

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING
(VIDEOCONFERENCE)
TERRITORY OF THE VIRGIN ISLANDS
31st MAY to 4th JUNE 2021

JUDGMENTS

Case Name:

JTrust Asia Pte Ltd.
Claimant/Counter-Appellant

and

[1] Mitsuji Konoshita
[2] A.P.F. Group Co. Ltd. (In Receivership)
Defendants

and

Showa Holdings Co., Ltd.
Appellant/Respondent

and

Nicholas James Gronow And John David Ayres
(As Receivers Of The Second Defendant)
Respondents

[BVIHCMAP2020/0031]
(Territory of the Virgin Islands)

Date: Monday, 31st May 2021

Coram for delivery of judgment: The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]
The Hon. Mr. C. Dennis Morrison, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Adrian Francis and Ms. Olga Osadchaya

Respondents: Mr. Hefin Rees, QC with him, Ms. Yegâne Güley for the Receivers
Mrs. Kimberly Crabbe-Adams for JTrust Asia PTE Ltd.

Issues:

Commercial appeal — Insolvency law — Receivership — Appellate interference with trial judge's exercise of discretion — Appellate interference with trial judge's findings of fact — Application for adjournment — Appellate interference with judge's exercise of case management powers — Whether the learned judge erred in refusing to grant adjournment — Removal of directors by receivers — Application of correct legal test — Whether the learned judge failed to apply the correct legal test for the determination of the removal application and reached a decision no judge properly directed could have reached — Fair hearing — Whether the learned judge was predisposed against the appellant — Whether Showa Holdings Co. Ltd was deprived of a fair hearing by the learned judge during the removal application

Result and Reason:

Held: dismissing the appeal and affirming the orders of the learned judge in their entirety, allowing the counter-appeal, and ordering Showa to pay to the Receivers and JTrust no more than two-thirds of the costs in the court below, to be assessed by a judge of the Commercial Court unless agreed to within 21 days of this judgment, that:

1. An appellate court should not interfere with the judge's exercise of discretion except, in limited circumstances. The appellate court could only interfere if it is satisfied that in exercising his or her judicial discretion, the trial judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors, or by taking into account irrelevant factors; and that, as a result of the error, in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be blatantly wrong. Therefore, the appellate court should not easily substitute its own exercise of discretion for the discretion already exercised by the judge unless the decision of the judge was plainly wrong.

Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 followed; Novel Blaze Limited (In Liquidation) v Chance Talent Management Limited BVIHCVAP2020/0006 (delivered 16th April 2021, unreported) followed; Ian Hope-Ross v Martin Dinning et al AXAHCVAP2020/0005 (delivered 30th April 2021, unreported) followed; Throne Capable Investment Limited v Agile Star Group Limited [2021] ECSCJ No. 433, (delivered 14th January 2021) followed; Byers and Others v Chen Ningning [2021] UKPC 4 followed; Edy Gay Addari v Enzo Addari [2005] ECSCJ No. 125, (delivered 27th June 2005) followed; Charles Osenton & Co v Johnston [1941] 2 ALL ER 245 followed; Piglowska v Piglowski [1999] 1 WLR 1360 followed.

2. There is no principle that requires a judge to discuss every point or all of the evidence in depth, failing which the decision would be impugned. This does not provide any basis for an appellate court to interfere with the judge's findings of fact nor the evaluation of these facts and inferences drawn from them. Neither is there any duty on a judge to address every argument presented by counsel. However, it is important that the judge should have considered all of the evidence.

English v Emery Reimbold & Strick Ltd; DJ & C Withers (Farms) Ltd v Ambic Equipment Ltd; Verrechia (trading as Freightmaster Commercials) v Commissioner of Police of the Metropolis [2002] EWCA Civ 605 followed; Eagil Trust Co Ltd v Pigott-Brown and another [1985] 3 All ER 119 followed; Sohal v Suri and another [2012] EWCA Civ 1064 followed.

3. It is not open to the appellate court to overturn a trial judge's exercise of discretion on the basis of the judge's findings and evaluations of facts, simply because it would have found them differently. Unless the judge's findings of facts, evaluation and inferences drawn were perverse, the appellate court is prevented from interfering with the evaluation. Cognisance must be paid to the fact that the weight placed on evidence is a matter that is exclusively for the trial judge. The judge has been immersed in all

aspects of the case and therefore he would be able to better assess the evidence and has advantages which the appellate court does not have. It is not open to the appellate court to go trawling through the evidence in the manner that a first instance judge is required to do in order to make findings of facts.

Yates Associates Construction Company Ltd v Blue Sand Investments Limited [2016] ECSCJ No. 63 (delivered 20th April 2016) followed; Flat Point Development Limited v Mary Dooley [2019] ECSCJ No. 116 (delivered 13th March 2019) followed; Shaista Trading Company Limited d.b.a Diamond Republic v First Caribbean International Bank (Barbados) Ltd ANUHC VAP2018/0021 (delivered 26th April 2021, unreported) followed.

4. In this case, applying the principles of appellate restraint in relation to the judge's findings of fact and exercise of discretion, the learned judge has been hearing related matters between the parties including this one before the Court, for many months and there is no basis upon which it could be said that he plainly failed to take into account evidence or arrived at a conclusion which the evidence could not on any view support. It was clearly open to the judge, in the circumstances, to conclude that there was urgency in hearing the Adjournment Application. Further, in all of the circumstances the learned judge was justified, in exercising his case management powers, in refusing Showa's Adjournment Application. As for Showa's challenge to the time given by the learned judge to file and serve any evidence in response to the Removal Application, on the basis that it was not given ample or reasonable time to adduce the evidence required, this too is without merit and wholly unreasonable. Accordingly, there is no discernible error committed by the judge which could justify appellate interference with his findings and evaluation of facts or the exercise of his discretion in making the Adjournment Order.
5. In relation to the Removal Order, there was evidence adduced by the Receivers and which it was clearly open to the judge to accept in preference to the evidence Showa deployed. The judge's reasoning and

approach in his ex tempore judgment withstand scrutiny and do not indicate any errors of fact which could be subjected to the appellate court's interference. Additionally, the criticism that the learned judge failed to correctly apply the correct legal test in his decision to grant the Removal Application and thereby sanction the reconstitution of the Board cannot be sustained. The judge was clearly alive to, and correctly applied, the relevant principles from *Re Nortel Networks UK Ltd and Other Companies* in granting the Removal Order. It is clear that there was no bad faith on the part of Receivers in seeking the approval of the removal. The judge's jurisdiction was therefore supervisory in relation to the Receivers. In all of the circumstances, it was evidently within the judge's discretion to give sanction to the Receivers' application in relation to the Removal Order and his decision therefore cannot be impugned on this basis.

Re Nortel Networks UK Ltd and Other Companies [2016] EWHC 2769 (Ch) followed; *Phoenix Group Foundation and another v Carl Stuart Jackson and another* [2020] ECSCJ No. 373 (delivered 17th November 2020) followed; *Re MF Global UK Ltd* (in special administration) and another [2014] EWHC 2222 (Ch) considered; *Re Greenhaven Motors Limited* (in liquidation) [1999] BCC 463 followed; *Re Edennote Limited; Tottenham Hotspur plc and others v Ryman and another* [1996] 2 BCLC 389 followed; *Re Hans Place Ltd* (in liquidation) [1993] BCLC 768 considered; *Kevin Gerald Stanford v Stephen John Akers and another* [2018] ECSCJ No. 200 (delivered 12th July 2018) followed; Sections 128(1) and 132 of the Insolvency Act, 2003, Act No. 5 of 2003, Revised Laws of the Virgin Islands applied.

6. The totality of circumstances of this case do not suggest that the judge was predisposed against Showa or unfair to it. To the contrary, the judge displayed balance and good case management skills. Accordingly, there is no basis upon which it could be said that the judge was unfair or partisan to Showa, neither is there any evidence to substantiate Showa's complaint of predisposition against the judge.

Byers and Others v Chen Ningning [2021] UKPC 4

followed.

Case Name:

**JTrust Asia PTE Ltd.
Appellant**

and

**[1] Mitsuji Konoshita
[2] A.P.F. Group Co. Ltd. (In Receivership)
Defendants**

and

**Nicholas James Gronow And John David Ayres
(as Receivers of the Second Defendant)
Receivers**

and

**Showa Holdings Co., Ltd.
Respondent**

**[BVIHCMAP2020/0022]
(Territory of the Virgin Islands)**

Date: **Monday, 31st May 2021**

**Coram for
delivery of
judgment:** **The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]
The Hon. Mr. C. Dennis Morrison, Justice of Appeal [Ag.]**

Appearances:

Appellant: **Mrs. Kimberly Crabbe-Adams**

Respondents: **Mr. Adrian Francis and Ms. Olga Osadchaya on behalf of
Showa
Mr. Hefin Rees, QC with him, Ms. Yegâne Güley for the
Receivers**

Issues: **Commercial appeal – Insolvency Law - Appointment of
receiver on application of JTrust – Application by appellant
for information from receivers – Locus standi – Whether**

JTrust had legitimate interest in the outcome of the receivership – Whether the learned judge erred in holding that appellant lacked standing to seek a variation of the independent review committee order – Whether the learned judge erred by not exercising case management powers to substitute the Receivers in place of JTrust – Whether Court of Appeal ought to consider judge's failure to substitute Receivers where this was not pleaded or argued in the court below

Result and Reason:

Held: dismissing the appeal; affirming the judgment of the judge and ordering that JTrust pays costs to Showa to be assessed by a judge of the Commercial Court at no more than two-thirds of the costs in the court below, if not agreed within 21 days of this judgment, that:

1. It is settled law that receivers are officers of the court and therefore are answerable to the court and not to the party at whose behest they were appointed. As an exception to the general rule, the party who was instrumental in securing the appointment is entitled to bring an application against the receivers if they have acted in bad faith or their decision was so perverse that no reasonable receiver could have come to it. Accordingly, absent any bad faith and utter unreasonableness, the decision-making process is a matter for the receiver and the court will only interfere with the acts of a receiver in very limited and defined circumstances.

Deloitte & Touche AG v Johnson and Another [1999] 4 LRC 281 applied; Portman v Mill [1835-42] All ER Rep 669 applied; Re Edenote Limited [1996] 2 BCLC 389 applied; Re Hans Place Ltd (in liquidation) [1993] BCLC 768 applied.

2. Neither section 24(1) of the Eastern Caribbean Supreme Court (Virgin Islands) Act nor the court's inherent jurisdiction places any restrictions on the persons who may apply for the appointment of a receiver. Nonetheless, where the court is asked to exercise its statutory or inherent powers in relation to receivership, the applicant must demonstrate that he is the proper person to invoke the court's jurisdiction. Consequently, the applicant must show that he not

merely has an interest in making the application or is one who may be affected by its outcome but one who has a legitimate interest in the relief sought. It is common ground that the Receivers were appointed on the application of JTrust and while it was not disqualified from making the application and does have a general interest in the outcome of the receivership, that is not the same as a legitimate interest in the outcome which accords with the threshold as outlined in Deloitte & Touch AG. Furthermore, neither the fact that JTrust was permitted to make submissions nor the Receivers' support for the application was sufficient to confer standing on JTrust. Accordingly, the learned judge did not err in the exercise of his discretion and cannot be faulted for concluding that JTrust lacked the requisite standing to request that the Receivers provide it with updates. The judge's decision cannot be impugned.

Deloitte & Touche AG v Johnson and Another [1999] 4 LRC 281 applied; ABN AMRO Fund Services (Isle of Man) 24 Nominees Limited formerly Fortis (Isle of Man) Nominees Limited and Others v Kenneth Kryss et al [2017] ECSCJ No. 255 (delivered 20th November 2017) followed; Kevin Gerald Stanford v Stephen John Akers et al (as Joint Liquidators of Chesterfield United Inc) [2018] ECSCJ No. 200 (delivered 12th July 2018) followed.

3. As a general rule, a party is unable to prosecute a point before the appellate court unless it was taken in the court below, save in limited circumstances. The complaint about the judge's failure to substitute the Receivers, being an entirely new point, cannot and should not be interrogated in this appeal. In the totality of the circumstances, it would be unfair to criticise the judge for not doing so in circumstances where this argument was not canvassed with the judge either during or after the hearing and before the rendering of the judgment.

Marie Makhoul v Cicely Foster et al [2015] ECSCJ No. 34 (delivered 23rd February 2015) followed.

Case Name:

**1. Siong Seng Beng
2. Ching Hui Huat
3. Springfield Investments & Nominees PTE Ltd.
v
Caldicott Worldwide Ltd
[BVIHCMAP2020/0020]
(Territory of the Virgin Islands)**

Date:

Tuesday, 1st June 2021

**Coram for
delivery of
judgment:**

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

Appearances:

**Appellants: Mr. Iain Tucker
Respondent: Mr. Alex Hall Taylor, QC**

Issues:

Interlocutory appeal — Principles governing appellate interference with exercise of discretion by court below — Application to set aside service of claim out of jurisdiction — Non-disclosure — Test of materiality of non-disclosure — Whether learned judge misapplied test of material non-disclosure and erred in finding that the non-disclosure was not material — Application for stay of proceedings in favour of arbitration — Whether learned judge erred in finding that the circumstances were not “rare and compelling” such as to justify a stay on case management grounds — Application to admit fresh evidence — Whether fresh evidence would probably have an important influence on the result of the appeal if admitted — Jurisdiction — Whether appellants have submitted to jurisdiction of the BVI courts

**Result and
Reason:**

Held: dismissing the appeal; ordering the appellants to pay the costs of the appeal assessed at no more than two-thirds of the costs assessed in the lower court, such costs to be assessed if not agreed within 21 days of the date of this order; and granting the fresh evidence application in the terms set out in paragraph 65 of the judgment, that:

1. On an *ex parte* application for permission to serve out, the applicant must make full and frank disclosure of all matters relevant to the decision whether or not to grant the application. The test of materiality is whether the matter might reasonably be taken into account by the judge in deciding whether or not to grant the application. In this case, the judge considered all the relevant circumstances, including the fact that there was an alternative gateway open to the respondent and the respondent would have been given permission to serve the appellants outside the jurisdiction in any event. As such, the matters not disclosed at the *ex parte* hearing were not material in the sense contemplated by the rule against failing to give full and frank disclosure of all material facts on an *ex parte* application. There is no basis to interfere with the judge's decision to refuse the appellants' application to set aside the order granting permission to the respondent to serve the appellants outside the jurisdiction and finding that there was no material non-disclosure in the *ex parte* application.

Commercial Bank–Cameroun v Nixon Financial Group Limited [2011] ECSCJ No. 120, (delivered 6th June 2011) applied; MRG (Japan) Ltd v Engelhard Metals Japan Ltd [2003] EWHC 3418 (Comm) considered; Dufour v Helenair Corporation Ltd and others (1996) 52 WIR 188 followed.

2. The power to grant a stay of proceedings is discretionary and should only be exercised in rare and compelling circumstances. In this case the learned judge accepted that the claim could be amended to exclude the claims against the Company and found that it was appropriate for the claim to proceed ahead of or in tandem with the arbitration proceedings. Further, that there was no sufficient risk of inconsistent judgments. The judge did not make any errors of principle that would take his decision outside the ambit of reasonable disagreement and make it blatantly wrong. In any event, this was not a case with rare and compelling circumstances to justify the grant of a stay of proceedings. There is no basis for setting aside the learned judge's case management decision to dismiss the application for a stay of the

proceedings.

Section 18(a) of the Eastern Caribbean Supreme Court (Virgin Islands) Act Cap. 80 of the Revised Laws of the Virgin Islands 1991 applied; Rule 26.1 (2)(q) of the Civil Procedure Rules 2000 applied; Texan Management Limited and others v Pacific Electric Wire & Cable Company Limited [2009] UKPC 46 considered; Amlin Corporate Member Ltd and others v Oriental Assurance Corporation [2012] EWCA Civ 1341 considered; Marinor Enterprises Limited and another v First Caribbean International Bank (Barbados) Ltd [2016] ECSCJ No. 46 (delivered 4th April 2016) applied; Reichhold Norway ASA and another v Goldman Sachs International (a firm) [1999] 1 All ER (Comm) 40 applied; Dufour v Helenair Corporation Ltd and others (1996) 52 WIR 188 followed.

3. In order for fresh evidence to be admitted on appeal it must be shown that: (i) the new evidence could not have been obtained with reasonable diligence for use in the lower court; (ii) the new evidence is such that if admitted it would probably have an important influence on the result of the appeal, though it need not be decisive; and (iii) the evidence must be apparently credible though it need not be incontrovertible. In this case, the judgment of the lower court dated 13th October 2020 and the consequential order satisfy the test for admitting fresh evidence as they were useful, though not decisive, in considering the stay appeal. However, the First Affidavit of Robert Charles John Foote filed on 17th February 2021 with exhibits, and the request for information filed on 5th February 2021 are not admitted because they did not have an important or any influence on the result of the appeal.

Ladd v Marshall [1954] 3 All ER 745 applied.

4. The appellants' conduct in applying for further information is consistent with a waiver of the challenge to the jurisdiction of the court. The information that was requested relates to the proceedings in the lower court and the request was made without reserving the appellants' position on its challenge to the jurisdiction. The appellants'

subsequent attempt to reserve the position and their explanation about why the request for further information was made do not assist in avoiding the inescapable conclusion that they submitted themselves to the jurisdiction of the courts of the BVI.

Alexander Katunin v JSC VTB Bank
BVIHCMAP2015/0004 & BVIHCVAP2015/0007
(delivered 20th June 2016, unreported) applied.

Case Name: **Hector Finance Group Limited**
v
Caldicott Worldwide Ltd
[BVIHCVAP2020/0012]
(Territory of the Virgin Islands)

Date: **Tuesday, 1st June 2021**

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

Appearances:
Appellant: **Mr. Robert Nader**
Respondent: **Mr. Alex Hall Taylor, QC**

Issues: **Interlocutory appeal – Jurisdiction – Injunction – Whether the learned judge continued the ex parte injunction or granted a fresh injunction - Section 43 of Arbitration Act – Whether Court of Appeal has jurisdiction to hear appeal from an injunction granted under section 43 of the Arbitration Act**

Result and Reason: **Held: dismissing the appeal; and awarding costs of the appeal to the respondent, such costs to be assessed at no more than one-half of the costs assessed in the lower court, that:**

- 1. The Court of Appeal does not have jurisdiction to entertain an appeal from the lower court's decision to grant an interim remedy relating to arbitration proceedings under section 43(10) of the Arbitration**

Act. The wording of the order of the new injunction does not support the continuation of an injunction previously granted. The order of the court is more consistent with the court granting a fresh injunction under section 43(10). Accordingly, this Court does not have jurisdiction to hear the appeal from the injunction granted on 16th September 2020.

Section 43(10) of the Arbitration Act, 2013, Act No. 13 of 2013 applied.

2. Section 43(3) of the Arbitration Act provides that the powers under the section may be exercised whether or not similar powers may be exercised by an arbitral tribunal relating to the same dispute. Therefore, a judge making an injunction order under section 43 is not constrained to limit the duration of the order to the establishment of an effective arbitration tribunal. It follows that the learned judge did not err in limiting the duration of the injunction order in this matter to the trial of the claim or further order.

Franek Jan Sodzawiczny v Andrew Joseph Ruhan and others [2018] EWHC 1908 (Comm) distinguished.

Case Name:

Yao Juan

v

1. Kwok Kin Kwok

**2. Crown Treasure Group Limited
[BVIHCMAP2018/0042]**

Date:

Tuesday, 1st June 2021

Coram for
delivery of
judgment:

**The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]
The Hon. Mr. C. Dennis Morrison, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. Romane Duncan

Respondents: Mr. Richard Evans and Dr. Alecia Johns

Issues:

Commercial appeal – Costs – Interpretation of previous court order – Whether learned judge erred in his interpretation of Court of Appeal costs order – Costs of in-

house foreign lawyers – Section 18(3) of Legal Profession Act, 2015 – Whether learned judge correctly permitted recovery of costs incurred by in-house foreign lawyers who were not enrolled as legal practitioners in the Territory of the Virgin Islands

Result and Reason:

Held: allowing the appeal and counter appeal in part; affirming the learned judge's assessment of Madam Kwok's costs in the earlier Court of Appeal proceedings; setting aside the decision of the learned judge to allow, as part of the costs to be paid by the appellant, costs incurred by the use of the foreign lawyers; and making no order as to costs, that:

1. The starting point to interpreting the words of a court order is its natural and ordinary meaning, considered in light of its syntax and the background and context in which the order was made. The Court of Appeal's costs order was not ambiguous. The order was clear, the syntax simple and terms of the order itself, were uncomplicated. There is nothing in the background to the proceedings or anything before the learned judge which ought to have caused him to depart from the natural and ordinary meaning of the costs order. In the circumstances, the learned judge did not err in assessing Madam Yao's costs in her appeal at two-thirds of the costs of the previous Commercial Court proceedings, in accordance with the natural and ordinary meaning of the Court of Appeal's order.

R v Evans [2004] EWCA Crim 3102 applied; Feld v The Secretary of State for Business, Innovation and Skills [2014] EWHC 1383 (Ch) considered; Sans Souci Limited v VRL Services Limited [2012] UKPC 6 applied; Pan Petroleum AJE Ltd v Yinka Folawiyo Petroleum Co Ltd [2017] EWCA Civ 1525 applied; Emmerson International Corporation v ABC Grandeservus Limited [2020] ECSCJ No. 321 (delivered 30th September 2020) followed; Rule 65.13 and Part 69B of the Civil Procedure Rules 2000 considered;

2. Section 18(3) of the LPA provides that no costs shall be recoverable in respect of any person who is acting as a legal practitioner while not registered on the Roll as a legal practitioner in the BVI. Section 18(3) is underpinned by the obvious public interest in

preventing damage to the public by unregistered persons who are not regulated by the LPA, are not bound by the Code of Ethics, cannot be the subject of complaint or disciplinary proceedings under the LPA, and are outside the BVI courts' wasted costs jurisdiction under the Civil Procedure Rules 2000. For the purposes of section 18(3), it does not therefore matter that a foreign lawyer was working under the supervision of a BVI legal practitioner. The essential question under section 18(3) is whether the foreign lawyer was 'acting as a legal practitioner' within the meaning that is given to that expression, while not enrolled as a legal practitioner in the BVI.

Section 18(3) of the Legal Profession Act, 2015 interpreted; *Dimitry Vladimirovich Garkusha v Ashot Yegiazaryan et al* [2016] ECSCJ No. 104 (delivered 6th June 2016) followed; *John Shrimpton et al v Dominic Scriven et al* [2017] ECSCJ No. 15 (delivered 3rd February 2017) followed; *Gany Holdings (PTC) SA and Anor v Zorin Sachak Khan and Others* (2020) 96 WIR 378 followed; *Piper Double Glazing v DC Contracts* [1994] 1 WLR 777 distinguished; *Agassi v Robinson* [2005] EWCA Civ. 1507 distinguished.

3. It is clear that the foreign lawyers utilised by Conyers, Dill & Pearman were intricately involved in the conduct of Madam Kwok's case by, among other things, considering, reviewing and drafting pleadings, assessing the strength of arguments, conducting research, instructing counsel and briefing paralegals. The foreign lawyers were active members of Madam Kwok's litigation team and were clearly acting as legal practitioners while not enrolled as such under BVI law. The fact that the foreign lawyers may have been operating under the direction and supervision of a BVI qualified practitioner raises no real point of distinction. In the circumstances therefore, the learned judge erred in his interpretation and application of the law to the facts before him and in concluding that the costs incurred by the Madam Yao in relation to the work of the foreign lawyers were recoverable. Applying the correct principles, in light of the clear legislative intent of section 18(3), costs associated with the use of foreign lawyers were irrecoverable as a matter of law.

Case Name:

**Clement Donovan
(Attorney for Constance I. Hovis
Personal Representative of Edmund Gregory Haig
Donovan)**

v

**1. Admina Whitrod
2. Martin Whitrod
[BVIHCVAP2020/0003]
(Territory of the Virgin Islands)**

Date:

Friday, 4th June 2021

**Coram for
delivery of
judgment:**

**The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]
The Hon. Mr. C. Dennis Morrison, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. Lewis Hunte, QC

Respondents: Ms. Marie-Lou Creque

Issues:

**Civil appeal – Interpretation of instrument of conveyance –
Whether learned judge misdirected herself as to the nature
of the appellant’s claim – Whether learned judge applied
correct legal principles in interpreting instrument –
Admissibility of extrinsic evidence – Whether extrinsic
evidence is admissible to determine the intention of the
parties save for an action for rectification – Instrument to
be read as a whole – Whether plain meaning of the
language in an instrument does not lead to an absurdity –
Section 100 of Registered Land Ordinance – Requirement
to state in the instrument whether persons are joint
proprietors or proprietors in common**

**Result and
Reason:**

**Held: dismissing the appeal; and ordering that each party
bear their own costs, that:**

- 1. A review of the claim clearly shows that the learned
judge did not identify the main issue in the claim
when she purported to identify the issues for
determination in her judgment. However, the learned**

judge did in fact address the main issue, which was the interpretation of the Instrument. While the learned judge placed much emphasis on the issue of rectification, in the process of determining whether there should be rectification, the judge did interpret the Instrument, finding the provisions, including the declaration, to be reconcilable, and that there was no need to make any determination in relation to rectification. Accordingly, the learned judge did not misdirect herself as to the nature of the appellant's claim.

2. Extrinsic evidence is not admissible to determine the intention of the parties, save for an action for rectification. The intention of the parties is to be determined from the document itself, when read in its entirety having regard to the factual matrix. The evidence of Adina Whitrod, which the learned judge took into consideration, went beyond evidence relating to the factual matrix. The evidence related to the subjective intention of the parties to the Instrument. This evidence, being extrinsic evidence, was clearly inadmissible in interpreting the Instrument. In so doing, the learned judge erred.

Investors Compensation Scheme Ltd v West Bromwich Building Society [1999] All ER (D) 23 applied; Cherry Tree Investments Ltd v Landmain Ltd [2013] 2 WLR 481 applied; Prenn v Simmonds (1971) 1 WLR 1381 considered; Reardon Smith Line Ltd v Yngvar Hansen-Tangen and Sanko SS & Co Ltd [1976] 1 WLR 989 considered; Irnham v Child 1 Bro C C 93 considered.

3. The approach of the court is to apply general principles in the interpretation of documents irrespective of the nature of the document. As it relates to instruments conveying property, the court must have regard to the instrument as a whole, including any plan which forms part of it. The court has no power to improve upon the instrument which it is called upon to construe. When the Instrument is read as a whole, it is pellucid that Albert was desirous of giving his interest in the Property, along with the newly built house where he resided, to his daughter Adina Whitrod, while the other two siblings

agreed to continue to live in the blue house and hold their interest jointly. Further, where land is held by more than one person, section 100 of the Registered Land Ordinance requires that it must be stated in the instrument whether the persons are joint proprietors or proprietors in common. If they are proprietors in common, the share of each party must be stated. The declaration made by Adina Whitrod, Eric and Adina, which they executed before a Notary Public, states very clearly that they hold the Property as joint proprietors. The provisions of the Instrument are not irreconcilable and the plain meaning of the words of the Instrument do not lead to an absurd result. It therefore follows that, in so far, as the learned judge admitted the evidence of Adina Whitrod to ascertain the intentions of the parties, the learned judge was not correct in her application of the principles of interpretation of an instrument of conveyance, albeit the interpretation remains the same as found by the learned judge.

Lovering and another v Atkinson and others [2020] UKPC 14 applied; in *Re Moon, ex parte Dawes* (1886) 17 Q.B.D 275 considered; *Attorney General of St. Lucia v River Doree Holdings Ltd* [2017] UKPC 39 considered; *Attorney General of Belize and others v Belize Telecom Ltd and another* [2009] 1 WLR 1988 applied; Section 100 of the Registered Land Ordinance Cap 229 of the Revised Laws of the Virgin Islands applied.

4. Section 100 of the Registered Land Ordinance simply requires parties to a transfer to indicate whether the parties are joint proprietors or proprietors in common. If they fail to do so, this does not invalidate the transfer document but rather they would be held to hold the property as proprietors in common. When the judgment of the learned judge is read in context, it is apparent that the learned judge was simply stating that in the absence of specific shares, and where there is a declaration that the parties hold as joint proprietors, then the parties hold as joint proprietors. The learned judge was not seeking to state a principle of law that where no specific shares are ascribed to parties, a

proprietorship in common does not arise. The learned judge therefore did not err in construing the effect of section 100 of the Registered Land Ordinance.

Section 100 of the Registered Land Ordinance Cap 229 of the Revised Laws of the Virgin Islands applied.

APPLICATIONS AND APPEALS

Case Name:

Frandi Thomas

v

The Queen

[BVIHCRAP2017/0004]

Date:

Monday, 31st May 2021

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. V. Dexter Theodore, QC, Justice of Appeal
[Ag.]**

Appearances:

Appellant: Mr. Michael Maduro

Respondent: Mrs. Kellee-Gai Smith, Principal Crown Counsel

Issues:

Criminal appeal – Application to strike out appeal for want of prosecution – Application to amend notice of appeal – Application for adjournment

**Type of
Order:**

Oral Decision

**Result /
Order:**

IT IS HEREBY ORDERED THAT:

- 1. The application to strike out the notice of appeal for want of prosecution is dismissed having been withdrawn by the Crown.**
- 2. Leave is granted to the appellant to rely on 2 further**

grounds of appeal.

3. Leave is granted to withdraw the ground of appeal originally filed in support of the appeal.
4. The application for adjournment of the appeal is refused.

Reason:

The Court considered an application by the respondent to strike out the appellant's notice of appeal for want of prosecution, and applications by the appellant to amend the grounds of appeal and for an adjournment of the hearing of the appeal. Counsel for the respondent sought leave of the Court to withdraw the application to strike out the appeal. The Court was satisfied that leave to withdraw should be granted. In relation to the applications by the appellant, the Court noted that the respondent did not object to the application to amend the grounds of appeal but objected to the application for the adjournment on the basis that the Crown's skeleton arguments, which were already filed, were sufficient to respond to the appeal including the amendments proposed to be made by the appellant. The Court was satisfied that the appellant should be granted leave to amend the notice of appeal, but that the application for an adjournment should be refused and the appeal heard as scheduled.

Case Name:

**Frandi Thomas
v
The Queen
[BVIHCRAP2017/0004]**

Date:

Monday, 31st May 2021

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. V. Dexter Theodore, QC, Justice of Appeal
[Ag.]**

Appearances:

Appellant: Mr. Michael Maduro

Respondent: Mrs. Kellee-Gai Smith, Principal Crown Counsel

Issues:

Criminal appeal — Appeal against conviction — Good

character direction — Whether trial judge's direction as to appellant's good character was sufficient in light of the evidence adduced at trial — Requirement for warning in relation to unreliable evidence – Section 146 of the Evidence Act, 2006 — Whether trial judge was required to warn jury about reliability of virtual complainant's evidence given her age and alleged self-interest — Whether appellant's conviction rendered unsafe by alleged deficiencies in judge's directions

Type of Order

Oral Judgment

Result /
Order:

IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.
2. The conviction of the appellant is affirmed.

Reason:

This was an appeal against the appellant's conviction for incest on two grounds, that- (i) the learned trial judge's directions to the jury were insufficient on the issue of the appellant's good character; and (ii) the learned trial judge did not give a warning to the jury in keeping with 146(1)(c) of the Evidence Act, Act 15 of 2006.

In relation to the first ground of appeal, counsel for the appellant contended that the judge's direction was inadequate and that the judge should have given further directions as to both established limbs of a good character direction– (i) credibility; and (ii) propensity.

The Court noted that the primary rule is that a person of good character is entitled to a full direction covering both limbs of their good character – credibility and propensity. The credibility limb signifies that an accused person with no previous convictions is more likely to be believed than one who has previous convictions. The propensity limb signifies that a person of good character is less likely to commit a crime, such as the one for which he has been charged, than someone who is not of good character.

The Court noted that, in this case, there was some evidence that the appellant was of good character. However, the law is clear that the force of a complaint in relation to the sufficiency of the credibility limb is greatly

diminished in circumstances where the appellant does not give evidence on oath at trial. Where a defendant does not give evidence on oath at trial, but gives an unsworn statement, it removes much of the need for a good character direction and the credibility limb of a good character direction is less likely to be helpful to a defendant.

In this case, the appellant chose not to give evidence on oath. His reliance on the credibility limb was therefore necessarily affected. Having considered the direction given by the trial judge in respect of credibility limb of the appellant's good character, the Court took the view that the judge gave an adequate good character direction in the circumstances of the case, noting that the appellant did not give evidence on oath.

In relation to the propensity limb, the Court, having examined the direction, was of the view that the direction given by the judge was adequate and that no exception could be taken to the direction. The ground of appeal in relation to the appellant's good character direction was therefore dismissed.

In relation to the second ground of appeal, the Court noted that section 146(1)(c) of the Evidence Act applies to evidence, the reliability of which might be affected by a number of factors. Counsel for the appellant argued that the trial judge was required by section 146(1)(c) to give a warning to the jury in light of the appellant's age and alleged self-interest. The Court noted that at the time the virtual complainant gave evidence, she was 21 years old. She testified to events that happened when she was 14, 15, 16 and 18.

The Court noted arguments by counsel for the respondent who submitted that section 146(1)(c) was not engaged. Counsel argued that with respect to the self-interest, no evidence was given during the trial which indicated self-interest on the part of the virtual complainant when she gave evidence although certain suggestions were put to the virtual complainant in cross-examination. In the absence of any such evidential basis therefore, there was no ground upon which the trial judge could have given directions on the issue of self-interest. Likewise on the issue of age, counsel for the respondent submitted that

section 146(1)(c) was not engaged. Counsel argued that the virtual complainant had given her evidence at the age of 21, that the jury were aware of the appellant's age at the time the evidence was given, and that reference was made by the judge and throughout the trial of the various instances when the offences occurred. The Court agreed with the arguments made by the respondent and concluded that, in all the circumstances, there was no material misdirection or anything else which could have rendered the appellant's conviction unsafe.

Case Name:	Harvest Network Limited v CHC Investment Holdings Limited [BVIHCMAP2018/0007]
Date:	Monday, 31st May 2021
Coram:	The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mr. V. Dexter Theodore, QC, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Mr. Peter Ferrer
Respondent:	Mr. Brian Lacy
Issues:	Application for conditional leave to appeal to Her Majesty in Council – Whether decision of Court of Appeal to dismiss an appeal as a nullity on the basis that leave to appeal had not been sought raised a question of great general or public importance – Whether Court of Appeal's decision that leave is required to appeal to the Court of Appeal against an order refusing leave to institute derivative proceedings raises question of great, general or public importance
Type of Order:	Oral Decision

**Result /
Order:**

IT IS HEREBY ORDERED THAT:

1. The applicant is granted conditional leave to appeal to Her Majesty in Council against the order of the Court of Appeal dated 1st November 2018 with reasons for the decision on 23rd November 2020.
2. The applicant shall, within 90 days of the date of this order, lodge with the Registrar of the High Court, the US dollar equivalent of GBP 500.00 as security for the prosecution of the appeal to Her Majesty in Council and the payment of all such costs as may become payable by them in the event of them not obtaining an order granting final leave to appeal or the appeal being dismissed for non-prosecution or of the Judicial Committee ordering them to pay the costs of the appeal (as the case may be).
3. The record of appeal shall be prepared by the applicant in accordance with rules 18 to 20 of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 and Practice Directions 4.2.1 to 4.3.2 and 5; the same to be transmitted to the Registrar of the Judicial Committee of the Privy Council without delay where final permission to appeal has been granted.
4. The applicant shall make an application for final leave to appeal to Her Majesty in Council, supported by the certificate of the Registrar of the High Court that the security for costs of the prosecution of the appeal ordered herein has been given to the satisfaction of the Registrar within the time prescribed by this Order.
5. The Costs of an occasioned by this application by costs in the appeal to Her Majesty in Council.

Reason:

The Court considered the submissions filed by the parties and was satisfied that the intended appeal raised a question of great general or public importance which should be referred to Her Majesty in Council.

Case Name:

**Sheikha Amena Ahmed H.A. Al-Thani (also known
as Amena Ahmed Al-Thani**

v

Sheikha Aisha Mohammed Ali Abdulla Al Thani

[BVIHCVAP2021/0001]

Date: Monday, 31st May 2021

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

Appearances:

Applicant: Mr. Steven Moverley Smith, QC with him, Mr. Dave Marshall

Respondent: Mr. Bajul Shah and Mr. Nicholas Brookes

Issues: Application for leave to appeal – Whether proposed appeal has realistic prospect of success – Whether application for leave to appeal was filed in time rule 62.2(1) of Civil Procedure Rules 2000

Type of Order: Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. Leave is granted to appeal the order of Ellis J dated 12th January 2021.
2. The applicant shall file the notice of appeal within 21 days.
3. Costs shall be costs in the appeal.

Reason: The Court considered an application for leave to appeal the order of Ellis J dated 12th January 2021 and an objection by the respondent to the application for leave to appeal on the basis that the notice of application for leave to appeal was filed outside of the time required by rule 62.2(1) of the Civil Procedure Rules 2000. The Court was satisfied that, consistent with rule 62.2(1), the application for leave to appeal the order of Ellis J was made in time and that no extension of time was needed. The Court was also satisfied that the appeal had realistic prospects of success and therefore that leave to appeal should be granted.

Case Name:

Chen Mei-Huan

v

1. Victory Success Holdings Limited

2. Peckson Limited

3. Macau Hotel Developers Limited

[BVIHCMAP2020/0028]

Date:

Monday, 31st May 2021

Coram:

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

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

The Hon. Mr. C. Dennis Morrison, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. John McDonnell, QC and Ms. Dancia Penn, QC

Respondents: Mr. Charles Bear, QC with him, Mr. Andrew Willins for the 1st respondent

Mr. Grant Carroll and Ms. Rosamund Baker for 2nd and 3rd respondents

Issues:

**Commercial appeal – Application to adduce fresh evidence
– Consent order**

**Type of
Order:**

Oral Decision

**Result /
Order:**

IT IS HEREBY ORDERED BY CONSENT THAT:

1. Victory Success has permission to rely upon:

(i) the Affidavit of Fraser Mitchell filed on 4th February 2021 and its exhibit;

(ii) the Affidavit of Terence Wyndham Wong and its exhibit.

2. The Appellant has permission to rely upon:

(i) the Second Witness Statement of Francisco Leitao and its exhibit;

(ii) the extracts from the report of Astra Penn and its exhibit.

3. Costs to be costs in the appeals.

Reason:

The Court considered 2 applications filed by the appellant, and 2 applications filed by the first respondent, to adduce and rely on fresh evidence in the appeal. The parties filed a draft consent order expressing their collective consent to all 4 applications. The Court was satisfied that leave should be granted to adduce and rely on the fresh evidence and that an order should be made in the terms of the consent order.

Case Name:

Chen Mei-Huan

v

- 1. Victory Success Holdings Limited**
 - 2. Peckson Limited**
 - 3. Macau Hotel Developers Limited**
- [BVIHCMAP2020/0028]**

Date:

Monday, 31st May 2021 and Tuesday 1st June 2021

Coram:

**The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]
The Hon. Mr. C. Dennis Morrison, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. John McDonnell, QC and Ms. Dancia Penn, QC

**Respondents: Mr. Charles Bear, QC and Mr. Andrew Willins for the 1st respondent
Mr. Grant Carroll and Ms. Rosamund Baker for 2nd and 3rd respondent**

Issues:

Commercial appeal – Discharge of injunction – Whether learned judge erred in exercise of discretion to discharge an injunction restraining 1st respondent from taking steps in relation to property which were adverse to other respondents – Whether learned judge adopted correct approach to determining whether appellant had shown a serious question to be tried and whether the balance of convenience favoured discharge of the injunction – Whether learned judge erred in his evaluation of evidence and findings of fact – Whether findings of fact were open to

judge on the evidence – Locus standi – Whether learned judge erred in concluding that appellant had no locus standi to pursue a claim in court below for unjust enrichment – Forum non conveniens – Whether learned judge wrongly concluded that Macau is a more appropriate forum than the Territory of the Virgin Islands for determination of appellant's claim – Whether learned judge erred in concluding that respondents had breached duty to give full and frank disclosure

Type of
Order:

N/A

Result /
Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:
Judgment is reserved.

Case Name:

Qin Hui

v

1. Goldteam Group Limited
 2. Dayspring Investments Limited
 3. King Frame Trading Ltd
- [BVIHCMAP2020/0023]

Date:

Tuesday, 1st June 2021

Coram:

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

Appearances:

Applicant: Mr. Michael Fay, QC

Appellant: Mr. Qin Hui, in person, assisted by Mr. Benjamin Xue

Issues:

Application by legal practitioner to be removed from the record as legal practitioner for the appellant – Rule 63.6 of Civil Procedure Rules 2000

Type of
Order:

Oral Decision

**Result /
Order:**

IT IS HEREBY ORDERED THAT:

1. The applicant, ABVI Law, is removed from the record as legal practitioners for the appellant.
2. The applicant is to comply with CPR 63.6(4) and (5) and shall serve the client, Mr. Qin Hui either by post to the address [address redacted] or by email at email address [email address redacted].
3. There is no order as to costs on this application.

Reason:

This was an application by ABVI Law (“the applicant”) to be removed from the record as legal practitioners for the appellant (“the client”). The Court considered the affidavits filed by the parties to the application, and heard oral arguments from Mr. Michael Fay, QC, on behalf of the ABVI Law, and Mr. Benjamin Xue, who appeared as a friend of the client who, it is accepted, does not speak the English language. The Court was satisfied, in the circumstances, that the attorney-client relationship between the applicant and the client had irretrievably broken down and therefore that the application by ABVI Law to be removed from the record should be granted.

Case Name:

Qin Hui

v

1. Goldteam Group Limited
2. Dayspring Investments Limited
3. King Frame Trading Ltd
[BVIHCMAP2020/0023]

Date:

Tuesday, 1st June 2021

Coram:

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

Appearances:

Appellant: Mr. Qin Hui, in person, assisted by Mr. Benjamin Xue

Respondents: Mr. Robert Nader for the 1st respondent

Issues:

Commercial appeal – Adjournment

**Type of
Order:**

Adjournment

**Result /
Order:**

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

- 1. The hearing of the appeal is adjourned to the sitting of the Court of Appeal in St. Kitts and Nevis scheduled for the week commencing 12th July 2021, with a time estimate of 2 and a half hours.**
- 2. The costs of the adjournment to be assessed by the court below if not agreed within 14 days.**

Reason:

The Court was minded in the circumstances to adjourn the appeal in light of its earlier order removing ABVI Law from the record as legal practitioner for the appellant. The adjournment was granted to permit the appellant to seek and retain counsel to prosecute the appeal on his behalf.

The Court heard submissions from the counsel for the respondents who requested that the appeal be set down for hearing at a date sooner than the next sitting of the Court of Appeal in the Territory of the Virgin Islands, and that their costs for the adjournment be paid by the appellant. The Court considered the background to the appeal and was satisfied that the appeal should be traversed to a date earlier than the next sitting of the Court in the Virgin Islands. The Court was also minded to award the respondents their costs for the adjournment.

Case Name:

**Sergey Taruta
v
JSC VTB Bank
[BVIHCMAP2021/0002]**

Heard together with:

**Sergey Taruta
v
JSC VTB Bank
[BVIHCMAP2021/0008]**

And
Sergey Taruta
v
JSC VTB Bank
[BVIHCMAP2021/0012]

Date: Wednesday, 2nd June 2021

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Adrian Francis

Respondent: Mr. Grant Carroll and Mr. Daniel Mitchell

Issues: Interlocutory appeals – Appeals against case management orders – Exercise of discretion – Whether learned judge erred in exercising discretion to dismiss appellant’s application to amend defence – Whether learned judge erred in exercising discretion to dismiss appellant’s application to compel respondent to respond to a request for information – Refusal of stay pending appeal – Whether learned judge erred by refusing appellant’s application for a stay of proceedings in the court below pending determination of a related appeal – Whether dismissal of application for a stay pending appeal was determined by judge in breach of due process and natural justice – Striking out expert witness statement on matters of Russian law– Whether learned judge erred striking out witness statement on basis that evidence of Russian law sought to be produced was not required to resolve proceedings justly

Type of Order: Oral Judgment with Written Reasons to Follow

Result / Order: IT IS HEREBY ORDERED THAT:
1. The appeals in BVIHCMAP2021/0002,

BVIHCMAP2021/0008 and BVIHCMAP2021/0012 are dismissed.

2. Costs to the respondent to be assessed by a judge of the commercial court if not agreed within 21 days.

3. Written reasons to be provided at a later date.

Reason:

The Court considered three appeals against case management decisions in the court below. The Court took the unanimous view that all three appeals should be dismissed. The Court indicated that it will later provide written reasons for its decision.

Case Name:

Chen Mei-Huan

v

1. Victory Success Holdings Limited

2. Peckson Limited

3. Macau Hotel Developers Limited

[BVIHCMAP2020/0028]

Date:

Friday, 4th June 2021

Coram:

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

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

The Hon. Mr. C. Dennis Morrison, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. John McDonnell, QC and Ms. Dancia Penn, QC

Respondent: Mr. Charles Bear, QC with him, Mr. Andrew Willins for the 1st respondent

Mr. Grant Carroll and Ms. Rosamund Baker for 2nd and 3rd respondents

Issues:

Application for conditional leave to appeal to Her Majesty in Council – Whether appeal from decision of Court of Appeal to strike out parts of notice of appeal raises question of great general or public importance which should be referred to Her Majesty in Council

**Type of
Order:**

Oral Decision

**Result /
Order:**

IT IS HEREBY ORDERED THAT:

1. The application for leave to appeal to Her Majesty in Council against the decision of the Court of Appeal dated 23rd February 2021 is refused.
2. Costs to the respondents to be assessed by a judge of the Commercial Court if not agreed within 21 days.

Reason:

This was an application by notice of motion for leave to appeal to Her Majesty in Council against the decision of the Court of Appeal reflected in the certificate of result of appeal dated 23rd February 2021, by which the Court struck out aspects of the applicant's notice of appeal which related to a learned judge's treatment of the issue of *forum non conveniens* in the court below.

The application for leave to appeal was made on the basis that the intended appeal raises an issue which, by reason of its great general or public importance, ought to be submitted to Her Majesty in Council. The Court gave consideration to the notice of motion and the applicant's affidavit in support. The Court also considered the oral and written submissions advanced on behalf of the applicant, and the submissions made on behalf of the respondent.

The Court took the view that leave to appeal to Her Majesty in Council should be refused. The Court was satisfied that the intended appeal did not raise an issue of great general or public importance in the sense contemplated by the decisions of in Martinus Francois v The Attorney General of Saint Lucia [2004] ECSCJ No. 126 (delivered 7th June 2004), Bank Crozier Limited (In Liquidation) and another v Garvey Louison Liquidator of Bank Crozier Limited [2008] ECSCJ No.80, Pacific Wire & Cable Company Limited v Texan Management Limited et al British Virgin Islands [2008] ECSCJ No. 109 (delivered 6th October 2008) and Marinor Enterprises Enterprises Limited et al v First Caribbean International Bank (Barbados) Ltd [2016] ECSCJ No. 146 (delivered 6th July 2016).

In arriving at its conclusion, the Court also paid regard to the concession made by counsel for the applicant, Mr. McDonnell, QC, that the issues proposed to be referred to Her Majesty in Council have been rendered academic as

the 23rd February 2021 decision of the Court of Appeal had been overtaken by the fact that the entirety of the appeal, including the aspects struck out by the Court of Appeal, was heard by the Full Court of the Court of Appeal on 31st May and 1st June 2021, and the Court's decision on the appeal reserved. There were therefore no live issues which could be argued before Her Majesty in Council.

In all the circumstances, the Court was satisfied that leave to appeal should be refused.

Case Name:

**Tethyan Copper Company PTY Limited
v
1. Islamic Republic of Pakistan
2. Pakistan International Airways Corporation
Limited
3. PIA Investments Limited
4. Minhal Incorporated
5. PIA Hotels Limited
6. Registrar of Corporate Affairs
7. CITCO B.V.I. Limited
8. Harneys Corporate Services Limited
[BVIHCMAP2021/0014]**

Date: Friday, 4th June 2021

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

Appearances:

Applicant: Lord Charles Falconer, QC with him, Mr. Piers Plumptre and Mr. Andrew Filliland

Respondent: Mr. Vernon Flynn, QC with him, Ms. Angeline Welsh, Mr. Lucas Bastin, Mr. Cameron Miles, Mr. Mubarak Waseem, Mr. Grant Carroll and Mr. Daniel Mitchell for the 1st respondent

Mr. Andrew Willins for the 2nd respondent

Mr. Stephen Moverley Smith, QC with him, Mr. Tim Wright and Mr. Paul Griffiths for the 3rd, 4th and 5th respondents

Issues:

Application for stay pending appeal – Preliminary objections – Whether Court of Appeal has jurisdiction to grant a stay before time for filing notice of appeal has expired but before notice of appeal has in fact been filed – State immunity – Section 1(1) of the State Immunity Act, 1978 – Whether Court of Appeal has jurisdiction to grant stay pending appeal in view of legal principles on sovereign state immunity – Whether effect of a stay pending appeal would be to make an order against the Islamic Republic of Pakistan in the absence of adjudicative and enforcement jurisdiction over the state – Oral application for leave to appeal to Her Majesty in Council – Oral application not considered

Type of Order:

Oral Decision

Result / Order:

IT IS HEREBY ORDERED THAT:

- 1. The application for a stay pending appeal of the orders of Wallbank J [Ag.] made on 25th May 2021 is dismissed.**
- 2. Written reasons for the Court's decision will be provided at a later date.**
- 3. Costs to the 1st to 5th respondents to be assessed by a judge of the Commercial Court if not agreed within 14 days.**

Reason:

The applicant filed an application for a stay pending appeal of the decision of Wallbank J [Ag.] made on 25th May 2021 whereby the learned judge discharged injunctive relief which was previously granted in favour of the applicant on an ex parte basis.

The Court considered two preliminary objections to the application. The first, was an objection by the respondents that the Court did not have jurisdiction to grant a stay pending appeal before a notice of appeal had been filed. In relation to this objection, the Court accepted that it had the inherent jurisdiction to hear and grant a stay pending

appeal of the orders made in the lower court, in circumstances where an appeal had not yet been filed but the time for appealing had not yet expired. The Court considered its earlier decision in CAGE St. Lucia Limited v Treasure Bay (St. Lucia) Limited et al Saint Lucia HCVAP2011/045 (delivered 23rd January 2012), where Edwards JA concluded at paragraph 42 that, in the absence of a notice of appeal timely filed, the Court of Appeal would have no jurisdiction to grant a stay pending appeal. The Court considered that the decision of CAGE St. Lucia was decided in materially different circumstances and therefore should be distinguished. In this case, the time for filing the notice of appeal following the grant of leave to appeal had not yet expired, whereas, in CAGE St. Lucia, the period for the filing the notice of appeal had expired. The statements of Edwards JA in CAGE St. Lucia could not therefore apply in this case. The Court noted that a judge of the High Court has the power to grant a stay pending the determination of an appeal and it would be anomalous that the Court of Appeal did not have a similar jurisdiction. In all the circumstances, the Court concluded that it had the jurisdiction to hear the application.

In relation to the substantive application for a stay, Mr. Flynn, QC argued that the Court did not have jurisdiction to grant a stay of proceedings in this case because of section 1(1) of the State Immunity Act, 1978 and the authorities interpreting that section including A Co Ltd v Republic of X [1990] 2 Lloyd's Rep 520. The Court was satisfied on the submissions of Mr. Flynn, QC, that it did not have jurisdiction to grant a stay of the judge's orders made on 25th May 2021. The Court accordingly dismissed the application for a stay and indicated that its written reasons for so doing would be provided at a later date.

Following the dismissal of the stay application, the Court heard an oral application by the applicant for leave to appeal to Her Majesty in Council and for a stay of the learned judge's orders in the court below, pending the determination of the appeal to Her Majesty in Council, or pending the making of a written application for leave to appeal to Her Majesty in Council. The Court repeated its practice that applications for leave to appeal to Her Majesty in Council should be made by notice of motion, and that in the circumstances, the applicant's oral application could not be entertained. The Court also decided that its finding

that it did not have jurisdiction to grant a stay pending appeal to the Court of Appeal meant that it would not be appropriate to grant a stay pending the applicant's intended appeal to Her Majesty in Council.