents:

Ms. Sherasmus Evelyn

Issues:

Interlocutory appeal — Application to strike out appeal — Whether notice of appeal vague or in general terms — Whether notice of appeal disclosed reasonable grounds for bringing appeal — Appeal against refusal of application for recusal — Apparent bias — Whether learned judge erred in refusing recusal application — Whether fair-minded informed observer would conclude that there was real possibility of bias — Whether learned judge ought to have recused himself given his knowledge and prior involvement in matter — Whether learned judge prejudged or predetermined claim — Judicial oath — Weight to be attached to judicial oath in context of recusal application — Approach to be taken by judge where there are doubts as to need for recusal — Whether inconvenience, delay and costs are relevant considerations in determining whether judge ought to be recused

Type of Order: N/A

Result/Order: IT IS HEREBY ORDERED THAT:
Judgment reserved.

Case Name:

Keston Riley

v

The Montserrat Port Authority

**[MNILTAP2020/0001]
(Montserrat)**

Date: Tuesday, 23rd June 2020

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant: Mr. Warren Cassell

Respondent: Mr. Jean Kelsick

Issues: Civil Appeal – Application to strike out counter notice of appeal – Counter notice of appeal filed prior to obtaining case stated from Labour Tribunal

Type of Order: Oral Decision

Result/Order: IT IS HEREBY ORDERED THAT:

1. The notice of appeal filed on 10th February 2020 and the counter notice of appeal filed on 20th March 2020 are deemed properly filed.
2. The application by the appellant to strike out the respondent's counter notice of appeal is dismissed.

3. The respondent is granted leave to amend its grounds of appeal within 14 days of the date of this order.
4. No order as to costs.

Reason:

On 10th February 2020, the appellant Keston Riley filed a notice of appeal against certain aspects of a decision of the Labour Tribunal of Montserrat dated 13th November 2019. The notice of appeal was served on the respondent, the Montserrat Port Authority on 17th February 2020. On 2nd March 2020, the respondent filed a counter notice of appeal even before receiving a case stated by the Tribunal in order to have its counter notice filed within 14 days of receiving the appellant's notice. On 18th March 2020, the appellant filed a notice of application to strike out the counter notice of appeal. The appellant only served the application on the respondent on 11th May 2020. On 13th May 2020, the respondent, having received the application to strike out the counter notice, filed a notice of opposition and on 18th May 2020, filed an application for an order either deeming the notice of counter-appeal validly filed or an order extending the time limit for filing the counter notice. The respondent also sought leave to file an amended counter notice. The stated grounds of the respondent's application were firstly a need to file an application before the issuance of a case stated because of what the respondent referred to as 'the very limited window for filing the counter notice' and secondly because the Tribunal only served the case stated on 15th May 2020. The respondent also sought leave to amend the counter notice in order to address the case stated it received days prior. On 9th June 2020, the appellant filed submissions in support of its strike out application. The appellant essentially contended that the respondent's notice of appeal, having been filed outside of the 28 days prescribed by section 26(2) of the Labour Code, Cap 15.03 of the Revised Laws of Montserrat, is a nullity and should therefore be struck out.

On 17th June 2020, the respondent filed skeleton arguments in reply in which it essentially contended that the appellant's appeal was filed on 10th February 2020

which was well outside the 28 days prescribed by section 26(2) of the Labour Code and if the respondent's counter notice is a nullity for having been filed outside of the 28 days, the appellant's appeal is also a nullity and so there is neither an appeal nor a counter appeal.

Instead of striking out both the appeal and counter appeal, the Court exercised its inherent powers to do justice between the parties to litigation by deeming both the notice and counter notice of appeal valid so that the matter can proceed. This is consistent with the decision of the learned Baptiste JA in Patrick Morille v Hermina Roseline Morille [2016] ECSCJ No. 96 (delivered 26th February 2016).

In terms of application for leave to amend its grounds of appeal to address the case stated, the respondent is granted leave to amend the grounds of appeal within 14 days of the date of this order. The court was minded to make no order as to costs.

Case Name:

David Brandt

V

**[1] The Commissioner of Police
[2] Attorney General
[3] Director of Public Prosecutions**

**[MNIHCVAP2019/0009]
(Montserrat)**

Date:

Tuesday, 23rd June 2020

Coram :

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal**

Appearances:

Appellant:

Dr. David Dorsett

Respondent:

Ms. Anesta Weekes

Issue:	Petition for conditional leave to appeal to Her Majesty in Council as of right — Whether appeal to Her Majesty in Council lies as of right pursuant to section 20(4) of the Constitution of Montserrat – Search and seizure - Section 9 of the Constitution - Protection of private and family life and privacy of home and other property - Whether search of cell phones breached appellant’s constitutional right to privacy — Limitation on right to privacy — Whether search of cell phones without prior authorisation unlawful
Type of Order:	Oral decision
Result/Order:	IT IS HEREBY ORDERED THAT: 1. Leave to appeal to Her Majesty in Council is granted to the appellant pursuant to section 20(4) of the Montserrat Constitution Order 2010 against the judgment of the Court of Appeal pronounced herein on 14th February 2020 upon the condition that: i. The appellant do within ninety (90) days of the hearing of this application for leave to appeal enter into good and sufficient security in the sum of Five Hundred Pounds Sterling (£500.00) for the due prosecution of the appeal and the payment of all such costs as may be payable by the appellant in the event of this appeal being dismissed, such security to consist of the deposit of the said amount in the Court. 2. The appellant do take such steps for the purpose of procuring the preparation of the Record, settling such Record with the Solicitors for the Appellant and transmitting of such Record to the Registrar of the Privy Council within ninety (90) days of the date of hearing of this application for leave to appeal. 3. The Record shall be comprised of the Record used at the hearing of the appeal, excluding documents of a formal nature and those omitted by consent, and shall include the judgment and orders of the Court of Appeal, and the order granting conditional leave to appeal.

4. The appellant shall make application to this Court for final leave to appeal to Her Majesty in Council supported by the Certificate of the Registrar that the security for costs herein ordered has been given within the time prescribed by this order to the satisfaction of the Registrar.
5. The costs of the application to be costs in the cause.

Case Name:

Junior Meade

V

The Queen

**[MNIHCRAP2019/0002]
(Montserrat)**

Date:

Tuesday, 23rd June 2020

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal**

Appearances:

Applicant/Appellant: Mr. Jean Kelsick

Respondent: Mr. Henry Gordon

Issues:

Criminal Appeal - Application to add additional ground of appeal

**Type of
Order:**

Oral decision

Result/Order:

IT IS HEREBY ORDERED THAT:

The application is granted by adding a 4th ground of appeal, there being no objection by counsel for the Crown.

Case Name:

Junior Meade

V

The Queen

**[MNIHCRAP2019/0002]
(Montserrat)**

Date:

Wednesday, 24th June 2020

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Mr. Jean Kelsick

Respondent:

Mr. Henry Gordon

Issues:

Criminal appeal – Indecent assault – Appeal against conviction – Appellant’s defence contained in caution statement – Whether trial judge failed to put the defence fairly and adequately or at all to the jury – Adequacy of judge’s summation – Whether judge’s summation to the jury rendered the verdict unsafe and constituted a material irregularity – Whether in the circumstances the fresh evidence adduced at trial constituted a material irregularity – Section 64 of the Criminal Procedure Code – Whether judge erred in preventing defence from seeing psychologist’s notes

**Type of
Order:**

N/A

Result/Order:

IT IS HEREBY ORDERED THAT:

Judgment is reserved.

Case Name:

Glenworth Prince

v

Director of Public Prosecutions

**[MNICRAP2019/0004]
(Montserrat)**

Date: Wednesday, 24th June 2020

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
[Ag.]

Appearances:

Appellant: Ms. Chivone Gerald

Respondent: Mr. Oris Sullivan, Director of Public Prosecutions with Ms. Safiya Moore

Issues: Magisterial criminal appeal – Section 3(1) of Liquor Licence Act – Prohibition of sale of intoxicating liquor without licence – Guilty plea entered at earliest opportunity - Whether learned magistrate erred in ordering the forfeiture and destruction of intoxicating liquor and imposing maximum fine – Section 3(3) of the Act – Whether learned magistrate erred in ruling that she had a discretion to order forfeiture of liquor on first offence and conviction contrary to section 3(3) of the Act – Whether learned magistrate exceeded jurisdiction in ordering destruction of liquor upon forfeiture – Whether learned magistrate erred in prohibiting appellant from applying for renewal of liquor at earlier date

Type of Order: Oral Judgment

Result/Order: IT IS HEREBY ORDERED THAT:

1. The appeal is allowed and the orders of the magistrate: (i) for the seizure and destruction of the liquor exposed by the appellant for sale at his bar; and (ii) directing the appellant to apply afresh for a liquor licence are set aside.

2. The appellant not having appealed against the fine of \$240.00 imposed by the magistrate, the sentence is affirmed.

Reason:

The appellant paid the fine and appealed against the forfeiture and destruction order and the prohibition of him applying for a renewal of his licence which sentences he submitted are both wrong in law and excessive in the circumstances. He submitted that the magistrate did not have the authority to make the destruction order which the respondent conceded. The appellant also submitted that the magistrate did not have the authority to order forfeiture because the section only permitted forfeiture on a second offence. The respondent at first did not agree to this submission. The appellant submitted too that the magistrate did not have the authority to order the appellant to apply afresh for a liquor licence when the liquor licence court next meets in October 2019 instead of allowing him to apply before for renewal of his licence. The respondent also conceded on this point. This then left for determination only the question of whether the magistrate had the authority to order forfeiture of the intoxicating liquor exposed for sale which issue the respondent did not concede. This Court was of the view that the correct interpretation of section 3(3) of the Liquor Licence Act, Cap. 10.13 of the Laws of Montserrat is that the order of forfeiture can only be made upon a second or subsequent conviction of an offence under section 3(1) of the Liquor Licence Act. Indeed, after some exchanges between the DPP and the Bench, the DPP considered that the magistrate did not have authority to order forfeiture upon conviction for a first offence under section 3 of the Act.

This Court would have been inclined to allow the appellant's ground of appeal that the sentence imposed was excessive in the circumstances of this case, particularly where the appellant entered an early guilty plea to the offence and was sentenced to the maximum fine imposable under the section. However, the Court found it unnecessary to make such an order as the appellant did not contest the fine imposed and the respondent conceded the magistrate's error with respect

to the other orders he made.

The Court accordingly allowed the appeal and set aside the orders made by the magistrate for the seizure and destruction of the intoxicating liquor exposed by the appellant for sale at his bar. Although it may now be of no practical value, the Court was also constrained to set aside the magistrate's order directing the app to apply afresh for a liquor licence thus prohibiting him from applying for renewal. Having not appealed against the fine of \$240 imposed by the magistrate, the Court affirms that sentence.

Case Name:

Commissioner of Police

V

[1] Murry Edwards

[2] Ceejay Wilson

**[MNIMCRAP2019/0007]
(Montserrat)**

Date:

Wednesday, 24th June 2020

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Mr. Oris Sullivan, Director of Public Prosecutions with Ms. Safiya Moore

Respondents:

Ms. Chivone Gerald for the first respondent, no appearance by or on behalf of the second respondent

Issue:

Magisterial criminal appeal – Appeal by way of motion – Section 102(1) of the Proceeds of Crime Act – Detention of seized cash – Whether learned chief magistrate erred in ordering return of cash to the respondent in circumstances where it was lawfully held

Type of

Oral judgment

Order:

Result/Order:

IT IS HEREBY ORDERED THAT:

1. The appeal against the order of the magistrate is allowed and the order of the magistrate is quashed.
2. No order as to costs.

Reason:

On 11th March 2019, the appellants were jointly charged for drug trafficking, possession of cannabis with intent to supply and other offences. The police recovered the sum of \$12,694 and made an application for an order before the Magistrate for detention of the cash under section 102 of the Proceeds of Crime Act, Cap. 4.04 of Laws of Montserrat ("POCA"). In the affidavit in support of the application, it was deposed that there are reasonable grounds for suspecting that the monies directly or indirectly represented recoverable cash. The magistrate granted the order on 11th March 2019. On 13th June 2019, an application was made for the return of the cash on the ground that 3 months had elapsed since the order was granted and no application was made for an extension of time. The application was resisted on the ground that despite the absence of an extension of time, section 24(d) of the Police Act, Cap. 10.01 of the Laws of Montserrat gave the police lawful authority to hold the cash without a further detention order pursuant to section 102 of POCA. The magistrate found that section 24(d) would apply if the money having been seized under section 24(d) did not become the subject of the detention order under section 102 of POCA. The magistrate reasoned that the detention of cash under section 102 is made pursuant to seizure under section 101(a) which gives a police officer the power to seize cash if he has reasonable grounds for suspecting that it is recoverable cash. Having so seized the cash, the police can hold it for up to 72 hours without a court order. If it were to be held longer an order of the court has to be sought, which was done by way of application filed on 11th March 2019. The order was valid until 10th June 2019 as section 102(2)(a) prescribes a 3 month period for the detention of the cash.

The magistrate referred to the prosecution's reference to section 108(4)(c) of POCA and the submission that it applies given that 'the money seized is with regards to a

criminal trial and the detained cash can be held without need for an application for an extension of time as it is evidence in a criminal trial.’ The magistrate pointed out that section 108 refers to any cash detained under this part and section 108(4)(c) refers to section 102 and section 105 of POCA and there is no reference to any other statute or section 24 of the Police Act. The magistrate held that the application for detention having been made under section 102 of POCA, it places the cash seized under the ambit and the jurisdiction of that Act and further that section 24 of the Police Act cannot be relied on once the choice was made to detain the cash under section 102 of POCA. The magistrate ordered the return of the cash as: (i) section 24 of the Police Act does not apply; (ii) an application under POCA does not incorporate section 24 of the Police Act; (iii) both pieces of legislation should not be used conveniently or interchangeably; (iv) the Commissioner of Police in applying for the detention of cash under section 102, all the provision of the Act obtains; (v) three (3) months are to be calculated as calendar months and (vi) as at 10th June 2019, three (3) months had elapsed.

The Director of Public Prosecutions (“DPP”) appealed the order on the ground that she erred in ordering the return of the cash when the cash was, at the time, lawfully held. The reasons advanced were: (i) at the time the application was made, the time for holding the cash had not elapsed; (ii) the cash was an exhibit in another matter; (iii) at the time of the application, the Crown was still at liberty to make an application for forfeiture.

The DPP referred also to sections 104 and 108 of the POCA. The DPP argued that two factors of importance here are that before the cash can be released it must have been detained under section 102 and secondly, the applicant must show, to the court’s satisfaction, that the continued detention did not satisfy the requirements of either sections 102(3) or 102(4) of POCA. The DPP submitted that the 2 grounds on which the cash could have been returned were not satisfied. Section 28(1) of the Drugs (Prevention of Misuse) Act, Cap. 4.07 of the Revised Laws of Montserrat (“DPMA”) provides that any person charged with an offence under the provisions of the Act, if convicted of an offence under the Act, may be subjected to forfeiture of any article related to the offence. Section

28(2) provides that, without prejudice to section 28(1), where a person is convicted of a drug trafficking offence, the court shall, in passing sentence, order forfeiture. The DPP submitted, and the Court agrees, that in ordering the return of the money, the magistrate was in effect depriving the subsequent court from making an order in relation to section 28 as such the court is entitled to do if it finds that the money relates to the offence on the finding of guilt or on a plea of guilty. The order also prevented the Crown from making an application for forfeiture of the cash pursuant to the 28 of the DPMA.

It is evident to the Court that the magistrate's decision was essentially based on the finding that the application for detention was based on section 102 of POCA, which Act contains an all-inclusive procedure for the continued detention of the money which must be strictly complied with. If the provisions are not complied with by the Crown, particularly in respect of the continued detention of the money, one cannot look outside the Act to preserve the detention of the money. This Court, however, respectfully dissents from that position as it would render sterile and ineffective a clear provision like section 28 of the DPMA which confers on the court the power to order forfeiture of money upon a conviction for drug trafficking. If there is a clear provision of statute which provides for forfeiture of money in relation to a conviction for drug trafficking, neither the prosecution nor the magistrate should be disabled from utilizing its provision by virtue of the money being released from detention by an application under the POCA even if detention was by virtue of the Act. It appears to the Court that the proper procedure would have been to defer in making an order on the application for release from detention pending the completion of the drug trafficking charge.

In the premises, the appeal against the order of the magistrate is allowed and the order of the magistrate is quashed.

Case Name:

[1] Joseph Fenton

[2] Richard Fenton
[3] Mary Ryan

V

William Keith Thomas
(Executor of the Estate of Peter William Molyneaux, deceased)

[MNIHCVAP2018/0004]
(MONTSEERRAT)

Date: Thursday, 25th June 2020

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

Appearances:
Appellants: Mr. Ralph A. Francis
Respondent: Mr. Khari Markham

Issues:

Type of Order: Oral Judgment with written reasons to follow

Result/Order: IT IS HEREBY ORDERED THAT:

1. The appeal against the decision of Morley J is dismissed.
2. The counter appeal is also dismissed.
3. Each party shall bear their own costs.
4. Reasons for the decision will follow at a later date.

Case Name: Terrance Wade
(The Sole Executor of the Late William Anthony Tuitt)

V

James Weekes

**[MNIHCVAP2019/0002]
(Montserrat)**

Date: Thursday, 25th June 2020

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

Appearances:

Appellant: Mr. Jean Kelsick

Respondents: Mr. Kenroy Hyman

Issue: Civil appeal – Costs – Prescribed costs - Rule 65.5 of the Civil Procedure Rules 2000 – Order of learned trial judge for respondent to pay ‘reasonable costs’ of action - Whether learned master erred in ruling that award of reasonable costs means prescribed costs – Whether learned master erred by failing to properly consider the extent and complexity of pre-trial litigation – Exercise of discretion – Whether learned master erred in concluding that costs must be quantified on a prescribed basis

Type of Order: Oral judgment

Result/Order: IT IS HEREBY ORDERED THAT:

1. The appeal is allowed, and the order of the learned master is set aside.
2. In the exercise of its discretion afresh, the Court makes the following orders:
 - i. The appellant shall have prescribed costs on the substantive claim in the court below pursuant to rule 65.5(3) of the Civil Procedure Rules 2000.
 - ii. The appellant shall have costs on the application for interim injunction and the

recusal application in accordance with rule 65.11(7) of the Civil Procedure Rules 2000.

- iii. The appellant is awarded costs on the appeal, being two-thirds of the amount awarded in the court below.

Reason:

The matter before this Court is an appeal against the decision of a master dated 1st March 2019 whereby the master ordered that the appellant is entitled to prescribed costs on a trial in which the appellant prevailed in the High Court and was awarded costs. The costs order made by the learned trial judge was as follows: ‘Weekes shall pay Wade’s reasonable costs of this action, (which will include the earlier hearings and filings as to injunction and recusal’. Arising from this order, the matter was brought before a master for assessment of costs whereupon the master made an order that the claimant (appellant) is entitled to prescribed costs on the judgment. The appellant appealed against the order of the judgment essentially on the basis that in the circumstances of this case, the appellant ought to be entitled to an award significantly higher than what he would get under the prescribed costs regime. The appellant filed submissions in support of his appeal in which he concluded that the master’s decision to quantify costs on a prescribed costs basis was clearly wrong and that this Court should set aside the costs order and remit the assessment of the costs to the master. In response, the respondent maintained that in accordance with the Civil Procedure Rules 2000 (“CPR”), the appellant was entitled to no more than prescribed costs. The Court has read the submissions of both parties and has listened to the oral submissions of counsel for the appellant. The Court did not call upon counsel for the respondent to respond.

Having reviewed the submissions, both written and oral, and having regard to the decision of this Court in Unicomer (Saint Lucia) Limited v Comptroller of Inland Revenue SLUHCVP2016/0007 (delivered 18th April 2018), this Court is of the view that there being no reason to disapply rule 65.3(b) of the CPR, the only order which was open to the court below to make in this case was an order for prescribed costs in accordance with rule 65.5 of the CPR. The Court agrees with counsel for the appellant that the order made by the trial judge was not in accordance

with the rules and that there is no provision in part 65 or in any other part of the CPR to make an order for “reasonable costs”. In accordance with rule 65.3(b), the general rule is that costs ought to be quantified on the basis of either prescribed costs or where applicable, budgeted costs. But, if there is a basis to disapply the general rule only then can the court make an assessed costs order. The trial judge, having not given any reason for disapplying rule 65.3(b) should in fact have made a prescribed costs order on the substantive trial. It ought not to have fallen to the Master to make a specific order as required by the rules.

In relation to the interlocutory proceedings, the Court agrees with Mr. Kelsick that there ought to be separate costs orders in respect of each of the proceedings such as the application for the interim injunction and the recusal application but the Court also agrees with Mr. Hyman that the quantification of the costs on these interlocutory applications should be in accordance with rule 65.11(7) of the CPR. The Court is of the view that the learned master, when faced with the faulty order of the trial judge and trying her best in the circumstances, exercised her discretion improperly when she simply ordered prescribed costs without more.

The Court accordingly allowed the appeal and set aside the order of the learned master.

Case Name:

Michelle James

V

- [1] The President of the Family Court**
- [2] The Director of Family Services as
the Chairperson of the Adoption
Committee**
- [3] The Attorney General**

**[SVGHCVAP2020/0006]
(Saint Vincent and the Grenadines)**

Date: Friday, 26th June 2020

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

Appearances:

Applicant: Mr. Gilbert Peterson, SC with Ms. Vynette Frederick

Respondents: Ms. Cerepha Harper-Joseph with Ms. Gabrielle Myers

Issue: Application for extension of time to appeal — Whether applicant satisfied the requirements to be granted an extension of time — Length of delay and whether delay excusable – Whether there was a realistic prospect of success on the appeal – Prejudice to parties

Type of Order: Oral decision

Result/Order: IT IS HEREBY ORDERED THAT:

The application for an extension of time to file a notice of appeal is refused.

Reason: This is an application for an extension of time to appeal against decision of the learned judge in the court rendered on 22nd May 2019. The Court has reviewed the application together with supporting affidavit and has given deliberate consideration to the submissions of counsel for both sides. The Court is of the unanimous view that this application does not satisfy the requirements for this Court to grant an extension of time for the main reason that it doubts that the appeal would have a chance of success. The Court is of the view that there is nothing in the application that could undergird a claim for judicial review. Having reviewed all of the matters which has been deposed to in the supporting affidavit and having reviewed the decision of the learned judge, this Court is undoubtedly of the view that the errors that were made were made by counsel who appeared before the Family Court. In the circumstances, there is no discernible error on the face of the record of the Family Court. Furthermore, and critically, having determined that the appeal has no

chance of success, the Court is of the view that it ought not to exercise its discretion to grant an extension of time to the applicant in order for them to appeal against a decision which, in this Court's view, is unimpeachable.

The application was accordingly dismissed.

Case Name:

Bennette Roach

v

**National Development Foundation Montserrat
Limited**

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

Date:

Friday, 26th June 2020

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Mr. Warren Cassell

Respondent:

**Ms. Romilly Murrain and Mr. John Ryan, representatives of
the respondent**

Issues:

**Oral application by respondent for an adjournment to seek
counsel**

**Type of
Order:**

Adjournment

Result/Order:

IT IS HEREBY ORDERED THAT:

- 1. The application for an adjournment by the
respondent is granted.**

2. The respondent is granted leave to file and serve written submissions with authorities on or before 30th September 2020.
3. The matter is adjourned to the sitting of the Court of Appeal in the Federation of Saint Christopher and Nevis during the week commencing 26th October 2020.
4. The respondent shall pay costs to the appellant in the sum of \$1,000.00.

Case Name:

Kranston John

V

The Commissioner of Police

**[MNIMCRAP2019/0003]
(Montserrat)**

Date:

Friday, 26th June 2020

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mde. Margaret Price-Findlay, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Mr. Warren Cassell

Respondent:

Mr. Henry Gordon, Senior Crown Counsel

Issue:

Magisterial criminal appeal – Oral application by appellant to withdraw appeal

**Type of
Order:**

N/A

Result/Order:

IT IS HEREBY ORDERED THAT:

The appeal having been withdrawn by the appellant, is accordingly dismissed.

