

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING
VIDEOCONFERENCE

TERRITORY OF THE VIRGIN ISLANDS
22nd FEBRUARY TO 2nd MARCH 2021

JUDGMENTS

Case Name: **Net International Property Limited**
v
ADV. Eitan Erez
(As Trustee in Bankruptcy for Rachel Sofer Sayag)

[BVIHCMAP2020/0010]
(Territory of the Virgin Islands)

Date: **Monday, 22nd February 2021**

Coram: **The Hon. Dame Janice M. Pereira, DBE, Chief Justice**
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mr. Anthony Gonsalves, Justice of Appeal [Ag.]

Appearances:

Appellant:	Mr. John Carrington, QC
Respondent:	Ms. Tameka Davis and Ms. Allana-J Joseph

Issues: **Commercial appeal – Recognition and assistance pursuant to common law or inherent jurisdiction of the court – Jurisdiction of the court to grant recognition and assistance to trustee – Parts XVIII and XIX of the Insolvency Act – Whether the Insolvency Act, expressly or by necessary implication, abrogated the common law right of recognition, notwithstanding that Part XVIII is not yet effective – Whether the common law power to grant assistance survives having regard to the provisions of Part XIX of the Insolvency Act – Res judicata – Whether issues raised by appellant in its defence are res judicata – Fixed date claim – Dealing with fixed date claim summarily – Rule 27.2(3) of the Civil Procedure Rules 2000 – Whether judge erred in exercise of discretion to try fixed**

date claim form summarily at first hearing – Jurisdiction to rectify register of members – Whether learned judge erred in ordering registered agent of the company to rectify the register of members – Costs

Result and Reason:

Held: allowing the appeal in part; affirming paragraph 1 of the judge's order dated 9th June 2020, setting aside paragraphs 2, 3 and 4 of the said order and directing that submissions on costs be filed, that:

1. Recognition was a part of the common law of the BVI before the passing of the Insolvency Act in 2003 and continues to be. A local court in the BVI has power under the common law to recognise a foreign office holder as having status in the BVI in accordance with his or her appointment by the foreign court. Recognition is usually accompanied by assistance which gives the foreign office holder powers to deal with the local estate. However, recognition does not necessarily include assistance.

Re African Farms Ltd [1906] TS 373 applied; Rubin and another v Eurofinance SA and others [2012] UKSC 46 applied; Re Manhattan Investments Fund Ltd BVI Civil Suit No. 19 of 2000 (delivered 20th March 2000, unreported) considered; Globe-X Management Limited and others v Clifford Johnson and another AXAHCVP2003/0004 (delivered 23rd May 2005, unreported) applied.

2. An established common law right may be abrogated by necessary implication where statute provides a comprehensive scheme that replaces the common law right. While Part XVIII of the Insolvency Act, 2003 provides a comprehensive scheme for the recognition of foreign office holders that may be sufficient to abolish the common law of recognition, Part XVIII is not yet effective. Therefore, the common law right of recognition survives in the BVI and the Trustee was entitled, under the common law jurisdiction of the local court, to seek recognition. The learned judge did not err in granting him common law recognition.

Part XVII of the Insolvency Act, 2003, Act No. 5 of 2003, Laws of the Virgin Islands applied; Dimitry

Vladimirovich Garkusha v Ashot Yegiazaryan et al BVIHCMP2015/0010 (delivered 6th June 2016), [2016] ECSCJ No. 103 applied; Islington London Borough Council v Uckak and another [2006] EWCA Civ 340 applied.

3. Part XIX of the Act provides a complete code for foreign representatives from designated foreign countries to apply to the BVI courts for assistance. However, Israel has not been designated as a relevant foreign country and the Trustee is not entitled to apply for assistance under Part XIX of the Act. Assistance is no longer available at common law to foreign office holders from non-designated countries.

Part XIX of the Insolvency Act, 2003, Act No. 5 of 2003, Laws of the Virgin Islands applied; Re C (a Bankrupt) BVIHC (Com) 0080 of 2013 (delivered 31st July 2013, unreported) followed.

4. The doctrine of res judicata comprising cause of action estoppel and issue estoppel provides that a decision of a court of competent jurisdiction cannot be reopened and relitigated in subsequent proceedings between the same parties or their privies. It is also an established principle that the court will prevent a party from raising, in extant proceedings, an issue that was essential to the existence or non-existence of the cause of action in an earlier case between the same parties, but which was not raised by the party who now seeks to rely on the issue. In this case, there is no cause of action estoppel because the substantive issue of the Supreme Court in Israel regarding the Trustee's ability to pierce the corporate veil of Net International and claim the assets of the Company was not resolved in favour of the Trustee and is not being challenged in the BVI proceedings. There is, however, an issue estoppel regarding the shares comprised in the bearer share certificate by which Net International would be estopped from raising any issue that any person other than that Mrs. Sofer is the beneficial owner of the bearer shares. This estoppel does not apply to Net International's ability to give evidence as to the state of the Company's register and any related issue regarding the Company's current shareholding.

Henderson v Henderson (1843) 3 Hare 100, 114-115 applied; Greenhalgh v Mallard [1947] 2 All ER 255 at 257 considered.

5. A trial judge managing a case commenced by fixed date claim form has the power to try the claim summarily at the first hearing. This is a case management decision and it is inappropriate for an appellate court to interfere with the judge's decision unless it is plainly wrong. In this case, Net International was not given an opportunity to file evidence in support of its case, the Trustee did not apply to the Company to deal with the disabled bearer shares and the registered shareholder was not given an opportunity to resist what could amount to a cancellation of his or her shares. The judge erred in deciding to hear the fixed date claim summarily and this is an appropriate case to set aside his decision.

Part 27 of the Civil Procedure Rules 2000 applied; Richard Frederick and another v The Comptroller of Customs and another Saint Lucia Civil Appeal HCVAP2008/0037 (delivered 6th July 2009, unreported) considered; Agnes Danzie and others v Cecil Anthony Saint Lucia Civil Appeal HCVAP2015/0009 (delivered 4th December 2015, unreported) considered; Travis Augustin v Choc Estates Limited Saint Lucia Civil Appeal HCVAP2014/0002 (delivered 9th June 2015, unreported) considered.

6. The court does not have jurisdiction to rectify the share register of the Company to show the owner of disabled bearer shares as a registered shareholder. Further, the rectification order should have been directed to the Company itself and/or its directors, and not the registered agent, especially where, as in this case, there is no evidence that the registered agent maintains the register of members of Net International.

Case Name:

Joseph Cadette
v
St. Lucia Motor & General Insurance Company
Limited
[SLUHCAP2018/0039]

(Saint Lucia)

Date: Monday, 22nd February 2021

Coram: The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, QC, Justice of Appeal [Ag.]
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. V. Dexter Theodore, QC

Respondent: Mr. Leslie Prospere

Issues: Civil appeal – Statutory Interpretation – Insurance Law – Motor Vehicles Insurance (Third Party Risks) Act – Section 4(7) – Requirements in respect of policies of insurance – Section 9 – Duty of insurers to satisfy judgment against persons insured against third party risks – Whether respondent on risk at time of accident and thereby obliged to satisfy judgment obtained against its insured - Section 11(1)(i) – Avoidance of restrictions on scope of policies covering third party risks – Whether learned master correctly construed and applied sections 4(7) and 9(1) of the Act in light of sections 11(1) and (2) – Unlicensed operator of motor vehicle – Whether section 11(1)(i) vitiated condition of certificate of insurance issued by respondent excluding persons not disqualified by order of court or law from driving motor vehicle – Whether respondent can rely on contractual defences under terms of insurance policy in its defence

Result and Reason: Held: dismissing the appeal; affirming the order of the learned master; and ordering costs to St. Lucia Motor in the sum of no more than two-thirds of the prescribed costs in the court below to be assessed by a master if not agreed within 21 days, that:

1. The legislative intent of the MVIA is to protect third parties against risks such as bodily injury, loss, death or property damage arising out of being involved in a

motor vehicle accident. The compulsory nature of the MVIA is evidenced by section 3 which creates a mandatory requirement for all drivers to be insured against third-party risks. Further, section 4(7) of the Act imposes an obligation on insurers to indemnify injured third-parties for any liability which the policy covers; and section 9 creates an obligation on insurers to satisfy judgments obtained by injured third-parties resulting from any conduct of the insured which is covered by the policy.

Sections 3, 4 and 9 of the Motor Vehicles Insurance (Third Party Risks) Act, Cap. 8.02 of the Revised Laws of Saint Lucia applied; *Asiyah Grant v Javier Maduro* BVIHCVAP2019/0001 (delivered 13th November 2019, unreported) considered.

2. It is clear that under the MVIA, the obligation on an insurer to satisfy a third-party judgment and the right of a third-party to seek satisfaction of its judgment(s) by the insurer are governed by section 9(1). Section 9(1) can only be properly invoked once the conditions outlined are met and does not oblige the insurer to satisfy any judgment obtained in respect of a liability falling outside the scope of the policy. Applying section 9(1) and its clear effect, it is evident that in so far as the certificate of insurance issued by St. Lucia Motor to Messrs. Anglion and Linor expressly excludes from coverage any incidents arising from the use of the insured motor vehicle by a person who is not qualified to drive in Saint Lucia, St. Lucia Motor is not liable under section 9(1) of the MVIA to satisfy any judgment obtained against the insured in those circumstances.

Section 9(1) of the Motor Vehicles Insurance (Third Party Risks) Act, Cap. 8.02, Revised Laws of Saint Lucia applied; *The Presidential Insurance Company Ltd v Resha St. Hill* [2012] UKPC 33 applied; *The Presidential Insurance Company Ltd v Mohammed and others* [2015] UKPC 4 applied.

3. It is settled law that the Court must give effect to the natural and ordinary meaning of words used in the context of the legislation and may only depart where

that meaning leads to an absurd result which cannot reasonably be supposed to have been the intention of Parliament. In this case, there is no ambiguity in section 11(1)(i) of the MVIA which clearly speaks to ‘persons named in the policy who may or may not drive the vehicle’. This could not be interpreted as covering an unlicensed driver operating the motor vehicle, and thereby vitiating the restriction contained in the certificate of insurance. This is more so particularly where the application of that restriction would exclude coverage in relation to Ms. John who, at the material time, was not a person named in the policy. Accordingly, there was no need to resort to the social and historical context in order to properly interpret the clear legislative provisions since, by way of emphasis, there was no ambiguity in the relevant legislative provisions. It is evident that the master correctly construed and applied sections 4(7) and 9(1) in light of sections 11(1) and (2) and properly concluded that St. Lucia Motor was not on risk at the material time and consequently not liable to cover the judgment debt under section 9 of the Act. Her decision cannot be impugned.

Sections 9 and 11 of the Motor Vehicles Insurance (Third Party Risks) Act, Cap. 8:02, Revised Laws of Saint Lucia applied; *Smith v Selby* [2017] CCJ 13 (AJ) applied; *Attorney General of the Turks and Caicos Islands v Misick and Others* [2020] UKPC 30 applied; *The Labour Tribunal v St. Lucia Electricity Services Limited* [2020] ECSCJ No. 120 (delivered 8th April 2020) followed.

4. Whilst sections 9(2) and (3) set out specified circumstances or statutory ‘let-outs’ under which an insurer may avoid indemnifying a third-party judgment creditor, as exceptions to the general duty to indemnify, there is nothing in the language of section 9 which limits an insurer’s avoidance of indemnification to the named circumstances under sections 9(2) and (3) only. An insurer may rely on contractual defences provided that they do not run afoul of the provisions of the statute. Though the courts have recognised that exemptions provided for in the statute cannot be ignored, this cannot be interpreted to mean that the

statutory ‘let-outs’ limit an insurer’s reliance on contractual defences generally, especially in circumstances where they do not offend any of the provisions of the MVIA as in the appeal at bar.

Sections 9 of the Motor Vehicles Insurance (Third Party Risks) Act, Cap. 8.02 of the Revised Laws of Saint Lucia applied; *Matadeen v Caribbean Insurance Co. Ltd* [2002] UKPC 69 applied; *Mecheck Willis v Globe Insurance Company of Jamaica Limited* [2015] JMCA Civ 36 applied.

5. Sections 4 and 9 of the MVIA do not impose an obligation on insurers to satisfy judgments obtained by a third-party for risks outside the terms of the policy except as specified under section 11 which does not invalidate an insurer’s limitation on coverage to persons not disqualified by law to drive a motor vehicle. Accordingly, St. Lucia Motor is not precluded from availing itself of a contractual defence in Mr. Cadette’s claim against it, particularly where the driver at the material time was not an authorised driver entitled to indemnity.

Section 4 and 9 of the Motor Vehicles Insurance (Third Party Risks) Act, Cap. 8.02, Revised Laws of Saint Lucia applied *Prudence Robinson v Sagicor General Insurance Inc* [2019] ECSCJ No. 315, (delivered 18th September 2019) distinguished; *Matadeen v Caribbean Co Ltd* [2002] UKPC 69 applied; *The Presidential Insurance Company Ltd v Resha St. Hill* [2012] UKPC 33 applied; *The Presidential Insurance Company Ltd v Mohammed* [2015] UKPC 4 applied.

Case Name:

Clive Crick

v

[1] Norris Lewis

[2] Joan Lewis

Date:

Thursday, 25th February 2021

Coram:

**The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. Andrew Willins holding papers for Mr. Richard Williams and Ms. Dannielle Francis

Respondent: Dr. Linton Lewis

Issues:

Civil appeal – Cross examination - No accepted documentary evidence in court below – No independent witnesses - Whether learned trial judge erred in that, having established that the outcome of the case hinged on credibility, failed or refused to permit counsel for the appellant to pursue a line of cross-examination of the respondents intended to put in doubt their credibility – Rule 29.10 of the Civil Procedure Rules 2000 – Latitude to be given to counsel during cross-examination – Evidence elicited in cross-examination may be relevant to the witness’ credit despite not being directly relevant to issue before court – Latitude to be given to counsel during cross-examination where there is no independent witnesses or admissible evidence – Rule 29.1 of the Civil Procedure Rules 2000

Result and Reason:

Held: allowing the appeal; setting aside the orders of the learned trial judge; ordering a retrial in the High Court before a different judge; and ordering that each party bear its own costs on the appeal and in the court below, that:

1. Rule 29.10 of the Civil Procedure Rules 2000 (“CPR”) gives latitude to counsel cross-examining an opposing witness to question him or her on statements made in his or her witness statement even though not even a part of the statements was referred to in the witness’ evidence in chief. Further, this rule does not restrict counsel to asking only questions arising from statements made in the witness’ witness statement. The trial judge in the court below adopted a very narrow view of the scope of cross-examination, consistently ruling that counsel could only ask a witness a question under cross-examination if the question was on an issue which was addressed in his client’s statement of case or witness statement. This approach is contrary to CPR 29.10 which in fact enlarged, and not narrowed, the scope of cross-examination. The trial judge accordingly erred.

Rule 29.10 of the Civil Procedure Rules 2000 applied.

2. Evidence given in court, whether elicited in examination-in-chief, cross-examination or re-examination, should be relevant to the issue or issues before the court. Evidence elicited in cross-examination, however, may be relevant to the witness' credit, even though not directly relevant to the issue or issues before the court. The trial judge restricted cross-examination of the witnesses to questions which she determined were relevant only to the matters in issue between the parties and/or matters which were addressed in the opposing party's statements of case or witness statements. This prevented counsel for the appellant from testing the credibility of the second respondent and from seeking to establish that her motive for filing the case against the appellant was not to recover money that he owed to her and her husband, but in furtherance of the animus which she had developed towards him on account of a dispute over family lands. It follows that the trial judge did err in her approach.

Phipson On Evidence 14th Edition applied; Hobbs v Tinling (C.T.) and Company, Limited and Hobbs v Nottingham Journal, Limited [1929] 2 K.B. 1. applied.

3. In cases where there were no independent witnesses or admissible documentary evidence, and which therefore turned entirely on the credibility of the parties, it is of the utmost importance for counsel to have the latitude to cross examine opposing witnesses on issues of credibility, even though not directly relevant to the issue or issues being tried by the court, and even though not addressed in the party's statements of case or witness statements. Insofar as the trial judge did not give this latitude to counsel, and in fact directed witnesses not to answer questions posed by opposing counsel or disallowed the questions from counsel even when the questions were relevant to the credibility of the witnesses, she fatally erred in the exercise of her powers under rule 29.1 of the CPR to control the evidence given at trial.

Rule 29.1 of the Civil Procedure Rules, 2000 applied.

Case Name: [1] The Minister of Agriculture, Lands,
Housing, Co-operatives and Fisheries
[2] Nevis Housing and Land Development
Corporation
v
Eustace Nisbett
[SKBHCVAP2019/0020]
(Saint Christopher and Nevis)

Date: Tuesday, 2nd March 2021

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

Appearances:
Appellant: Mr. Merrick Watson holding papers for Ms. Terrence V. Byron
Respondent: Mr. Brian Lacy holding papers for Mr. Patrice Nisbett

Issues: Civil appeal – Judicial review – Whether learned judge erred in finding that the Minister terminated the disbursement granted to respondent by the Cabinet – Whether claim by respondent was properly instituted as a claim for judicial review rather than a claim in private law of an employee and employer dispute – Whether respondent was entitled to relief in public law on his claim – Whether rules of natural justice may be imported in a private contractual relationship

Result and Reason: Held: allowing the appeal; setting aside the orders of the learned trial judge; and ordering no costs in the court below and no costs on the appeal, that:

1. An appellate court will exercise great restraint before interfering with a finding of fact by a lower court. Where however, the court is satisfied that the finding of fact cannot be supported by the evidence, an appellate court will intervene.

**Elefterescu v Royal College of Veterinary Surgeons
2020 UKPC 6 considered.**

2. There is no evidence to support the learned judge's finding that the decision to terminate the financial assistance was the decision of the Minister. The learned judge having found that there was no communication from the Cabinet Secretary, and no evidence that the Cabinet made the decision to terminate the financial assistance, erroneously concluded that the Minister made a decision to terminate the financial assistance granted by the Cabinet. The learned judge having proceeded on this wrong basis, gave no consideration to whether 'all disbursements' included the financial assistance approved by the Cabinet. When the termination letter is read in the context of the discourse between the Minister and Mr. Nisbett, it is very clear that the Minister was referring to disbursements from the Corporation and not any disbursements from the Cabinet. Accordingly, the learned judge erred in his conclusion.

3. The approach to be adopted in determining whether a public law remedy such as judicial review is the appropriate course, is that the court must look at whether there is a public law element in the decision and whether the allegation involves suggested breaches of duties or obligations owed as a matter of public law; only then will the decision be reviewable. As it relates to the ordinary contracts of employment, there is no 'public law' element present. Further, employment by a public authority does not per se inject an element of public law, nor does the fact that the employee holds a senior post. Where statute provides for employment by a public body to be on certain terms, it would give rise to public law rights and if there is failure to comply by the public body, then public law remedies could be sought. In relation to Mr. Nisbett, his position as Manager of the Corporation was not a position fortified by statute. Although the Corporation had statutory powers to employ, there are no statutory provisions or limitation on the positions or the terms and conditions on which persons are to be employed. It is therefore clear that Mr. Nisbett's claim is concerned with the infringement of his rights under

contract law and that the learned judge erred in his findings.

R v Panel on Take-overs & Mergers, Ex parte Datafin plc and another [1987] Q.B. 815 applied; R v East Berkshire Health Authority ex parte Walsh [1984] 3 All ER 425 considered; R v Derbyshire County Council (ex parte Noble) [1990] IRLR 332 considered; Swan v Attorney General [2009] UKPC 22 considered; N.H International Caribbean Limited v Urban Development Corporation of Trinidad and Tobago and Hafeez Karamath Limited Civ. Appeal No. 95 of 2005 considered.

4. The rules of natural justice may be imported in a private contractual relationship, but it would go to the rights and duties of the contract. It would not import the necessary public element to bring the matter in the realm of public law. It follows that the terms in clause 7 of Mr. Nisbett's contract of employment may import the rules of natural justice and that a breach of the rules of natural justice may result in a termination being unlawful.

R v East Berkshire Health Authority ex parte Walsh [1984] 3 All ER 425 applied; Gary Nelson v The Attorney General et al [ANUHCVP2012/0001] (delivered 26th May 2014, unreported) considered; McLaughlin v The Governor of the Cayman Islands [2007] UKPC 50 considered.

APPLICATIONS AND APPEALS

Case Name:

**Myett's Enterprises Limited
v
Kimberly Cooke Leigh**

Date:

Monday, 22nd February 2021

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mr. Anthony Gonsalves, QC Justice of Appeal [Ag.]**

Appearances:

Appellant: Ms. Dancia Penn, QC

Respondent: Mr. Richard G. Rowe and Mr. Daniel R. Fligelstone Davies

Issues:

Civil appeal – Summary judgment – Whether learned master erred in granting summary judgment in favour of the Respondents/claimants based on the facts pleaded and evidence presented and a consideration of the defence pleaded by the Appellant within the context of the provisions of Virgin Islands Labour Code – Whether any evidence brought at trial could put Appellant’s defence in a better position than as pleaded – Whether respondents entitled to severance pay in circumstances where their employment either ceased or was suspended following the passage of hurricanes Irma and Maria where they were neither recalled nor paid after the hurricanes – Whether employment was terminated – Whether respondents’ were entitlement to severance pay having not engaged in the conciliation or mediation process under the Labour Code before bringing claim – Whether impact of hurricanes Irma and Maria in September 2017, accepted as Acts of God and Force Majore created a new and novel emerging area of law so that the Labour Code, 2010 could not be applied – Whether employer absolved from complying with the Virgin Islands Labour Code, 2010 due to the passage of hurricanes Irma and Maria in relation to severance/notice pay

Type of Order

N/A

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:
Judgment is reserved

Case Name:

[1] Mitsuji Konoshita

**[2] A.P.F. Group Co., Ltd
v
JTrust Asia PTE Ltd
[BVIHCMAP2020/0017]**

Date: Monday, 22nd February 2021

Coram: The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, QC, Justice of Appeal [Ag.]
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal [Ag.]

Appearances:

Appellants: Mr. Stephen Midwinter, QC
Mr. Hefin Rees, QC (holding a watching brief for the Receivers of A.P.F. Group Co. Ltd.)

Respondent: Mr. Vernon Flynn, QC

Issues: Interlocutory appeal – Appeal against refusal of application to discharge worldwide freezing injunction and receivership order – Whether learned judge erred in refusing to discharge orders – Whether judge required on application to discharge to reassess whether claimant had a good arguable case – Whether learned judge properly determined whether there were material changes in circumstances warranting discharge of worldwide freezing and receivership orders – Whether decisions of Court of Appeal in Convoy Collateral Ltd v Broad Idea International Limited et al and Broad Idea International Limited v Convoy Collateral Limited amounted to a material change in circumstances

Type of Order N/A

Result / Order: [Oral Delivery]

**IT IS HEREBY ORDERED THAT:
Judgment is reserved.**

Case Name: Showa Holdings Co. Ltd

Appellant

V

[1] JTrust Asia PTE Ltd
Counterappellant/Claimant
[1] Mitsuji Konoshita
[2] A.P.F. Group Co. Ltd

Defendants

Nicholas James Gronow and John David Ayres
(as Receivers of the Second Defendant)
Respondents/Receivers

[BVIHCMAP2020/0031]

Date: Tuesday, 23rd February 2021

Coram: The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, QC, Justice of Appeal
[Ag.]
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal [Ag.]

Appearances:

Appellants:	Mr. Adrian Francis and Ms. Olga Osadchaya for Showa Holdings Co. Ltd. Mr. Vernon Flynn, QC with him, Mr. Peter Ferrer for JTrust Asia PTE Ltd (the counter appellant)
Respondent:	Mr. Hefin Rees, QC with him, Mr. Iain Tucker and Ms. Yegane Guley for the Receivers

Issues: Interlocutory appeal – Appeal against the learned judge’s order granting the Receiver’s application sanctioning the reconstitution of the board of directors of Showa – Appeal against the learned judge’s order refusing Showa’s adjournment application and directions for extension of time to file and service responsive evidence, adjournment and extension of hearing time – Whether the learned judge erred in exercising his discretion – Whether the learned judge failed to take into account relevant factors and took into account irrelevant factors – Whether the proceedings below were irregular and procedurally unfair – Whether the learned judge demonstrated a predisposition in favour of the Receivers’ Application

Type of Order N/A

Result / Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:
Judgment is reserved.

Case Name: JTrust Asia PTE Ltd. **Appellant**
V
[1] Mitsuji Konoshita
[2] A.P.F. Group Co. Ltd. (in Receivership) **Defendants**
Nicholas James Gronow and John Ayres
(as Receivers of the Second Defendant)
Receivers/Respondents
and
Showa Holdings Co. Ltd **Respondent**

[BVIHCMAP2020/0022]

Date: Tuesday, 23rd February 2021

Coram: The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, QC, Justice of Appeal
[Ag.]
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal [Ag.]

Appearances:
Appellant: Mr. Vernon Flynn, QC with him, Mr. Peter Ferrer
Respondents: Mr. Adrian Francis and Ms. Olga Osadchaya for Showa Holdings Co. Ltd.
Mr. Hefin Rees, QC with him, Mr. Iain Tucker and Ms. Yegane Guley for the Receivers

Issues: Interlocutory appeal – Insolvency proceedings – Locus standi – Whether learned judge erred in finding that appellant had no standing to seek a variation of the court’s previous order – Whether learned judge applied proper test in determining whether appellants had standing – Exercise of discretion – Whether learned judge erred in law by not exercising his power to substitute parties to appellant’s application

Type of Order N/A

Result / Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:
Judgment is reserved.

Case Name: Chen Mei-Huan
v
[1] Victory Success Holdings Limited
[2] Peckson Limited
[3] Macau Hotel Developers Limited

Date: Tuesday, 23rd February 2021

Coram: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, Justice of Appeal [Ag.]

Appearances:

Appellant:	Mr. John McDonnell, QC and Ms. Dancia Penn QC for the appellant
Respondent:	Mr. Charles Bear, QC with him Mr. Andrew Willins for the first respondent Mr. Grant Carroll for the second and third respondents

Issues: Interlocutory appeal – Appeal against orders staying proceedings on grounds of forum non conveniens and discharge of interim injunction – Preliminary objection – Whether leave to appeal was required – Whether leave to appeal ought to have been sought in relation to parts of

the notice of appeal concerning stay of proceedings granted in court below – Whether parts of the notice of appeal ought to be struck out as nullities – Oral application for extension of time to seek leave to appeal and leave to appeal

Type of Order

Oral Decision

Result / Order:

IT IS HEREBY ORDERED THAT:

1. The notice of appeal as it relates to the appeal against the grant by Jack J [Ag.] of a stay of the proceedings on the ground of forum non conveniens is struck out.
2. Liberty to the appellant to make such applications as she may be advised within 7 days of the date of this order.
3. The appeal against the discharge by Jack J [Ag.] of the interim injunction is adjourned to a date to be fixed by the Chief Registrar to be heard together with all applications outstanding in this matter at that time.
4. The application for a stay is denied. The appellant has liberty to make such applications as she may be advised.
5. Costs to the first respondent on the striking out of the notice of appeal as it relates to the appeal against the grant by Jack J [Ag.] of a stay of the proceedings on the ground of forum non conveniens, such costs to be assessed by a judge of the Commercial Court unless agreed within 7 days of the date of this order.
6. The appellant shall pay to the first respondent the amount agreed or assessed within 7 days of the agreement or assessment, failing which, the appeal will be struck out together with any applications that have been filed by the appellant in this matter.
7. No order is made as to costs in relation to the second and third respondents.

Reason:

The Court was satisfied that leave to appeal was required in relation to the orders granting of a stay of proceedings on forum grounds. The notice of appeal, so far as it pertained to the appeal against the stay order, was

therefore a nullity. The Court considered an oral application by counsel for the appellant for the Court to grant leave to appeal. The Court considered that it could not consider the application whether it was made orally or in writing as the application would, in any event, have been out of time and an extension of time would have first been required. The Court however granted leave to the Appellant to make the application for an extension of time.

The Court considered that, in relation to the remainder of the appeal, no leave was required to discharge the injunction but that it would be pointless to hear such an appeal against discharge of the injunction in the face of the order staying the proceedings. The Court therefore adjourned the hearing of appeal to a date to be fixed by the Chief Registrar where all matters can be considered at that time, if an extension of time is granted to the appellant in relation to its intended appeal against the stay order.

Case Name: Candey Limited
v
[1] Russell Crumpler
[2] Christopher Farmer
(As Joint Liquidators of Peak Hotels and Resorts Limited)
[BVIHCMAP2020/0021]

Date: Thursday, 25th February 2021

Coram: The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal [Ag.]

Appearances:
Appellant: Mr. Muhammed Haque, QC
Respondent: Mr. Andrew Willins

Issues: Commercial appeal – Application to strike out notice of appeal as a nullity – Whether leave to appeal required to appeal against an application made in the context of liquidation proceedings – Appellant’s applications for an extension of time, leave to appeal and relief from

sanctions – Whether in the circumstances the Court should grant the appellant an extension of time to seek leave to appeal

Type of Order

N/A

Result / Order:

**IT IS HEREBY ORDERED THAT:
Judgment is reserved.**

Case Name:

**Yao Juan
v
[1] Kwok Kin Kwok
[2] Crown Treasure Group Limited

[BVIHCMAP2018/0042]**

Date:

Thursday, 25th February 2021

Coram:

**The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. James Willan and Ms. Claire Goldstein

Respondent:

**Mr. Paul Chaisty, QC with him, Mr. Richard Evans and Dr. Alecia Johns for the 1st respondent
No appearance for the 2nd respondent**

Issues:

Interlocutory Appeal – Whether learned judge erred in his interpretation of the Court of Appeal’s order to award appeal costs at two-thirds of the costs in the Court below – Whether learned judge erred in allowing costs of foreign “in house” lawyers not qualified to practice law in the Territory of the Virgin Islands - Interpretation of “legal practitioner” and “practicing law” for the purposes of section 18 of the Legal Profession Act, 2015

Type of Order N/A

Result / Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:
Judgment is reserved

Case Name:

[1] Siong Beng Seng
[2] Ching Hui Huat
[3] Springfield Investments &
Nominees PTE Ltd
V
Caldicott Worldwide Ltd
[BVIHCMAP2020/0020]

Date: Thursday, 25th February 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. Timothy Collingwood, QC with him Mr. Iain Tucker

Respondent: Mr. Stephen Moverley Smith, QC and Ms. Amelia Tan

Issues: Commercial appeal – Service of claim outside jurisdiction – Whether learned judge applied the wrong test for materiality of non-disclosure – Stay of proceedings – Whether learned judge misconstrued the effect on the proceedings of a stay – Whether learned judge erred in holding that circumstances were not rare and compelling such as to justify a stay on case management grounds

Type of Order N/A

Result / Order: [Oral Delivery]

**IT IS HEREBY ORDERED THAT:
Judgment is reserved.**

Case Name: **Hector Finance Group Limited
V
Caldicott Worldwide Limited
[BVIHCVAP2020/0012]**

Date: **Friday, 26th February 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. Robert Nader**
Respondent: **Mr. Stephen Moverley Smith, QC with him, Mr. Dhanshuklal Vekaria**

Issues: **Interlocutory appeal – Continuation of injunction – Whether learned judge erred in concluding that there was a real risk of dissipation in respect of the appellant’s assets that warranted continuation of injunction – Full and frank disclosure – Whether learned judge erred in concluding that there was full and frank disclosure at the ex parte hearing at which the injunction was first granted**

Type of Order **N/A**

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

**IT IS HEREBY ORDERED THAT:
Judgment is reserved.**

Case Name: **[1] Phoenix Group Foundation
[2] Minardi Investments Limited
V
[1] Carl Stuart Jackson
[2] Greig Mitchell**

**[3] Simon Bonney
[4] Andrew Hosking
(as Joint Liquidators of Unicorn Worldwide
Holdings Limited, Ballaugh Holdings Limited,
Glen Moar Properties Limited and Sulby
Investment Holdings Limited)**

**[BVIHCMAP2020/0012]
[BVIHCMAP2020/0019]**

Date: Friday, 26th February 2021

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

Appearances:

Appellants:	Mr. David Lord, QC with him Mr. Sebastain Kokelaar and Mr. Iain Tucker
Respondents:	Mr. Michael Pascoe, QC and Ms. Blair Leahy, QC with them, Ms. Laure-Astrid Wigglesworth

Issues: Application for conditional leave to appeal to Her Majesty in Council as of right in BVIHCMAP2020/0019- Application for conditional leave to appeal to Her Majesty in Council pursuant to section 3(2) of the 1967 Order – Respondent’s application that costs of appeal BVIHCMAP2020/0012, including the costs of the hearings on 31st July 2020 and 15th September 2020, be treated as being costs in appeal BVIHCMAP2020/0019 or alternatively that Respondent’s costs of appeal BVIHCMAP2020/0012, including the costs of the hearing on 31st July 2020 and 15th September 2020, be treated as being costs in appeal BVIHCMAP2020/0019

Type of Order Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The appellants' applications for conditional leave to appeal to Her Majesty in Council in appeal no. BVIHCMAP2020/0012 and appeal no. BVIHCMAP2020/0019, are dismissed.

2. Costs are awarded to the respondents in relation to the appellants' applications in appeal no. BVIHCMAP2020/0012 and appeal no. BVIHCMAP2020/0019, such costs to be assessed by a judge of the Commercial Division, if not agreed within 21 days.

3. The respondents' application filed on 23rd December 2020 in appeal no. BVIHCMAP2020/0019, is granted as follows:

i. The respondents' costs of appeal no. BVIHCMAP2020/0012, including the costs of the hearings on 31st July and 15th September 2020, are treated as being costs in appeal no. BVIHCMAP2020/0019.

ii. The appellants shall pay the said costs to the respondents, such costs to be assessed by a judge of the Commercial Division, unless agreed within 21 days.

iii. No order as to costs of this application.

Reason:

There were three applications before the Court: (i) the appellants' application for leave to appeal the decision of this Court dated 17th September 2020 that the Notice of Appeal filed by the Appellant's in BVIHCMAP2020/0012 (referred to as "Appeal 12") was a nullity; (ii) the appellants' application for leave to appeal the decision of this Court dated 17th November 2020 in BVIHCMAP2020/0019 ("Appeal 19") upholding the sanction order of Mr. Justice Jack dated 15th July 2020; and (iii) the respondents' application for an order that the appellants' pay the costs of the Appeal 12, (the "Costs Application").

As background, the Court noted that at the hearing of Appeal 12 on 15th September 2020, the Court held that the appellants required leave to appeal, leave to appeal was neither sought nor obtained, and that the notice of appeal was therefore a nullity and should be struck out.

In relation to Appeal 19, the Court dismissed an appeal against an order by Mr. Justice Jack delivered orally on 22nd June 2020 in the Commercial Division of the High Court and the order made by the learned judge dated the 15th July 2020 (“the Sanction Order”) by which the judge sanctioned the respondents’, the joint liquidators of four holding the company incorporated in the Territory of the Virgin Islands (“the BVI”), to enter into and to implement the terms of a written settlement agreement dated 5th September 2019.

The Appellants sought leave to appeal to Her Majesty in Council in relation to Appeals 12 and 19. Pursuant to section 3(1)(a) of the Virgin Islands Appeals to the Privy Council Order, 1967 in civil proceedings an appeal shall lie as of right from the decisions of this Court to the Privy Council where: (i) the decision is a final decision; and (ii) the matter in dispute on the appeal to Her Majesty in Council is of the value is 300 pounds sterling or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of 300 pounds sterling or upwards.

Where an appeal does not lie as of right, leave to appeal to the Privy Council may only be given where in the opinion of this Court the question involved in the appeal is one that by reason of its great general or public importance or otherwise ought to be submitted to Her Majesty in Council.

In relation to Appeal 12, the appellants in the notice of motion for Conditional Leave to Appeal to Her Majesty in Council indicated their reliance on section 3(2)(a) of the 1967 Order as the intended appeal is from a decision in civil proceedings which raise a question that by reason of great or public importance or otherwise ought to be submitted to Her Majesty in Council for the reasons set out in the draft ground of appeal and submissions. In the draft grounds of appeal, ground two was that the issues raised on the appeal are issues of great general or public importance. No ground of appeal was included to cover the ‘or otherwise category’. Similarly, in the submissions on behalf of the Appellants’ it appeared to this Court that the only ground that was being advanced and which was expressly mentioned was that the appeal raised a question of great general or public importance. It did not appear to

the Court and from a review of the draft grounds of appeal or the submissions that the 'or otherwise' category was being advanced or relied on. This was also the understanding of the respondents as set out in paragraph 11 of their submissions where they identified that the appellants sought leave on the great general or public importance ground and the appellants did not seek to invoke the Court's reserved jurisdiction to determine otherwise that the case ought to be referred to the Judicial Committee of the Privy Council. However, in his oral address to the Court, Mr. Lord, QC, insisted that he was in fact also relying on the court's reserved jurisdiction and suggested that paragraph 17 to 21 of his skeletons intended to cover that ground.

The Court agreed with the respondents that to satisfy the great general or public importance test, the appeal must involve a very serious issue of law or a constitutionally provision that has not been settled or an area of law in dispute or a legal question the result of which forces dire consequences for the public. The Court also agreed that it follows that it is not enough to show a sufficient prospect of the appeal succeeding where there is no genuine dispute on the applicable principles of law it would be very difficult to establish any issue of great general or public importance where there is no general dispute on the applicable principles of law the court may exercise the reserved decision to determine otherwise that the case ought to be referred to the Judicial Committee of the Privy Council, where for example there is some reasonable doubt as to accuracy of the Court's decision. Further, where the question to be decided on the appeal is procedural rather than substantive in nature, the general rule is that leave to appeal shall be refused.

Having considered the oral and written arguments of counsel the Court did not take the view that issues raised were of any great general or public importance. The legal issue raised in relation to Appeal No. 12 was whether Justice Jack's sanction order is a final or interlocutory order. The BVI practice in this area is well-settled and the correct test is set out in CPR 62.1. In addition, there was no reason advanced for the court to doubt to correctness of its decision. In fact Mr. Lord, QC, conceded that he was unable to point to any case where on a similar application, this Court came to a different conclusion. On this basis,

the application for leave to appeal to Her Majesty in Council in appeal number 12 was dismissed.

In relation to Appeal 19, the appellant sought to appeal on the ground that they had an appeal as of right or alternatively to seek leave on the ground that the appeal raises issues or questions of great public importance. The Court having held that the order made by Mr. Justice Jack was not a final order, it followed that Appeal 19 could not be a final appeal in respect of which an appeal as of right could be established. The appellants therefore could not be granted leave to appeal as of right.

The appellants relied on four grounds of appeal to argue that the appeal raised questions of great general or public importance. In relation to the leave to appeal, despite the arguments and submissions of Mr. Lord, QC, the Court was not convinced that any of his draft grounds of appeal raised any issues of great general or public importance. No serious issues of law that have been settled arose. Neither were there any areas of dispute or any legal questions, the resolution of which, pose dire the issues. The issues raised center of a great deal on the construction carried by this court on the terms of the settlement agreement applying well established principles. In the circumstances, the application for leave to appeal in relation to Appeal 19 was also dismissed.

In relation to the Costs Application, the Court considered that this can be resolved by a consideration of the effect of the consent order dated 1st September 2020. By paragraph 4 of the consent order, it was agreed that costs of the applications should be costs in the appeal. The Court took the position that the reference to the appeal meant that the substantive hearing or determination of the substantive matter on the appeal regardless of the number given to the appeal. Mr. Lord's position was that it was necessary to file a fresh appeal as a matter of procedure and the Court agrees. However, flowing therefrom it must be that it was in the appellants' contemplation that it would or might be necessary that the appellants would not now be able to escape the costs consequences of the consent order. In the circumstances, the Court found for the respondents to the Costs Application and approved the draft order attached to the respondents' notice of application dated 23rd December 2020.

Case Name: **Kenyatta Boynes**
v
The Queen
[BVIHCRAP2017/0001]

Date: **Tuesday, 2nd March 2021**

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

Appearances:

Appellant: **Mr. Paul Taylor, QC**

Respondent: **Mr. John Black, QC**

Issues: **Criminal appeal – Appeal against conviction – Whether conviction and unsafe – Identification evidence – Whether identification evidence and CCTV recording evidence were adequate in law to ground conviction of appellant – Oral application to amend grounds of appeal**

Type of Order **N/A**

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

IT IS HEREBY ORDERED THAT:

- 1. The 10 grounds contained in the Appellant’s grounds of appeal against conviction and skeleton arguments dated 20th December 2020 are substituted for the original grounds for appeal set out in the Notice of Appeal dated 13th February 2017.**
- 2. Judgment is reserved.**

Reason: **The Court noted that there was no order to amend the grounds of appeal. There was no objection by the respondent to the making of such an order.**

Case Name: **Cadman Capital Limited**

V
[1]Eric Klein
[2]Evan Klein
[BVIHCVAP2020/0010]

Date: Tuesday, 2nd March 2021

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

Appearances:

Appellant:	Mr. Brian Lacy
Respondent:	No appearance

Issues: Interlocutory appeal – Service outside of the jurisdiction – Whether learned master erred in refusing appellant’s application to serve claim form and statement of claim outside of the jurisdiction – Whether master failed to give proper consideration to appellant’s domicile – Whether master misunderstood and misapplied legal authorities on where publication is deemed to take place for purposes of a defamation claim – Whether master erred in weighing factors to be considered in exercise of discretion to refuse application to serve outside jurisdiction

Type of Order Oral Judgment

Result / Order: IT IS HEREBY ORDERED THAT:

1. The decision of the master made on 30th March 2020 refusing permission to serve the claim form and statement of claim on Mr. Eric Klein and Mr. Evan Klein out of the jurisdiction is set aside.
2. Permission is granted for the appellant to serve the Claim Form and statement of claim on the Mr. Eric Klein and Mr. Evan Klein.
3. The appellant is directed to prepare a draft order for the court’s approval.

Reason: By claim form and statement of claim filed on 8th October

2020, the claimants instituted a claim against the defendants for defamation seeking an injunction and damages. The claim arose out of a number of statements published by the defendants on two fundraising websites in September 2019. The statements allegedly contained a large number of serious allegations of commercial fraud against the claimant. Notwithstanding the correspondence with the defendants' counsel in Canada in which the claimant requested the defendants to remove the statements from their on the fundraising websites, and notwithstanding the formal notice given to the defendant via Facebook and email, the statements have not been removed by the defendants and they continue to be accessible by any user of the worldwide web, including users in the Territory of the Virgin Islands (or "the BVI"). Further, the defendants have published and continue to public online more allegedly defamatory material which have and continue to seriously affect the reputation of the claimant and cause damage to its business.

On 23rd January 2020 the claimant filed an application in the court below seeking the permission of the court to serve the claim form and statement of claim on the defendant in Canada pursuant to rule 7.3(4) of the Civil Procedure Rules 2000. On 12th February 2020, the claimant filed a skeleton argument in support of its application. The essential thrust of the skeleton argument was that, as a matter of the fact, the allegedly defamatory statements which were made against the defendants and were accessible to all the users of the worldwide web. The claimant argued that, as a matter of law, where allegedly defamatory words are on the Internet, publication takes place when and where the defamatory content is downloaded and not where it is uploaded even though it may be downloaded in several different jurisdictions and uploaded in another. On 30th March 2020 the master handed down his decision by telephone refusing the appellants' application with written reasons to follow. On 14th April 2020, the appellant filed an application in the High Court for leave to appeal against the decision of the Master. The Master heard the application on 4th May 2020

and refused to grant the leave to the appellant to appeal against his decision. On 12th May 2020 the appellant filed an application in the Court of Appeal seeking the leave of the Court to Appeal against the master's decision made on 30th March 2020. On 28th July 2020 the Court of Appeal heard the application and granted leave to the appellant to appeal against the decision of 30th March.

On 11th August 2020 the Appellant filed a notice of appeal appealing against the decision of the Master made 30th March 2020 refusing the appellant's application for permission to serve the claim form and statement of claim out of the jurisdiction on the intended defendants. The findings of the master which were challenged by the appellant were contained in paragraph 37 of the master's written reasons for decision where the master made the following findings: (i) that the appellant has failed to establish any BVI reputation or connection, save temporary presence in the Territory to commence proceedings; (ii) the alleged defamatory remarks on which the respondents' tortious responsibility is based were published in Canada; and (iv) the appellant is unable to discharge the onus on it in showing that the Territory of the Virgin Islands is clearly or distinctly the appropriate forum for determination of the issues in this case.

The notice of appeal sets out three grounds of appeal against the decision of the master. The appellant filed written submissions in support of its appeal together with the notice of appeal on 11th August 2020. Before the Court, the appellant advanced oral arguments in support of its appeal. Having read the appellants' application and affidavit in support and having heard counsel for the appellant the Court was satisfied that the master erred in both his statement and analysis of the facts and of its application of the law.

On the facts before the Court, the appellant is a company registered and regulated under BVI law with business in the BVI. The allegedly defamatory statements were published in the BVI with reputational damage likely to

befall the appellant in the BVI.

The Court was satisfied, on the cases relied on by the appellant, that the place of publication of the defamatory statement on the Internet is the place where the defamatory material was downloaded and not where it is uploaded. In this case, the evidence is that the allegedly defamatory material was been downloaded in the BVI. The most significant error of fact was in finding by the master that the appellant has just a temporary presence in the BVI, when in fact the evidence was that the appellant is a BVI registered company with a long-standing presence in the BVI. The most significant error of law was that master's use of CPR 7.3(2), instead of CPR 7.3(4) as the gateway for grounds for the jurisdiction to serve out of the jurisdiction.

The errors of fact and law made by the master were, in the Court's opinion, sufficiently serious for the Court to set aside the decision of the master to refuse leave to serve out, and for the Court to consider the matter afresh. In considering the matter afresh, the Court was satisfied that the BVI was the most appropriate forum for the trial of the claim and having regard to the following connecting factors: (i) the company is incorporated in the BVI and is regulated by the BVI Financial Service Commission; (ii) the company carries out business in the BVI and has a physical presence and employees in the Territory; (iii) the alleged tort was committed in the BVI and damage was suffered in the BVI.