

**EASTERN CARIBBEAN SUPREME COURT**  
**COURT OF APPEAL SITTING**

**ANTIGUA AND BARBUDA**  
**AUDIOCONFERENCE**  
**25<sup>TH</sup> MAY TO 29<sup>TH</sup> MAY 2020**

**JUDGMENTS**

**Case Name:**

**DAPHNE FRETT**

**V**

**[1] REESO MADURO**

**[2] REGISTRAR OF LANDS**

**[BVIHCVAP2018/0004]**

**(TERRITORY OF THE VIRGIN ISLANDS)**

**Date:**

**Monday, 25<sup>th</sup> May 2020**

**Coram:**

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice**  
**The Hon. Mde. Louise E. Blenman, Justice of Appeal**  
**The Hon. Mr. Mario Michel, Justice of Appeal**

**Appearances:**

**Appellant:**

**Ms. Lavonna Burrows**

**Respondents:**

**Mr. Justin L. Simon, QC holding papers for Mr. Leroy Jones for the first respondent**

**Mr. Hakim Creque for the second respondent**

**Issues:**

**Interlocutory appeal — Application to strike out amended claim — Preliminary issue — Whether notice of appeal filed out of time — Locus standi — Whether appellant has standing to bring claim on behalf of estate of decedent where no grant of letters of administration made in her favour — Rule in Ingall v Moran — Special circumstances principle exception — Whether special**

circumstances exist which enable appellant to bring proceedings without grant of letters of administration

**Result and  
Reason:**

**Per: The Hon. Mde. Louise Esther Blenman, Justice of Appeal  
The Hon. Mde. Gertel Thom, Justice of Appeal  
The Hon. Mde. E. Ann Henry, QC, Justice of Appeal  
[Ag.]**

**Held: dismissing the appeal save for varying the order of the court below to remove the words “with prejudice”; and ordering that Ms. Frett pay the respondents’ costs in this appeal, to be assessed if not agreed within 21 days of the date of this judgment, that:**

- 1. Having regard to rules 3.2(2) and (3) of the Civil Procedure Rules 2000, and to the evidence of the date of filing of the notice of appeal, there is no doubt that Ms. Frett filed the notice of appeal within the required time.**

**Rules 3.2(2) and 3 of the Civil Procedure Rules 2000 applied; R (Dinjan Hysaj) v Secretary of State for the Home Department; Fathollahipour v Aliabadibenisi; May v Robinson [2015] WLR 2472 considered; Samuels v Mount St. John’s Medical Center Board and Anor ANUHCv2011/0785 (delivered 21st November 2013, unreported) considered.**

- 2. The general rule, as applied in the Territory of the Virgin Islands, is that proceedings may not be commenced by a party for the benefit of an intestate estate if that party does not have a grant of letters of administration. However, a party may commence proceedings without a grant if special circumstances exist. To engage the special circumstances principle, the subject of the claim must be an asset in the estate at the date of the Decedent’s death and there must be a person appointed as trustee of the estate whose conduct or inaction is depleting the 3 assets in the estate. In this case, although the learned judge failed to consider the special circumstances principle, it is clear that the lands which were the subject of the claim were never held in the estate of the Decedent, and that Mr. Maduro was not appointed as the**

trustee of the estate. Further, at the time of the alleged wrongdoing, the Decedent was alive. There are therefore no special circumstances which entitle Ms. Frett, without a grant of letters of administration, to bring proceedings on behalf of the estate of the Decedent. Accordingly, there is no basis for this Court to interfere with the exercise of the learned judge's discretion in striking out Ms. Frett's claim.

Ingall v Moran [1944] KB 160 applied; Haastrap v Okorie and others [2015] EWHC 1581 (Ch) applied; Roberts v Gill & Co. and Anor [2010] 2 WLR 1227 applied; Hayim and Anor v Citibank N.A. and Anor [1987] 1 AC 730 considered; Michel Dufour et al v Helenair Corporation et al (1996) 52 WIR 188 followed; Kingsley Bowman v Hansraj Matadial Saint Vincent and the Grenadines High Court Civil Appeal No. 7 of 1996 (delivered 16th September 1996, unreported)

3. The learned judge ought not to have dismissed Ms. Frett's claim "with prejudice". If Ms. Frett's application for letters of administration were to be granted in her favour, the dismissal of her claim "with prejudice" would preclude her from bringing a fresh claim and would not be fair in all the circumstances.

Case Name:

**INGRID BRANFORD-HUGHES**

**V**

**GOLDEN YEAR HOME FOR THE  
ELDERLY**

**[MNILTAP2019/0002]  
(MONTSEERRAT)**

Date:

**Tuesday, 26<sup>th</sup> May 2020**

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal  
The Hon. Mde. Gertel Thom, Justice of Appeal  
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**

**Appearances:**

**Appellant:** Mr. Ralph Alexander Francis

**Respondent:** Ms. Chivone Gerald

**Issues:**

**Civil Appeal — Employment Law — Summary dismissal — Labour Code of Montserrat— Section 61(1) of Labour Code — Gross misconduct—Section 61(2)) (a) Labour Code — Unfair dismissal —Termination based on warning—Section 61(3) of Labour Code — Whether the Tribunal was entitled to refer to the previous warnings — Entitlement of Court to review the decision of the Labour Tribunal — Section 26 of Labour Code — Findings of fact based on printed evidence**

**Result and Reason:**

**Per: The Hon. Mr. Mario Michel, Justice of Appeal  
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]  
The Hon. Mr. John Carrington, QC, Justice of Appeal [Ag.]**

**Held: allowing the appeal; setting aside the decision of the Tribunal dated 20th February 2019; remitting the dispute to the Labour Tribunal to be heard by a new panel of members; ordering that the rehearing take place on the affidavits already filed in the dispute; and ordering each party to bear their own costs of the appeal, that:**

- 1. In treating with the dispute surrounding the events of the 13th and 14th of June 2017, the Tribunal erred in taking into consideration the historical misconduct of the appellant in its assessment of the fairness of the respondent's decision to summarily terminate the appellant and incorrectly treated the dispute as a warning case pursuant to sections 61(3) and (4) of the Code. The respondent itself had not in its case relied on these allegations nor did it rely on the warning procedure as set out in sections 61(3) and (4) of the Code. By relying on same, the Tribunal gave the respondent, on whom the burden lies, the benefit of a lower threshold 3 under section 61(3) to justify the summary dismissal of the appellant's employment. Unlike**

the threshold for summary dismissal, which requires the employer prove that the employee's behaviour amounts to gross misconduct and that it would be unreasonable to require the employer to continue the employment contract, the threshold under section 61(3) only requires that the employee repeat the misconduct about which he had been warned.

Section 61 of the Labour Code No. 12 of 2012, Laws of Montserrat applied.

2. The Tribunal's decision though final and binding is open to review by the Court of Appeal on a point of law under Section 26 of the Code. Based on the Court's finding that the Tribunal erred as a matter in law by considering the historical misconduct in coming to its decision, and by extension treating the case as a warning case, this Court is entitled to review the decision of the Tribunal.

Section 26 of the Labour Code No. 20 of 2012, Laws of Montserrat applied.

3. The question of whether misconduct justifies summary dismissal is a question of fact. The Court is very reluctant to make findings of fact based on printed evidence. The Court will only undertake such an exercise in exceptional circumstances. There were no exceptional circumstances in this case and the Court declined to make such a finding on the printed evidence.

Henry v Mount Gay Distilleries [1999] Lexis Citation 2002 applied.

Case Name:

**LEANOART MATTHIAS**

**v**

**ANTIGUA COMMERCIAL BANK**

**[ANULTAP2017/0002]**

**(ANTIGUA AND BARBUDA)**

**Date:** Thursday 28<sup>th</sup> May 2020

**Coram:** The Hon. Mr. Davidson K. Baptiste, Justice of Appeal  
The Hon. Mde. Gertel Thom, Justice of Appeal  
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

**Appearances:**

**Appellant:** Mr. Justin L. Simon, QC

**Respondent:** Mrs. Andrea Roberts-Nicholas

**Issues:** Civil appeal —Appeal from decision of Antigua and Barbuda Industrial Court—Unfair dismissal —Sections C9, C56, C58 and C59 of the Antigua and Barbuda Labour Code—Approach of Court of Appeal to findings of fact by Industrial Court —Section 17 of Industrial Court Act —Whether Court of Appeal empowered to review findings by Industrial Court — Whether there was sufficient evidential basis for findings of fact made by Industrial Court —Whether appellant’s dismissal was unfair —Natural justice — Right to procedural fairness —Whether appellant’s right to natural justice and procedural fairness was breached

**Result and Reason:**

**Per:** 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.]

**Held:** dismissing the appeal, affirming the decision of the Industrial Court, and making no order as to costs, that:

1. There is no express right of appeal against findings of fact by the Industrial Court. In order to establish that a finding of fact is susceptible to appeal, the person challenging the finding must show that it

was illegal in the sense contemplated by section 17(1)(e) of the Industrial Court Act. Such an illegality may be established, for example, where it is shown that the Industrial Court erred by making or drawing inferences for which there is no evidentiary basis, or that the court did not consider the facts in light of the applicable principles or statutory provision, and that the error was committed during the course of the proceedings and substantially affected the merits of the matter.

Section 17(1) of the Industrial Court Act Cap. 214 of the Laws of Antigua and Barbuda considered; *Jewellers Warehouse v Cecile Norde Antigua and Barbuda Civil Appeal No. 29 of 2004* (delivered 27<sup>th</sup> November 2006, unreported) followed.

2. It is clear that the Industrial Court did not rely on direct evidence in finding, as a matter of fact, that Mr. Matthias had prior notice of the global security alerts. The Industrial Court had before it evidence that a person in Mr. Matthias' position either knew or ought to have known about the global security alerts, and relied on this evidence to infer that Mr. Matthias was in fact aware of the alerts. The Industrial Court was entitled to draw such an inference on the evidence. Accordingly, the Court of Appeal cannot interfere with the Industrial Court's finding of fact in this regard.

Section 17(1)(e) of the Industrial Court Act Cap. 214 of the Laws of Antigua and Barbuda applied; *Jewellers Warehouse v Cecile Norde Antigua and Barbuda Civil Appeal No. 29 of 2004* (delivered 27<sup>th</sup> November 2006, unreported) followed.

3. The complaint by Mr. Matthias that the evidence before the Industrial Court was insufficient to find that he acted recklessly or intentionally, is essentially a challenge to the Court's findings based on its assessment of the evidence. Such findings are quintessentially matters for the Industrial Court whose members had the opportunity to observe the witnesses as they gave their evidence and to assess their demeanor and credibility. This is even more so in an appeal from the Industrial Court where the

Court of Appeal is precluded from hearing appeals on findings of fact unless the findings are illegal in the sense contemplated by section 17(1)(e) of the Industrial Court Act. In the circumstances, this Court cannot review or upset the findings of the Industrial Court regarding Mr. Mathias's intentions and recklessness. In any event, even if this Court could review the findings related to Mr. Matthias' conduct, it cannot be said that such findings were not open to the Industrial Court on the evidence or were blatantly wrong. There is therefore no basis to interfere with the Industrial Court's findings in this regard.

Section 17(1)(e) of the Industrial Court ActCap. 214 of the Laws of Antigua and Barbuda applied; *Jewellers Warehouse v Cecile Norde* Antigua and Barbuda Civil Appeal No. 29 of 2004 (delivered 27thNovember 2006, unreported) followed.

4. An employer may summarily terminate the services of an employee if the employee's misconduct is sufficiently serious that the employer can reasonably take the position that summary dismissal is justified without warning or giving an opportunity to present their case before dismissal. The allegations against Mr. Matthias were damning, overwhelming and accepted as truthful by the Industrial Court. In the circumstances, the alleged misconduct was of such nature that the Bank acted reasonably in dismissing Mr. Matthias without a further opportunity to present his case. The Industrial Court therefore did not err in finding that there was no procedural unfairness in the way that the Bank dismissed Mr. Matthias. In any event, even if Mr. Matthias did not get a proper opportunity to be heard, based on the overwhelming evidence of misconduct by him, his summary dismissal did not occasion a miscarriage of justice. There is therefore no basis upon which this Court should interfere with the finding of the Industrial Court.

Sections C9, C56, C58 and C59 of the Antigua and Barbuda Labour Code CAP 27 of the Laws of Antigua and Barbuda considered; Commonwealth Caribbean Public Law, Text, Cases and Materials

Albert Fiadjoe, 4thEdn. Routledge-Cavendish, (UK), 2011 considered; Polkey v A.E. Dayton Services Ltd [1988] AC 344 followed; Blackburn v LIAT (1974) Ltd [2020] UKPC 9 followed; Sillifant v Powell Duffryn Timber Ltd [1983] IRLR 91 followed.

5. The Industrial Court may act outside the technical rules of evidence and may inform itself on any matter, in such manner as it thinks just. If it does so, the parties to the proceedings must be given the opportunity, if they so desire, to adduce evidence on the matter. It was open to the court to determine the procedure for trial, and the time when it would view the video footage. Mr. Matthias was aware since the date of his termination that the video evidence existed and played an important part in the Bank's decision to dismiss him. He had the opportunity to view the tape prior to the trial, but did not, and he did not raise an objection at the trial when the Bank's lawyers offered to make the tape available to the Court. He did not deny unplugging the DVR and did not dispute at trial what was shown on the tape. In all the circumstances, the Industrial Court did not err in viewing the tape and in relying on it.

Section 9 of the Industrial Court Act Cap. 214 of the Laws of Antigua and Barbuda applied; Blackburn v LIAT (1974) Ltd [2020] UKPC 9 followed

Case Name:

[1] ANTOINE DEFOE  
[2] EDINGCOT ST. VALLE  
[3] MERVIN JOHN BAPTISTE

V

[1] ROOSEVELT SKERRIT  
[2] REGINALD AUSTRIE  
[3] RAYBURN BLACKMORE  
[4] CASSIUS DARROUX  
[5] JUSTINA CHARLES

[6] KATHLEEN DANIEL  
[7] IAN DOUGLAS  
[8] JOHNSON DRIGO  
[9] COLIN MC INTYRE  
[10] ROSELYN PAUL  
[11] IAN PINARD  
[12] PETTER ST. JEAN  
[13] IVOR STEPHENSON  
[14] KELVAR DARROUX  
[15] KENNETH DARROUX

[DOMHCVAP2017/0004]  
(COMMONWEALTH OF DOMINICA)

**Date:** Thursday 28<sup>th</sup> May 2020

**Coram:** The Hon. Mr. Davidson K. Baptiste, Justice of Appeal  
The Hon. Mde. Gertel Thom, Justice of Appeal  
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

**Appearances:**

**Appellants:** Ms. Cara Shillingford

**Respondents:** Ms. Amina Byron holding papers for Mr. Anthony Astaphan, SC

**Issues:** Civil Appeal — Treating — Election petition — Election offences — Pre-election allegations — Whether a charge against a member of the House of Assembly for treating can be instituted and prosecuted in the Magistrates' Court in Dominica — Exclusive jurisdiction of High Court to hear complaints against elected members — Modification of statute to conform with Constitution — Paragraph 2 of Schedule 2 of Constitution Order — Sections 59 and 61 of the House of Assembly (Elections) Act — Whether section 59 of the House of Assembly (Elections) Act conflicts with section 40(1)(a) of the Constitution — Whether the Magistrate was correct in quashing the summonses and complaints for the offence of treating that were issued against the respondents — House of Assembly (Elections) Act — Magistrate's Code of Procedure Act — The Constitution of the Commonwealth of Dominica

**Result and  
Reason:**

**Held: (Per Webster JA, [Ag.] and Michel JA, Blenman JA dissenting) allowing the appeal and setting aside the order of the learned judge, ordering the reinstatement of the complaints filed by the appellants and the summonses issued by the Magistrates' Court, discharging the stay of proceedings granted by the High Court, directing the Chief Magistrate to assign a magistrate to hear the complaints filed by the appellants, and ordering each party to bear his or her own costs in the appeal and in the court below, that:**

- 1. Section 59 of the Act permits a Magistrate to summarily try and sentence a person for the offence of treating. This is coterminous with the relief that the appellants were seeking in the complaints that were lodged in the Magistrates' Court. The complaints have nothing to do with an undue election or undue return of any of the respondents and are separate from any possible proceedings before the High Court to prevent a convicted person from retaining his seat as a member of the House of Assembly under section 40 of the Constitution. The Magistrate therefore had jurisdiction under section 59 to try the respondents for the offence of treating since such a trial is not a challenge to the validity of their election under the Constitution, and the appellants were entitled to use the summary procedure in section 59 of the Act to charge the respondents for treating, and to do so within the 6-month period prescribed by section 68 of the Magistrate's Code of Procedure Act for prosecuting offences in the Magistrates' Court. Per Michel JA (concurring): There are several types of proceedings the outcome of which can lead to a member of the House of Assembly being disqualified from retaining his seat as a member and which are also not proceedings to invalidate the election of a member of the House. These include bankruptcy proceedings, proceedings to determine a person's citizenship status, or to determine the state of his mental health, or a criminal trial for a charge unrelated to elections but which can result in a sentence exceeding 12 months' imprisonment. It could not be that all such proceedings, once**

involving a member of the House of Assembly, must be instituted by an election petition brought within 21 days of the election of the member, as required by section 68 of the Act, especially having regard to the fact that the conduct leading to these proceedings may have occurred more than 21 days after the election of the member.

Wingrove George v The Senior Magistrate and Another SKBHCV2018/0188 (delivered 15th January 2019, unreported) considered; Sections 59 and 61 of the House of Assembly (Elections) Act Cap 2.01 of the Laws of the Commonwealth of Dominica (1951, last amended 1990) considered; Section 68 of the Magistrate's Code of Procedure Act Cap. 4.20 of the Laws of the Commonwealth of Dominica (1891, last amended in 1991) applied; Section 40 of the Constitution of the Commonwealth of Dominica enacted as Schedule 1 of the Commonwealth of Dominica Constitution Order 1978 (S.I. 1978 No. 1027) considered.

2. If there is a challenge to the validity of a member's election, the challenge must be pursued by an election petition under section 65 of the Elections Act. There is no requirement that a claim under section 40 must be brought by election petition, except in relation to a challenge to the validity of an election under section 40(1) of the Constitution. Such a challenge does not come into play in this case. If the respondents are convicted, section 40(1) (d) may operate to cause that member to vacate his seat. This stage has not been reached in this case. In the circumstances, section 59 of the Elections Act is not inconsistent with section 40 or any other provision of the Constitution, and an elected member of the House of Assembly can be prosecuted by a magistrate for the offence of treating.

Section 40(1) of the Constitution of the Commonwealth of Dominica enacted as Schedule 1 of the Commonwealth of Dominica Constitution Order 1978 (S.I. 1978 No. 1027) considered; The Attorney General of St Christopher and Nevis v Dr. Denzil Douglas SKBHCV2018/0008 (delivered 2nd

July 2018, unreported); SKBHCVAP2019/0007 (delivered 12th March 2020, unreported) considered.

3. The judge's decision effectively created two types of offenders under the Elections Act, namely ordinary citizens who can be charged, convicted and sentenced under section 59, and members of the House of Assembly who are immune from prosecution under the Act. This duality of offenders is not apparent from a reading of the Elections Act. If it was intended to create immunity from prosecution for members of the House the lawmakers would have had to use very clear language. Neither the Act nor the Constitution contains language suggesting that this was Parliament's intention. The judge therefore erred when she, by her decision, created two classes of offenders under the Elections Act and found that the Magistrate did not have jurisdiction to try the respondents for the offence of treating.

Sharma v Brown-Antoine and others (2006) 69 WIR 379 considered; Eric 5 Matthew Gairy et al v The Attorney General of Grenada (1999) 59 WIR 174 considered; Sections 59 and 65 of the House of Assembly (Elections) Act Cap 2.01 of the Laws of the Commonwealth of Dominica (1951, last amended 1990) considered.

4. While the High Court has an exclusive jurisdiction to try election petitions challenging the validity of a member's election, the jurisdiction to try the offence of treating is not exclusive to the High Court. The judge therefore erred by giving the expression "exclusive jurisdiction" a wide interpretation, covering not just matters relating to the election of members, but also any matter that may ultimately affect the composition of the House of Assembly. The authorities relating to the High Court's exclusive jurisdiction to try election petition cases are those dealing with the validity of the election of members to the House, which is not germane to this appeal. They are therefore not relevant, far less decisive, and do not affect the overall finding that the Magistrate has jurisdiction to try the respondents for the offence of treating.

**Ram v The Attorney General and Others [2019] CCJ 10 (AJ) distinguished.**

**Per Blenman JA (dissenting):**

- 1. The allegations of treating which formed the basis of the complaints and summonses are very traditional examples of undue election which are dealt with by election petitions. The allegations therefore served to question whether the respondents were validly elected, or at the very least, whether they could have retained their seats on the basis that they have committed the offence of treating. As a matter of law, once there is a conviction in the Magistrates' Court for the offence of treating, disqualification of the member would inevitably follow. To say that challenges to the validity of an elected member or the ability to retain his seat are triable in the Magistrates' Court under section 59, but that the sanction of disqualification can only be imposed by the High court under section 61 would make a mockery of the jurisprudence. It would, therefore, be artificial to try to bifurcate the process by which election disputes of this nature are heard and determined. It is clear that sections 59 and 61 should be read together.**

**Sections 59 and 61 of the House of Assembly (Elections) Act Cap 2.01 of the Laws of the Commonwealth of Dominica (1951, last amended 1990) considered; Ram v The Attorney General and Others [2019] CCJ 10 (AJ) considered.**

- 2. Where it is alleged that an elected member is disqualified from sitting in the House, by virtue of some act done prior to an election, a challenge to the validity of that election must be by way of election petition in the High Court. The recent decision in Ram v The Attorney General and Others has definitively and authoritatively put this matter beyond any dispute. The courts in the independent Commonwealth Caribbean have consistently interpreted constitutional provisions which are in *pari materia* with section 40(1)(a) of the Constitution of Dominica as**

conferring exclusive and exclusionary jurisdiction on the High Court to hear allegations of pre-election infractions against members of the House. There is no difference between treating at common law and the statutory offence of treating. Therefore, sections 59 and 61 of the Act do not apply to a case where, as here, the pre-election allegations of treating are made against elected members. The correct forum to ventilate such issues is, therefore, the High Court.

Gladys Petrie and others v The Attorney-General and others (1968) 14 WIR 292 applied; William Bruce Williams v Emanuel Henry Giraudy and Eudes Bourne (1975) 22 WIR 532 applied; Ram v The Attorney General and Others [2019] CCJ 10 (AJ) applied; Russell (Randolph) et al v Attorney General of St. Vincent and the Grenadines (1995) 50 WIR 127 applied; Eugene Hamilton v Cedric Liburd and Others SKBHCVAP2005/0011; SKBHCVAP2005/0011A (delivered 3<sup>rd</sup> April 2006, unreported) applied; Julian Prevost v Rayburn Blackmore et al DOMHCV2005/0177 (delivered 14<sup>th</sup> September 2005, unreported) applied; Wingrove George v The Senior Magistrate and Another SKBHCV2018/0188 (delivered 15<sup>th</sup> January 2019, unreported) distinguished; The Attorney General of St Christopher and Nevis v Dr Denzil Douglas SKBHCV2018/0008 (delivered 2<sup>nd</sup> July 2018, unreported); SKBHCVAP2019/0007 (delivered 12<sup>th</sup> March 2020, unreported) distinguished; Section 40 (1)(a) of the Constitution of the Commonwealth of Dominica enacted as Schedule 1 of the Commonwealth of Dominica Constitution Order 1978 (S.I. 1978 No. 1027) considered; Sections 59 and 61 of the House of Assembly (Elections) Act Cap 2.01 of the Laws of the Commonwealth of Dominica (1951, last amended 1990) considered.

3. The distinction between election offences and election charges or allegations in relation to elected members is merely linguistic, denoting two sides of the same coin– the Constitution confers exclusive jurisdiction on the High Court

to hear any pre-election allegation of treating by way of election petitions. Consequently, where section 59, when read together with section 61, grants jurisdiction to the Magistrate (to try the offence of treating), in so far as it concerns elected members, it cannot coexist peacefully with the Constitution. The framers of the Constitution could never have intended for the High Court and the Magistrates' Court to have concurrent jurisdiction to hear and determine pre-election allegations of treating by elected members in relation to their ability to take up or retain their seats. Section 59, when read together with section 61, in so far as these provisions concern the pre-election infraction of treating by elected members, should therefore be read down or modified under paragraph 2 of Schedule 2 of the Constitution Order so as to bring it into conformity with section 40(1)(a) of the Constitution. Accordingly, the learned judge did not err in holding that the Magistrates' Court did not have the jurisdiction to hear the complaints against the respondents.

*Sharma v Brown-Antoine and others* (2006) 69 WIR 379 distinguished; *Eric Matthew Gairy et al v The Attorney General of Grenada* (1999) 59 WIR 174 distinguished; Section 40 (1)(a) of the Constitution of the Commonwealth of Dominica enacted as Schedule 1 of the Commonwealth of Dominica Constitution Order 1978 (S.I. 1978 No. 1027) considered; Sections 59 and 61 of the House of Assembly (Elections) Act Cap 2.01 of the Laws of the Commonwealth of Dominica (1951, last amended 1990) considered; Paragraph 2 of Schedule 2 of the Commonwealth of Dominica Constitution Order 1978 (S.I. 1978 No. 1027) applied; *Hinds v R* [1977] AC 195 applied.

4. Having found that the Magistrate did not have the jurisdiction to hear the criminal complaints, the judge was justified in quashing the summonses and complaints against the respondents. It was not open to the judge to hold otherwise since to do so would have resulted in internal

inconsistency in the decision or judgment and would have been contrary to the express dictates of the Constitution. There is therefore no basis to impugn the decision of the judge to quash the complaints and by extension, the summonses.

**Case Name: BROAD IDEA INTERNATIONAL LIMITED**

**V**

**CONVOY COLLATERAL LIMITED**

**[BVIHCMAP2019/0026]  
(TERRITORY OF THE VIRGIN ISLANDS)**

**Date: Friday 29<sup>th</sup> May 2020**

**Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice  
The Hon. Mde. Louise E. Blenman, Justice of Appeal  
The Hon. Mr. Mario Michel, Justice of Appeal**

**Appearances:**

**Appellant: Mr. Richard Morgan, QC, with him, Ms. Rosalind Nicholson**

**Respondent: Mr. Jonathan Addo and Ms. Lucy Hannett**

**Issues: Commercial appeal — Jurisdiction of High Court to grant interlocutory injunctions — Section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act — Freezing order — Whether BVI court has jurisdiction to grant a freestanding freezing order against a person against whom there is no cause of action — Whether any such jurisdiction extends to granting a freezing injunction in support of foreign proceedings to which the person is not a party — Black Swan Jurisdiction — Whether Black Swan Investment I.S.A. v Harvest View Limited et al wrongly decided — Exercise of discretion — Whether, if the learned judge had jurisdiction, he**

properly exercised his discretion to grant freezing order — Whether learned judge erred in finding that Chabra jurisdiction applied in the circumstances — Whether learned judge erred in finding risk of dissipation — Costs — Whether learned judge should have awarded appellant costs of respondent's application having failed to pursue relief

**Result and  
Reason:**

**Held:** allowing the appeal; and making the orders set out in paragraph 70 of the judgment, that:

**Per Pereira CJ, Blenman JA and Webster JA [Ag.]:**

1. It is well established that the court's jurisdiction under section 24 of the Supreme Court Act to grant a freezing order is based on there being a recognised cause of action which entitles the applicant to substantive relief against the defendant in the 3 matter. In this case, there are no allegations against Broad Idea in any claim made by Convoy, as Convoy has not filed any claim against Broad Idea either in the BVI or Hong Kong or anywhere else in the world. Convoy has only sought to freeze Broad Idea's assets as a means of safeguarding the enforcement of any money judgment it may obtain against Dr. Cho in the Hong Kong proceedings. As Convoy has no cause of action (nor has it sought to assert one) against Broad Idea itself, the learned judge had no jurisdiction to grant a freezing order against Broad Idea.

**Mareva Compania Naviera SA v International Bulkcarries SA [1975] 2 Lloyd's Rep. 509, C.A. applied; Siskina (owners of cargo lately laden on board) and others v Distos Compania Naviera SA ("The Siskina") [1979] AC 210 applied; Channel Tunnel Group LTD. and another v Balfour Beatty Construction Ltd. and others [1993] AC 334 applied; Mercedes-Benz A.G. v Leiduck [1995] 3 All ER 929 applied; Fourie v Le Roux and Others [2007] 1 All ER 1087 applied; Tassaruff Mevduati v Merrill Lynch Bank [2011] UKPC 17 applied.**

2. The majority judgment of the Privy Council in Mercedes-Benz A.G. v Leiduck, which this Court is bound to follow, and other persuasive decisions

affirm the need for substantive proceedings before a freezing order can be properly granted.

3. The decision of *Black Swan Investment I.S.A. v Harvest View Limited et al* does not provide support for the grant of freestanding interlocutory injunctions, such as the freezing order made against Broad Idea. In so far as the learned judge in *Black Swan* relied principally on the dissenting judgment in *MercedesBenz*, which suggests that there need not be substantive proceedings underlying the grant of a freezing order, this was not a course of action open to him.
4. It is apparent that, in the absence of any legislative enactment giving the courts of the BVI jurisdiction to grant interlocutory injunctions in support of foreign proceedings, it was not open to the learned judge to assume such a jurisdiction. Accordingly, the courts in the BVI have no jurisdiction to grant a freestanding interlocutory injunction in aid of foreign proceedings and the learned judge in the court below erred in so far as he seemed to have relied on *Black Swan* in arriving at his decision. It is therefore clear that *Black Swan* was wrongly decided.

*Mercedes-Benz A.G. v Leiduck* [1995] 3 All ER 929 applied; *Willers v Joyce and another* [2017] 2 All ER page 383 applied; *Fourie v Le Roux and Others* [2007] 1 All ER 1087 considered; *Yukos Cis Investments Limited et al v Yukos Hydrocarbons Investments Limited et al Territory of the Virgin Islands HCVAP2010/028* (delivered 26th September 2011, unreported) distinguished; *Black Swan Investment I.S.A. v Harvest View Limited et al BVIHCV2009/0399* (delivered 23rd March 2010, unreported) disapproved.

Per Pereira CJ and Webster JA [Ag.]:

5. Even if the learned judge had jurisdiction to grant the freezing order in the 4 circumstances, it was not open to him to consider Broad Idea as a valid non cause of action defendant (NCAD) under the Chabra jurisdiction as there is no cause of action raised by

Convoy against Dr. Cho in the BVI. There is also no sufficient basis for the conclusion that Broad Idea was merely holding assets to which Dr. Cho was beneficially entitled. Further, Convoy could not have availed itself of Chabra relief since Broad Idea's assets were not amenable to any process of execution to satisfy any judgment obtained against Dr. Cho in Hong Kong. The learned judge would therefore have been precluded from relying on the Chabra jurisdiction.

TSB Private Bank International SA v Chabra [1992] 2 All ER 245 considered; Lakatamia Shipping Company Ltd v Nobu [2014] EWCA Civ 636 considered; Linsen International Ltd. v Humpuss Sea Transport PTE Ltd. [2012] 1 BCLC 651 considered.

6. An applicant for a freezing order must provide solid evidence of a real (as opposed to fanciful) risk of dissipation. The evidence adduced by Convoy cannot be said to be solid evidence, demonstrating a real risk of dissipation. There is no doubt that Broad Idea's assets, being its shares in Town Health, are recorded as being legally and beneficially owned by it. In the absence of evidence which contradicts Broad Idea's ownership of its assets and which suggests that any judgment obtained by Convoy would be enforceable in the BVI against Broad Idea's assets, there is no basis for the learned judge's finding of a risk of dissipation. Accordingly, the learned judge would have incorrectly exercised his discretion to grant the freezing order in the circumstances, had the jurisdiction existed for him to do so.

Mitsuji Konoshita and A.P.F. Group Co. Ltd v JTrust Asia PTE Ltd. BVIHCMAP2018/0047 and BVIHCMAP2018/0020 (delivered 18th December 2018, unreported) followed; Holyoake v Candy [2017] EWCA Civ 92 considered; Prest v Petrodel Resources Ltd. [2013] 2 AC 415 considered.

Per Pereira CJ, Blenman JA and Webster JA [Ag.]:

7. As Convoy had not pursued any relief in the February application, the learned judge should have awarded Broad Idea the costs of that application.

## **APPLICATIONS AND APPEALS**

**Case Name:**

**Haynes Browne t/a Browne's Brothers  
Construction**

**v**

**Neil Sargeant, as Executor of the Estate of  
Buell Carr**

**[ANUHCVP2019/0038]  
(Antigua and Barbuda)**

**Date:**

**Monday 25<sup>th</sup> May 2020**

**Coram:**

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice  
The Hon. Mde. Louise E. Blenman, Justice of Appeal  
The Hon. Mr. Mario Michel, Justice of Appeal**

**Appearances:**

**Applicant: Ms. C. Debra Burnette and Ms. Mandi Thomas**

**Respondent: Dr. David Dorsett**

**Issues:**

**Application for leave to appeal — Part 18 of the Civil Procedure Rules — Counterclaim — Default judgment — Whether the learned Master erred in the treatment of a counterclaim as an ancillary claim under Part 18 — Whether Part 18 leaves no option for a counter claimant where no defence in response is filed — Stay of proceedings**

**Type of Order:**

**Oral Decision**

**IT IS HEREBY ORDERED THAT:**

**Result / Order:**

- 1. The applicant is granted leave to appeal to the Court of Appeal against the Order of the Master made on 11<sup>th</sup> December 2019.**

2. A stay of the proceedings is granted in the court below pending the determination of the appeal.
3. The applicant to file its appeal in accordance with the rules of court.
4. The costs of this application will be costs in the appeal.

**Reason:**

The applicant applied for leave to appeal against the order of the Master on 11<sup>th</sup> December 2019 and for a stay of the proceedings pending the determination of the appeal. Under the relevant background facts in the court below, the respondent had brought proceedings against the appellant by writ of summons claiming damages for breach of contract. The appellant had filed a defence along with a counterclaim, however no defence was filed by the respondent to the counterclaim. The appellant thereafter applied for judgment in default of defence to his counterclaim which was entered and served on the respondent. The respondent then applied to set aside the judgment in default on the basis that entry of a default judgment on a counterclaim is contrary to the Civil Procedure Rules 2000. The learned Master agreed and accordingly ordered that the default judgment be set aside.

Counsel for the applicant, Ms. Burnette, argued that while it is recognized that there may have been some constraints within the confines of Part 18 of the Civil Procedure Rules on the part of the Master, the appeal raises a real issue within the wider scope of the Civil Procedure Rules. On this basis counsel submitted that leave ought to be granted so that this issue could be properly ventilated. Counsel did not dispute the fact that Part 18 clearly indicates that there should be no default judgment on a counterclaim, however, she argued that such provision in Part 18 which treats the counterclaim as an ancillary claim is irreconcilable within the whole scope of Part 18. She concluded that in essence, Part 18 has stopped short of saying what exactly a counterclaimant ought to do when there is no defence and therefore that lacuna ought to be properly addressed by this Court.

Ms. Burnette further argued that the stay of proceedings was necessary since if no stay was granted then the

respondent would be free to commence enforcement proceedings in circumstances where the counterclaim may have occasioned as set-off in regard to damages on the original claim. Counsel contended that had it not been for the setting aside of the applicant's default judgment, he would have liquidated his debt to the respondent and has therefore lost the benefit of his judgment. On the above bases and the applicant's real prospect of success on appeal, counsel submitted that the matter ought to be stayed until the issues raised on the intended appeal are addressed by the Court.

In response to the application for a stay, Dr. Dorsett submitted that there was no prospect of success in the intended appeal since if the Master's decision was correct under the Rules, it would mean that the decision to set aside the default judgment was the correct decision and no other decision could possibly be entertained. Dr. Dorsett further indicated further that CPR 18.12 does make a provision for any failure to file a defence to an ancillary claim and therefore there is no issue where a counterclaim is treated as an ancillary claim. He concluded therefore that even where the Rules, as written, require revision, if the integrity of the Master's decision cannot be impeached because she did as she was obliged to do as a matter of law, it means that the intended appellant has no realistic prospect of success and therefore no stay ought to be granted.

The Court was of the unanimous view that, in the circumstances, the application had met the required threshold and accordingly the applicant was granted leave to appeal to the Court of Appeal against the order of the Master made on 11<sup>th</sup> December 2019. In circumstances where the applicant also sought a stay of the proceedings, the Court, having considered all the circumstances of this matter, was of the view that a stay ought to be granted of the proceedings in the court below pending the determination of the appeal.

**Case Name:**

**Shaista Trading Company  
Limited d.b.a. Diamond Republic**

**V**

**First Caribbean International Bank (Barbados)  
Ltd**

**[ANUHCVAP2018/0021]  
(Antigua and Barbuda)  
(On Paper)**

**Date:** Monday 25<sup>th</sup> May 2020

**Coram:** The Hon. Dame Janice M. Pereira, DBE, Chief Justice  
The Hon. Mde. Louise E. Blenman, Justice of Appeal  
The Hon. Mr. Mario Michel, Justice of Appeal

**Appearances:**

**Appellant:** Ms. Andrea Smithen  
**Respondent:** Ms. Eleanor Solomon

**Issues:** Civil Appeal — Application to dismiss appeal — Application to extend time to file record of appeal — Part 62 of the Civil Procedure Rules — Whether appeal should be dismissed where appellant failed to file and serve the record of appeal and skeleton arguments within the time limit stipulated under Part 62 — Whether the appellant should be granted an extension of time to file and serve the record of appeal and skeleton arguments

**Type of Order:** Oral Decision

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

1. The application to dismiss the appeal for the failure to file the Record of Appeal is refused.
2. The application to extend the time to file the Record of Appeal is granted.
3. The Record of Appeal filed on 11<sup>th</sup> February, 2020 is deemed duly filed.
4. The skeleton submissions filed on 27<sup>th</sup> February, 2020 is deemed duly filed.

5. The respondent shall file its written submissions in support and in response to the appeal on or before 15<sup>th</sup> September, 2020.
6. There is no order as to costs in relation to the application to dismiss the appeal.
7. Costs to the respondent in relation to the application for extension of time, pursuant to rule 65.11(3)(b), in the sum of \$1000.00 to be paid on or before 3<sup>rd</sup> September, 2020.

**Reason:**

The Court noted that there are no sanctions in the Civil Procedure Rules (CPR) for the failure to comply with CPR 62.12 in relation to the filing of the Record of Appeal out of time, and therefore the Court has a discretion to grant an extension. The Court further examined the overriding objective of the matter and considered that it was an appeal which was regularly filed, although the Record of Appeal and written submissions were filed late.

The Court also considered Blackstone's 2009 Civil Practice at paragraph 46.6, page 607 which states: *"The main concept in the overriding objective ... is that the primary concern of the court is doing justice. Shutting a litigant out through a technical breach of the rules will not often be consistent with this, because the civil courts are established primarily for deciding cases on their merits, not in rejecting them through procedural default."*

The Court was of the view that to dismiss the appeal for those breaches of the rules would be disproportionate a response to the breaches which have occurred and further took the view that there would not be any prejudice to the respondent which could not be cured by a cost order in relation to the breach of the rules and the delay. Accordingly, the Court refused the application to dismiss the appeal for the failure to file the Record of Appeal.

**Case Name:**

**Leewind Paints (1980) Limited**

**v**

**Cosmos Phillips Jr.**

**[ANUHCVAP2019/0004]  
(Antigua and Barbuda)**

**Date:** Monday 25<sup>th</sup> May 2020

**Coram:** The Hon. Dame Janice M. Pereira, DBE, Chief Justice  
The Hon. Mde. Louise E. Blenman, Justice of Appeal  
The Hon. Mr. Mario Michel, Justice of Appeal

**Appearances:**

**Appellant:** Mr. Hugh Marshall and Ms. Kema Benjamin

**Respondents:** Mr. Lawrence Daniels and Mr. Pete-Semaj McKnight  
and Mr. Wendel Robinson for the first respondent  
Ms. C. Debra Burnette and Ms. Mandi Thomas for the  
counter-appellant/second respondent

**Issues:** Civil appeal — Interpleader proceedings — Charged  
lands — Proceeds of the sale of property — Whether the  
learned judge erred in dealing with the interpleader  
application summarily — Section 76 of the Registered  
Land Act Cap 374, Act No. 17 of 1975, Laws of Antigua  
and Barbuda — Costs

**Type of Order:** Oral Judgment

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

1. The appeal and the counter appeal is allowed and the order of the court below is hereby set aside in its entirety, on the basis that the learned judge erred in dealing with the interpleader application summarily and without carrying out an analysis for determining the claims as between the appellant, Leewind Paints as chargor of the lands sold by the interpleading party, the Royal Bank of Canada as chargee, having exercised its power of sale in respect of the charged lands on the one hand, and the first respondent on the other.

2. The Court considers that it is in just as good a position as the trial judge to treat with the interpleader application and to give directions for the trial of the competing claims as between the chargor, Leewind Paints, the appellant herein, and the estate of Mr. Cosmos Phillips (hereinafter called “the Estate”), which claims proceeds in respect of the said sale of the chargor’s property under a charge in favour of the Estate.
3. The Court takes into account section 76 of the Registered Land Act Cap 374, Act No. 17 of 1975, Laws of Antigua and Barbuda, and hereby gives the following directions for the determination of the competing claims:

  - i. the issue as to the entitlement of the surplus of the proceeds of sale held by the Royal Bank of Canada shall be tried as between the appellant chargor, Leewind Paints, and the Estate whereby the Estate shall be the claimant and the chargor, Leewind Paints, shall be the defendant. The bank shall be named as a respondent, as the interpleading party, to the proceedings.
  - ii. the claimant shall file and serve a claim form and statement of claim by 9th June, 2020 in respect of their claim to the surplus of the proceeds of sale.
  - iii. the defendant shall file and serve its defence to the claim by 24th June, 2020.
  - iv. thereafter, the case shall be managed by a master or judge with a view to trial of the competing claims.
4. The Royal Bank of Canada is entitled to its costs in the court below and on this appeal to be borne by the appellant, Leewind Paints, to be assessed if not agreed within twenty-one (21) days, provided that the costs on appeal shall not be more than two-thirds of the assessed costs in the court below.

**Case Name:**

**Lux Locations Limited**

**v**

**Yida Zhang**

**[ANUHCVP2020/0010]  
(Antigua and Barbuda)**

**Date:**

**Tuesday, 26<sup>th</sup> May 2020**

**Coram:**

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal  
The Hon. Mde. Gertel Thom, Justice of Appeal  
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**

**Appearances:**

**Applicant:**

**Mr. Thomas Roe, QC, with him Mr. Andrew O’Kola**

**Respondent:**

**No appearance**

**Issues:**

**Application for leave to appeal — Application for an  
adjournment of application for leave to appeal**

**Type of Order:**

**Adjournment**

**[Oral Delivery]**

**Result / Order:**

**IT IS HEREBY ORDERED THAT:**

**The application for leave to appeal is adjourned  
to the next sitting of the court in the state of St.  
Lucia during the week commencing 6<sup>th</sup> July 2020.**

**Reason:**

**The applicant sought an adjournment of the application  
for leave to appeal the orders of Robertson J on an  
interim application. Since the filing of the application  
seeking leave to appeal, Robertson J delivered her full  
judgment and therefore the applicant sought to  
consolidate the intended appeal with an appeal against  
the substantive matter. The Court, having considered  
the submissions of the applicant, was of the view that  
the adjournment ought to be granted.**

**Case Name:**

**The Queen**

**v**

**Rochell Jarvis**

**[ANUHCRAP2017/0008]  
(Antigua and Barbuda)**

**Date:**

**Tuesday 26<sup>th</sup> May 2020**

**Coram:**

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal  
The Hon. Mde. Gertel Thom, Justice of Appeal  
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**

**Appearances:**

**Appellant:**

**Mr. Anthony Armstrong, Director of Public  
Prosecutions and Mrs. Shannon Jones-Gittens and Mr.  
Curtis Cornelius**

**Respondent:**

**Mr. Lawrence Daniels**

**Issues:**

**Criminal appeal — Appeal against sentence —  
Fraudulent conversion — Sections 27(b) and 47(3)(b) of  
the Larceny Act Cap 241 of the Laws of Antigua and  
Barbuda — Section 2(2) of the Probation of Offenders  
Act Cap 345 of the Laws of Antigua and Barbuda —  
Section 47 Criminal Procedure Act Cap 117 of the Laws  
of Antigua and Barbuda — Suspended sentence —  
Whether the learned trial judge erred by imposing a  
suspended sentence — Whether the sentence was  
manifestly lenient — Compensation**

**Type of Order:**

**Oral Judgment**

**Result / Order:**

**IT IS HEREBY ORDERED THAT:**

**1. The appeal is allowed.**

2. The sentence ordered by the learned judge is set aside.
3. The sentence imposed by the Court is that the Respondent will pay to the virtual complainant, by making payments into the court office, of the sum of \$37,000 as follows:
  - i. The first payment of \$3000.00 on or before the 30th September, 2020.
  - ii. The respondent shall make monthly payments of \$1000.00 on the last working day of each month commencing on the last working day of the month of October 2020, such payments to continue until the total amount of \$37,000 is paid in full.
4. In default of any payment for a period of fourteen (14) days after the due date, there will be a sentence of imprisonment for the respondent of six (6) months.
5. All payment are to be made into the court office of the High Court.

**Reason:**

In this appeal, the respondent was convicted of fraudulent conversion of property under false pretences, an offence which caused the virtual complainant the loss of some \$37,000.00. The respondent was sentenced by the judge to 12 months' imprisonment and the judge suspended the sentence for 18 months. The Director of Public Prosecutions appealed against the sentence on the grounds that the judge had no power to impose a suspended sentence and that in any event the sentence was manifestly lenient.

The Court heard submissions from counsels on both sides in this matter and the Court was minded to impose a sentence involving the payment of compensation to the virtual complainant.

The appeal was accordingly allowed and the sentence ordered by the learned judge was set aside.

**Case Name:**

**The Queen**

**V**

**Shane Williams**

**[ANUHCRA2018/0011]  
(Antigua and Barbuda)**

**Date:** Tuesday, 26<sup>th</sup> May 2020

**Coram:** The Hon. Mr. Davidson K. Baptiste, Justice of Appeal  
The Hon. Mde. Gertel Thom, Justice of Appeal  
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

**Appearances:**

**Appellant:** Mr. Anthony Armstrong, Director of Public Prosecutions and Mrs. Shannon Jones-Gittens

**Respondent:** In person

**Issues:** Criminal appeal — Appeal against sentence — Unlawful sexual intercourse — Suspended sentence — Whether the learned judge erred when he imposed a suspended sentence — Whether the sentence was manifestly lenient — Whether it was improper for the learned judge to give a Goodyear indication where a plea of not guilty was entered — Whether the court is seized with jurisdiction to make a determination on conviction where the Director of Public Prosecution appeals against sentence and where the convicted has not appealed

**Type of Order:** Oral Judgment with Written Reasons to follow

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

1. The appeal against sentence is allowed to the extent that the sentence which was imposed is substituted by a sentence of seven (7) days being the time served on remand.
2. The court to give written reasons for its decision in this matter.

**Reason:**

This was an appeal by the Director of Public Prosecutions against the sentence imposed by the learned judge in the court below. The grounds of appeal were that the learned judge erred when he imposed a suspended sentence, and that the sentence imposed was manifestly lenient given all the circumstances of the case. The learned judge imposed a sentence in respect of the conviction of Shane Williams for the offence of sexual intercourse with a female under the age of 14 which arose from a guilty plea from the respondent.

The sentence imposed was two years imprisonment suspended for one year. On the basis of the conclusion of the Director of Public Prosecutions in his written submissions, the Court was in support of the appeal against sentence. The Court, having heard submissions from the appellant agreed that the judge erred in law when he imposed a suspended sentence and that the sentence was manifestly lenient. However, looking at all the circumstances of the case, the Court was of the view, and it accepted the DPP's view as articulated in his written submissions and his conclusion, that the hearing before the trial judge was beset with difficulties and that errors occurred which were not trifling or inconsequential, but were great. To summarize, these errors concerned matters including: the imposition of a suspended sentence, the unduly lenient sentence, the offering and initiation of the Goodyear Indication, and the appearance of pressure to plead guilty.

The Court considered the concerns raised by the Director of Public Prosecutions and noted the manner in which the matter proceeded in the court below, where the respondent had indicated that he was not guilty, that a Goodyear indication was given, and that he was deprived, in essence, of the right of trial, a defence and possibly being found not guilty. The Court also noted that there was no appeal against conviction, however, the Court was of the view that in the interest of justice and fairness, and because of the profound issues raised by the Director of Public Prosecutions, it was incumbent that a certain course be adopted.

The Director of Public Prosecutions quite properly suggested that in view of the Court's concern in the matter and in light of the fact that there was no appeal against conviction by Shane Williams that the appropriate disposal of this matter would be to allow the appeal against sentence to the extent that the sentence which was imposed is substituted to the seven (7) days the respondent spent on remand. The Court further proposed to give written reason for its decision in this matter.

**Case Name:**

**Luis Hernandez**

**v**

**The Commissioner of Police**

**[ANUHCRA2016/0004]  
(Antigua and Barbuda)**

**Date:**

**Tuesday 26<sup>th</sup> May 2020**

**Coram:**

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal  
The Hon. Mde. Gertel Thom, Justice of Appeal  
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**

**Appearances:**

**Appellant:**

**Mr. Cosbert Cumberbatch**

**Respondent:**

**Mrs. Shannon Jones-Gittens and Mr. Curtis Cornelius**

**Issues:**

**Criminal Appeal — Appeal against sentence — Battery — Whether the sentence is manifestly excessive — Section 3(6) of Criminal Records (Rehabilitation of Offenders) Act 2013 — Whether the magistrate erred by taking into account two matters as previous convictions where no such convictions existed**

**Type of Order:**

**Oral Judgment**

**Result / Order:**

**IT IS HEREBY ORDERED THAT:**

**The appeal is dismissed and the sentence is affirmed.**

**Reason:**

**This was an appeal against sentence where the magistrate imposed a sentence of six (6) months, the appellant having pleaded guilty to the offence of battery.**

**The appellant appealed on the ground that the sentence was manifestly excessive. Learned counsel, Mr. Cosbert Cumberbatch, submitted that the magistrate erred in that she took into account two matters as previous convictions where there were no convictions. Counsel referred to the reasons of the magistrate where she referred to a matter where an order was made that the appellant was reprimanded and discharged. Learned counsel submitted that in those circumstances, where an order is made for reprimand and discharge, there is no conviction. Secondly, in relation to the second matter, the police had not prosecuted the two charges of battery and so the magistrate erred in taking that into account in imposing the sentence of six (6) months. Learned counsel, Mrs. Jones- Gittens for the Crown conceded and the Court agreed that the magistrate erred in taking into account the two charges of battery which were not prosecuted by the police. In relation to the matter where an order was made for reprimand and discharge, Mrs. Jones- Gittens referred the Court to Section 3(6) of the Criminal Records (Rehabilitation of Offenders) Act 2013, which provides among other things, that where an order is made on conviction of absolute or conditional discharge, it would be treated as a conviction. The Court was of the view that based on the very clear provision of the legislations, that the magistrate did not err in taking into account the guilty plea for the charge of battery on the 24<sup>th</sup> May 2014, for which the appellant was reprimanded and discharged.**

**The Court also considered the aggravating facts in this matter and was of the view that the matter involved a planned attack in the car park of the business premises of the virtual complainant. It was a wholly unprovoked attack for which the complainant had to get medical attention. The Court also noted that the only mitigating factor was that the appellant pleaded guilty to the**

offence of battery. In those circumstances, the Court found that the sentence of six months was not manifestly excessive. Accordingly, there was no basis for this Court to interfere with the sentence imposed by the magistrate. The Court therefore dismissed the appeal and upheld the sentence.

**Case Name:**

**Vern Small**

**v**

**The Queen**

**[ANUHCRAP2017/0006]  
(Antigua and Barbuda)**

**Date:**

**Wednesday 27<sup>th</sup> May 2020**

**Coram:**

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice  
The Hon. Mde. Louise E. Blenman, Justice of Appeal  
The Hon. Mr. Mario Michel, Justice of Appeal**

**Appearances:**

**Appellant:**

**Mr. Cosbert Cumberbatch**

**Respondent:**

**Mrs. Shannon Jones-Gittens and Mr. Curtis Cornelis**

**Issues:**

**Criminal appeal — Appeal against conviction and sentence — Unlawful sexual intercourse — Rape — Fair trial — Whether the appellant was put to the jury in a fair and balanced way — Whether the verdict was unsafe and unsatisfactory — Whether there was any doubt that appellant committed the offence for which he was convicted — Whether the appellant was prejudiced at trial where one of the jurors knew the virtual complainant — Whether the sentence against the appellant was excessive**

**Type of Order:**

**Oral Judgment**

**Result / Order:**

**IT IS HEREBY ORDERED THAT:**

1. The appeal against the conviction is dismissed and the conviction is affirmed.
2. The original grounds of appeal are dismissed as having been abandoned.
3. The sentence is varied to fifteen (15) years.

**Reason:**

The appellant appealed on two grounds, one in respect of his conviction and the other in respect of his sentence. In respect of his conviction the appellant complained that an irregularity occurred during the course of the trial and that the irregularity rendered the verdict of the jury unsafe, being unfair in the circumstances; mainly in terms of an allegation of bias in respect of a juror who had indicated, during the course of the trial, that she knew the virtual complainant. It did not appear that the juror knew the virtual complainant by name, however when the virtual complainant appeared in the court room, the juror realized that she knew her. It was on this basis that the appellant argued that the learned judge did not ask sufficient questions or carry out a sufficient investigation to satisfy himself that the juror, nonetheless, could continue to serve in respect of the trial.

The Court considered the facts and circumstances as disclosed on the record; particularly the exchange between the learned trial judge and the juror concerned appearing at pages 65-66 of the record. Having considered this exchange the Court took the view that the juror was indicating to the learned trial judge that she indeed knew the virtual complainant, however there was no indication that they had some very close or personal relationship. Importantly the juror indicated that though she knew the virtual complainant, it would not affect her in anyway in relation to rendering a just verdict in the matter. The juror had gone further to indicate to the court below, at page 66 of the record, that she knew nothing about the case and in fact did not know that the virtual complainant had a case.

The Court was of the view that when all the above matters were taken together, it was clear that the learned trial judge had carried out a sufficient investigation and that he was satisfied, as was this Court, that it would not have had the effect of rendering

the trial unfair and being viewed as the juror having an inability to render a just verdict according to the evidence in the case. Accordingly, the Court considered that there was no merit in that ground of appeal and the appeal against the conviction ought to be dismissed.

The appellant, by his counsel, indicated that he did not intend to pursue the original grounds of appeal in relation to his conviction and they were accordingly also dismissed as having been abandoned.

In relation to the sentence the learned trial judge looked at the circumstances surrounding the commission of the offence including the mitigating factors and the aggravating factors. He considered there to be a number of aggravating factors and that there were hardly any mitigating factors. When the judge looked at circumstances in respect of the offender, he considered that there were a number of aggravating factors and not very much in the line of mitigating factors, save that he recorded that the appellant had expressed remorse, albeit after having been convicted by the verdict of the jury. After taking these circumstances into account, and after considering that this was a case where general deterrence as well as individual deterrence was necessary, the learned trial judge sentenced the appellant to 20 years imprisonment. What was unclear in the judge's reasoning on sentence is that he had not indicated what the starting point for his evaluation process was, and indeed how he arrived at the sentence of 20 years in conducting that evaluation process.

The Court was of the considered view that the appropriate starting point would be 12 years in all the circumstances, given the nature of the offence, as well as the fact that this was an offence involving a minor who was 14 years old at the time of the offence, and an appellant who at the time of the offence was 40 years old, and given that disparity, that there was also evidence that the appellant knew the virtual complainant to be a school girl. The Court further considered the aggravating features of the offence, including the fact that the appellant could be said to have abducted the virtual complainant because she only accepted a ride from the appellant due to the sun being hot, there being no available bus and on his

agreement to drop her off at the mall where she intended to go. The appellant instead passed the mall and took the virtual complainant to a remote location along a sparsely populated dirt road where he committed the offence after exerting some violence on the virtual complainant evidence by her attempt to fight him off. The Court also viewed that the virtual complainant could also be said to have been somewhat vulnerable, in that she had suffered a neck injury and was wearing a neck brace. These are all factors which aggravated the offence and the Court could not find any features which mitigated the offence.

As it relates to the aggravating factors in respect of the offender, the Court recognized that there were a number of aggravating features, including: the fact that the appellant had at least one prior conviction of a similar nature and that he committed this offence while he was on bail in respect of another offence. There was nothing in terms of mitigation, for example that the appellant himself lacked any maturity of any kind. Therefore, the Court considered imposing a sentence in the region of 16 years, however the Court had regard also to the fact that the appellant did express some remorse, albeit late. In applying the totality principle as well as the proportionality principles, having regard to all the factors, the Court was of the view that a sentence of 15 years fit and met the justice of this case. In that regard the Court considered that the sentence of 20 years was unduly excessive in the circumstances of this case. Accordingly, the sentence of the Court was 15 years, reduced from the 20 years imposed by the learned trial judge.

The Court also considered that the 9 months which the appellant spent on remand in respect of this offence, ought to be deducted from the sentence of 15 years. The appellant was given no discount however as the matter involved a full trial and there was no guilty plea to be considered. Accordingly, the conviction was affirmed, and the sentence varied to 15 years based on the reasons given.

Case name:

**Stuart A. Lockhart**

**v**

**[1] Valentina Nonini  
[2] Maurizio Pandini  
[3] The Disciplinary Committee**

**[ANUHC VAP2019/0004]  
(Antigua and Barbuda)**

**Date:** **Wednesday 26<sup>th</sup> May 2020**

**Coram:** **The Hon. Dame Janice M. Pereira, DBE, Chief Justice  
The Hon. Mde. Louise E. Blenman, Justice of Appeal  
The Hon. Mr. Mario Michel, Justice of Appeal**

**Appearances:**

**Appellant:** **Mr. Leslie Thomas, QC, with him, Dr. David Dorsett**

**Respondents:** **No appearance**

**Issue:** **Civil Appeal — Section 15 (8) of the Constitution of Antigua and Barbuda — Legal Professions Act 2008 — Procedural fairness of hearing — Breach of natural justice — Whether the determinations of the Disciplinary Committee were the product of a fair hearing — Whether the Panel of the Disciplinary Committee erred by excluding the appellant from the disciplinary hearing**

**Type of Order:** **N/A**

**Result / Order** **[Oral Delivery]**

**IT IS HEREBY ORDERED THAT:**

**The judgment is reserved.**

**Case Name:** **Washington Emanuel Bramble**

**V**

**[1] The Commissioner of Police  
[2] Dexter Wason**

**Magistrate for District “A”**

**[ANUMCRAP2017/0002]  
(Antigua and Barbuda)**

**Date:** Wednesday 27<sup>th</sup> May 2020

**Coram:** The Hon. Dame Janice M. Pereira, DBE, Chief Justice  
The Hon. Mde. Louise E. Blenman, Justice of Appeal  
The Hon. Mr. Mario Michel, Justice of Appeal

**Appearances:**

**Appellant:** In Person

**Respondents:** Mr. Anthony Armstrong, Director of Public Prosecutions

**Issues:** Criminal appeal — Appeal against conviction and sentence — Service of submissions

**Type of Order:** Adjournment

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

**IT IS HEREBY ORDERED THAT:**

1. The respondent shall serve the appellant with their written submissions on Thursday 28<sup>th</sup> May, 2020 at 10 a.m. in the public parking lot of the Education Department of the Government of Antigua as agreed to by the appellant.
2. The appellant shall have thirty (30) days that is by Monday 29<sup>th</sup> June, 2020, to file and serve on the Respondent submissions in reply.
3. The hearing of the appeal is hereby adjourned to the next sitting of the court scheduled for the week commencing 28<sup>th</sup> September, 2020.

**Reason:** The Court was of the view that in circumstances where the appellant had not yet been served with the respondent’s written submissions, the hearing of the appeal was unable to proceed at that time. The Court also considered that in light of the issues faced by the

Director of Public Prosecutions in serving written submissions on the appellant, directions were also necessary in order to effect such service.

**Case Name:** **Gervon Archibald**

**v**

**[1] Claudette Barnes**  
**[2] The District Magistrate**

**[ANUMCVAP2013/0004]**  
**(Antigua and Barbuda)**

**Date:** **Wednesday 27<sup>th</sup> May 2020**

**Coram:** **The Hon. Dame Janice M. Pereira, DBE, Chief Justice**  
**The Hon. Mde. Louise E. Blenman, Justice of Appeal**  
**The Hon. Mr. Mario Michel, Justice of Appeal**

**Appearances:**

**Appellant:** **In person**

**Respondents:** **Ms. Sherrie-Ann Bradshaw for the first respondent**

**Issues:** **Civil appeal — Judgment in default — Judgment debt — Discontinuance of appeal**

**Type of Order:** **Oral Judgment**

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

**The appeal having been discontinued, the judgment debt having been fully paid and satisfied is accordingly dismissed.**

**Reason:** **The Court was of the view that in circumstances where the appellant had already paid and satisfied the judgment debt, there remained no substance to the appeal. The appellant also having clarified his misunderstanding of the court process, agreed that there was nothing further to pursue in the appeal.**

Accordingly, the appeal was dismissed having been discontinued.

**Case name:** **Paul Chet Green**

**v**

**[1] Omari Samuel**  
**[2] Ansley Charles**

**[ANUHCVP2018/0019]**  
**(Antigua and Barbuda)**

**Date:** **Thursday 28<sup>th</sup> May 2020**

**Coram:** **The Hon. Mr. Davidson K. Baptiste, Justice of Appeal**  
**The Hon. Mde. Gertel Thom, Justice of Appeal**  
**The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**

**Appearances:**

**Appellant:** **Mr. Hugh Marshall Jr.**

**Respondent:** **Ms. Sherrie-Ann Bradshaw for the first respondent**  
**No appearance for the second respondent**

**Issue:** **Interlocutory appeal — Default judgment — Section 7 (1) of the Motor Vehicles Insurance (Third-Party Risks) Act (Cap.288) — Whether the insurance company acted as agent of the appellant — Whether release documents from insurance company evidence an intention to settle claim against appellant — Limitation of liability — Satisfaction and discharge of settlement agreement**

**Type of Order:** **N/A**

**Result / Order** **[Oral Delivery]**

**IT IS HEREBY ORDERED THAT:**

**The judgment is reserved.**

**Case Name: Flat Point Development Limited**

**v**

**Mary Dooley**

**[ANUHCVAP2018/0033]  
(Antigua and Barbuda)**

**Date: Thursday, 28<sup>th</sup> May 2020**

**Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal  
The Hon. Mde. Gertel Thom, Justice of Appeal  
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**

**Appearances:**

**Appellant: Unrepresented, Ms. Abiola Kienesberger in person as  
representative of the Appellant Company**

**Respondent: Ms. Amina Byron**

**Issues: Civil appeal — Assessment of damages — Whether the  
learned Master erred in law in considering one property  
as a comparative to the appellant's property — Whether  
the learned Master erred in law in awarding the  
respondent a fair rental value daily rate of US\$590.00 —  
Whether the learned Master erred in law in awarding the  
respondent any damages — Whether the learned  
Master failed to consider all relevant factors in  
determining a fair rental value including rental rates of  
other properties near to the appellant's property**

**Type of Order: Oral Judgment**

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

1. The appeal is allowed to the extent that amount for fair market value is reduced from XCD \$2,404,456.50 to XCD \$1,602,000.00.
2. Flat Point shall pay to the claimant the said XCD \$1,602,000.00 representing the fair rental value of the unit for the period of five (5) years.
3. The order for costs in the court below is varied to the extent that Flat Point shall pay to the claimant Ms. Dooley, prescribed costs on the amount of XCD \$1,602,000.00.
4. Costs of the appeal to Flat Point in an amount assessed at two-thirds of the amount awarded in the lower court, based on the revised figure of XCD \$1,602,000.00.
5. The award of interest in the lower court remains.

**Reason:**

In 2011, Ms. Dooley, the respondent, purchased one of the units in a development at Emerald Cove. Flat Point Development Limited, the appellant, did not carry out the transfer of the property to the respondent and she filed a claim in the High Court for breach of contract and to set aside the contract and for the return of the purchase money.

The claim was heard by Cottle J. The learned judge ordered Flat Point to transfer the unit to Ms. Dooley and to pay her damages for being kept out of the unit, such damages to be assessed on the basis of the fair rental value of the unit for the time that she was kept out of possession. Fair rental value means the amount that Ms. Dooley could have reasonably expected to receive in rent for the property. Flat Point appealed against the judgment of Cottle J, and the Court of Appeal dismissed that appeal, affirming the judgment of Cottle J in its entirety.

Thereafter, damages were assessed by the Master of the High Court. The Master assessed the damages by determining the fair rental value of the unit that is, the comparable method, and applied the resulting value to the 5-year period that the respondent was kept out of possession. This resulted in an award of

**XCD\$2,404,456.50 in damages. The Master also awarded interest and prescribed costs.**

**Flat Point then appealed against the Master's decision, which was the instant appeal before this Court. The thrust of this appeal related to the method of calculation used by the Master to assess the fair rental value of the unit. The appellant complained that the Master failed to consider relevant matters and erred in her calculation of the fair rental value of the unit.**

**The learned Master, in using the comparable method showed the Non Such Bay Resort Development which is a five star all-inclusive resort. The Master examined the hotel rates for that resort. The Master arrived at the rate of US\$590.00 by looking at the rental rates for the year and noted that there are different rates, starting from the deluxe rate two-bedroom unit at US\$1,595.00 and reduced that to arrive at the US\$590.00. The Master took into account the seasonal issue of the amount of rentals but also the difference between the Non Such Bay Resort and the unit that is the subject of this appeal thereby arriving at US\$590.00 per night.**

**The Court was of the view that the Master erred in principle in carrying out the assessment. The Court considered that a better way of assessing the rate was to choose the rate of US\$590.00 as a starting point and then examine the differences between Emerald Cove and Non Such Bay Resort. The Court found that there is no dispute that the Non Such Bay Resort carries very significant amenities, in that it is all inclusive, and has amenities such as: daily maid service, free Wi-Fi, complimentary transfer to and from the airport, concierge services, kids club activities, watersport activities, kite surfing and wind surfing. The unit at Emerald Cove does not have amenities close to the ones listed at Non Such Bay Resort. The unit at Emerald Cove is not an all-inclusive arrangement and the Court was therefore of the view that the Master should have taken this into account when she arrived at the starting point of US\$590.00 per night.**

**The Court took these matters into consideration, and also noted that other rental properties in the general area of Emerald Cove start as low as US\$300.00 per**

night. In exercising the assessment of the matter, the Court found that the Master erred in principle.

Therefore, having considered other properties in the area and differences between the two properties, the Court found that a fair rental value per night would be US\$400.00. Applying US\$400.00 to 300 nights per year, the Court found that the damages are to be assessed at US\$600,000.00 [XCD\$1,602,000.00]. Accordingly, the appeal was allowed to the extent that the fair rental value was reduced from XCD \$2,404,456.50 to XCD \$1,602,000.00.

**Case Name:** **Board of Education**

**v**

**D. Giselle Isaac**

**[ANULTAP2018/0009]  
(Antigua and Barbuda)**

**Date:** **Friday 29<sup>th</sup> May 2020**

**Coram:** **The Hon. Dame Janice M. Pereira, DBE, Chief Justice  
The Hon. Mde. Louise E. Blenman, Justice of Appeal  
The Hon. Mr. Mario Michel, Justice of Appeal**

**Appearances:**

**Appellant:** **Dr. David Dorsett**

**Respondent:** **Mr. Justin L. Simon, QC**

**Issues:** **Industrial appeal — Leave to appeal to Her Majesty in Council — Application to withdraw the motion**

**Type of Order:** **Oral Decision**

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

**The notice of motion filed on 20<sup>th</sup> April 2020 is withdrawn with the leave of the court.**

**Reason:** The Court considered that the appellant had filed an application to withdraw the notice of motion for leave to appeal to Her Majesty in Council, and accordingly leave of the Court was granted for the withdrawal of the motion.

**Case Name:** **Anthony Browne**

**v**

**The Commissioner of Police**

**[ANUMCRAP2012/0005]  
(Antigua and Barbuda)**

**Date:** **Friday, 29<sup>th</sup> May 2020**

**Coram:** **The Hon. Dame Janice M. Pereira, DBE, Chief Justice  
The Hon. Mde. Louise E. Blenman, Justice of Appeal  
The Hon. Mr. Mario Michel, Justice of Appeal**

**Appearances:**

**Appellant:** **Mr. Justin L. Simon, QC**

**Respondent:** **Mr. Anthony Armstrong, Director of Public Prosecutions**

**Issues:** **Criminal Appeal — Appeal against conviction and sentence — Jurisdiction of the Magistrate to try the offence — Whether the Magistrate’s decision was unreasonable — Whether the decision was erroneous in law — Whether the sentence was unduly severe**

**Type of Order:** **Oral Judgment**

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

**1. The appeal is allowed.**

2. The conviction and sentence are quashed on the basis that the Magistrate had no jurisdiction to try the matter.

**Reason:**

The Director of Public Prosecutions indicated that this appeal was in respect of Mr. Anthony Brown who was convicted and sentenced by the Chief Magistrate in circumstances where there were two complainants in respect of the same offence. When the matter was appealed previously, the appeal was brought before the Court in respect of only one of the complainants. That appeal was allowed, and the conviction and sentence quashed on grounds that the Magistrate had no jurisdiction to try the matter. The appellant's counsel having failed to list both matters together in the previous appeal; it was then necessary for this appeal to be pursued in respect of the other complainant. The Director of Public Prosecutions indicated he had no intention to oppose the appeal in light of the Court's previous disposition where the issues were identical and asked that a similar order be made therefore as was made in the previous appeal.

The Court was of the view that in the circumstances the appeal ought to be allowed and the conviction and sentence quashed on the basis that the Magistrate had no jurisdiction to try the matter.

**Case Name:**

**Joseph W. Horsford**

**v**

**Geoffrey Croft  
[ANUHCVP2018/0045]  
(Antigua and Barbuda)**

**Date:**

**Friday, 29<sup>th</sup> May 2020**

**Coram:**

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice  
The Hon. Mde. Louise E. Blenman, Justice of Appeal  
The Hon. Mr. Mario Michel, Justice of Appeal**

**Appearances:**

**Appellant:**

**In Person**

**Respondent:** Mr. Sylvester Carrott

**Issues:** Civil appeal — Assault and battery — Whether the learned judge misapplied the principles of assault and battery — Whether the learned judge failed to properly assess and evaluate the evidence that was led — Whether learned judge failed to make important findings of fact and to apply the relevant principles of law to those findings of fact — Whether the learned judge should have placed heavy reliance on the medical report

**Type of Order:** Oral Judgment

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

1. The appeal is allowed.
2. The decision in the lower court is set aside in its entirety.
3. The claim is remitted for a retrial in the High Court.
4. Costs to the appellant.
5. The costs in the court below to abide by the outcome of the retrial of the court below.

**Reason:** Per Pereira JA and Blenman JA, Michel JA Dissenting:

This was an appeal against the decision of the learned judge in circumstances where a claim was brought by Mr. Horsford against Mr. Croft on the basis of assault and battery. The learned judge heard the matter and rendered her judgement on 19<sup>th</sup> November 2018. Mr. Horsford being dissatisfied with the judgement of the learned judge, appealed against the learned judge's decision.

The Court was of the view in the majority that the decision of the learned judge should be set aside and in so doing the Court considered that the appeal should be allowed. The Court, accordingly, considered that the decision in the lower court ought to be set aside in its entirety, and the matter remitted to be tried in the High Court. In relation to the appeal, the Court was of the

view in the majority that Mr. Horsford should have his cost of the appeal. In relation to the costs in the High Court, the Court was of the view that those costs, having been set aside, should abide the cost on retrial.

By majority, the Court had no doubt that the learned judge misapplied the principles of the tort of assault and battery and refrained from making critical findings as to whether or not Mr. Horsford has established the tort of assault and battery on a balance of probabilities. The Court considered that the learned judge approached the claim in an impermissible manner and sought to determine the claim on the basis primarily of the damage which she found had been suffered. Insofar as the judge refrained also from dealing with the essence of the tort of assault and battery, and insofar as the Court was of the view that the learned judge failed to properly assess and evaluate the evidence that was led and to make important findings of fact and to apply the relevant principles of law to those findings of fact, the Court had no doubt that the decision of the learned judge could not stand. Importantly, the learned judge placed heavy reliance on the medical report and the Court had no doubt that this was an impermissible manner in which to have approached the issues of whether or not the tort of assault and battery had been established. Accordingly, the Court was of the view that the appeal ought to be allowed.

**Michel, JA Dissenting:**

The facts and issues as set out by Justice Blenman required no repetition. The following are brief reasons for the dissent from the majority. The trial judge in the court below was presented with two versions of the events to be satisfied on the day in question. It was for the appellant as the claimant in the court below to have proved his case on a balance of probabilities. The trial judge found that on the evidence before her, the appellant had not satisfied her to the requisite standard that he had been assaulted by the respondent and so she denied his claim. It was the dissenting view that it was open to the trial judge to make the determination that she did make and there was therefore no basis upon which this Court should overturn her

**decision. Accordingly, under the dissenting view the appeal ought to have been dismissed.**