

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

TERRITORY OF THE VIRGIN ISLANDS
VIDEOCONFERENCE
23rd TO 27th NOVEMBER 2020

JUDGMENTS

Case Name:

Haynes Browne
(t/a Browne Brothers Construction)

v

Neil Sargeant
(as Executor of the Estate of Buell Carr, deceased)

[ANUHCVP2019/0038]
(Antigua and Barbuda)

Date:

Monday, 23rd November 2020

**Coram for
delivery of
judgment:**

The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant: **Ms. Akilah Anderson holding papers for Ms. C. Debra Burnette**

Respondent: **Dr. David Dorsett**

Issues:

Civil appeal – Interlocutory appeal – Ancillary claim – Counterclaim – Interpretation of rules 18.2(4)(b) and 18.9(3) of the Civil Procedure Rules 2000 – Default judgment – Whether counterclaimant entitled to default judgment on an undefended counterclaim – Rule 18.6 of the Civil Procedure

Rules 2000 – How should a counterclaimant proceed with an undefended counterclaim – Equality of treatment of primary claimant and counterclaimant – Application of overriding objective – Rules 1.1 and 1.2 of the Civil Procedure Rules 2000

Result and Reason:

Held: allowing the appeal; setting aside the order of the learned master; restoring the judgment in default of defence entered 8th April 2013 in favour of the appellant/counterclaimant; making no declarations as to the constitutionality of CPR 18.1 and 18.2(4)(d); and ordering that each party shall bear their own costs, that:

- 1. Where the language of a rule admits of only one interpretation, the court must give effect to that interpretation. However, in cases where the rules are not clear, the overriding objective, is a useful tool, in addition to the general context and purpose of the rules, when the court deals with questions of procedure and interpretation of the rules in cases that are not clear. Though rules 18.2(4)(b) and 18.9(3), on a literal interpretation, prohibit a counterclaimant from obtaining a default judgment under Part 12, these rules do not ‘admit of only one interpretation’. Instead, on a proper interpretation of rules 18.2(4)(b) and 18.9(3), in light of the broader context of Part 18 and the overriding objective, a counterclaimant is permitted to obtain judgment in default of a defence under Part 12.**

The Attorney General v Keron Matthews [2011] UKPC 38 applied.

- 2. Rule 18.1 broadly defines ancillary claims as any claim other than a claim by a claimant against a defendant or a claim for a set off contained in a defence including a counterclaim by a defendant against a claimant. In light of this broad definition, the court must be careful to ensure that each of the provisions in Part 18 is intended to apply to the particular type of ancillary claim in play**

in the proceedings. While there is clear and good reason for the strict and literal application of rules 18.2(4)(b) and 18.9(3) to ancillary claims by a defendant against a third-party for contribution or indemnity, there is no rational reason for interpreting the rules in a manner that would create an entitlement in one claimant (the primary claimant) to default judgment under Part 12, and disentitle another claimant (the counterclaimant) from pursuing the same course. Such unequal treatment has no justifiable basis and does not accord with the overriding objective in a case such as this where the status of the claimant and counterclaimant and the remedies sought by the primary claim and the counterclaim are similar. In these premises, the learned master erred in concluding that a counterclaimant is precluded from obtaining judgment in default of defence under Part 18.

Rules 1.1, 1.2, 18.2(4)(b) and 18.9(3) of the Civil Procedure Rules 2000 interpreted; *Stumore v Campbell & Co* [1892] 1 QB 314 considered; *Michael Lewis Junior and another v Tashena James* [2016] ECSCJ No. 3 considered; *Artemiou v Procopiu* [1965] 3 All ER 539 applied; *Bergan v Evans* [2019] UKPC 33 applied; *Saint Lucia Furnishings Ltd. v Saint Lucia Co-operative Bank and another* [2003] ECSCJ No. 82 considered; *Texan Management Limited and others v Pacific Electric Wire & Cable Company Limited* [2009] UKPC 46 applied.

3. In short, the doctrines of judicial precedent and stare decisis mean that the Court of Appeal is generally bound by its own decisions, and the High Court is to a greater extent bound by those decisions, as an inferior court. While the Court of Appeal's decision in *Saint Lucia Furnishings Ltd. v Saint Lucia Co-operative Bank and another* does not clearly explain the reasoning which underpinned the conclusion that default judgment was available to a counterclaimant, it was simply not open to the learned master to conduct what was essentially a

review of the correctness of the decision, and conclude that the decision was decided per incuriam and that she was not bound to follow it. The master erred in so doing.

Young v Bristol Aeroplane Company Limited [1944] KB 718 referred.

4. The general rule is that costs follow the event unless the justice of the case demands otherwise. In this case, it is appropriate to depart from the general rule, as the appeal was occasioned primarily by a lacuna in the rules, the fact of the counterclaim provisions having been lumped in with ancillary claims under the CPR, and the failure of the rules to speak clearly to the manner in which a counterclaimant may obtain judgment where no defence has been filed. Neither the parties nor the learned master in this case can be faulted.

Case Name:

The Attorney General of Grenada

v

Muhammed Ehsan

[GDAHCVAP2019/0020]

(Grenada)

Date:

Friday, 27th November 2020

**Coram for
delivery of
judgment:**

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

Appearances:

Appellant:

Ms. Akilah Anderson holding papers for Ms. C. Debra Burnette

Respondent:

Dr. David Dorsett

Issues:

Civil appeal – Interlocutory appeal – Ancillary claim – Counterclaim – Interpretation of rules 18.2(4)(b) and 18.9(3) of the Civil Procedure Rules 2000 – Default judgment – Whether counterclaimant entitled to default judgment on an undefended counterclaim – Rule 18.6 of the Civil Procedure Rules 2000 – How should a counterclaimant proceed with an undefended counterclaim – Equality of treatment of primary claimant and counterclaimant – Application of overriding objective – Rules 1.1 and 1.2 of the Civil Procedure Rules 2000

Result and Reason:

Held: allowing the appeal; setting aside the order of the learned master; restoring the judgment in default of defence entered 8th April 2013 in favour of the appellant/counterclaimant; making no declarations as to the constitutionality of CPR 18.1 and 18.2(4)(d); and ordering that each party shall bear their own costs, that:

1. Where the language of a rule admits of only one interpretation, the court must give effect to that interpretation. However, in cases where the rules are not clear, the overriding objective, is a useful tool, in addition to the general context and purpose of the rules, when the court deals with questions of procedure and interpretation of the rules in cases that are not clear. Though rules 18.2(4)(b) and 18.9(3), on a literal interpretation, prohibit a counterclaimant from obtaining a default judgment under Part 12, these rules do not ‘admit of only one interpretation’. Instead, on a proper interpretation of rules 18.2(4)(b) and 18.9(3), in light of the broader context of Part 18 and the overriding objective, a counterclaimant is permitted to obtain judgment in default of a defence under Part 12.

The Attorney General v Keron Matthews [2011] UKPC 38 applied.

2. Rule 18.1 broadly defines ancillary claims as any claim other than a claim by a claimant against a defendant or a claim for a set off contained in a defence including a counterclaim by a defendant against a claimant. In light of this broad definition, the court must be careful to ensure that each of the provisions in Part 18 is intended to apply to the particular type of ancillary claim in play in the proceedings. While there is clear and good reason for the strict and literal application of rules 18.2(4)(b) and 18.9(3) to ancillary claims by a defendant against a third-party for contribution or indemnity, there is no rational reason for interpreting the rules in a manner that would create an entitlement in one claimant (the primary claimant) to default judgment under Part 12, and disentitle another claimant (the counterclaimant) from pursuing the same course. Such unequal treatment has no justifiable basis and does not accord with the overriding objective in a case such as this where the status of the claimant and counterclaimant and the remedies sought by the primary claim and the counterclaim are similar. In these premises, the learned master erred in concluding that a counterclaimant is precluded from obtaining judgment in default of defence under Part 18.

Rules 1.1, 1.2, 18.2(4)(b) and 18.9(3) of the Civil Procedure Rules 2000 interpreted; *Stumore v Campbell & Co* [1892] 1 QB 314 considered; *Michael Lewis Junior and another v Tashena James* [2016] ECSCJ No. 3 considered; *Artemiou v Procopiu* [1965] 3 All ER 539 applied; *Bergan v Evans* [2019] UKPC 33 applied; *Saint Lucia Furnishings Ltd. v Saint Lucia Co-operative Bank and another* [2003] ECSCJ No. 82 considered; *Texan Management Limited and others v Pacific Electric Wire & Cable Company Limited* [2009] UKPC 46 applied.

3. In short, the doctrines of judicial precedent and stare decisis mean that the Court of Appeal is generally bound by its own decisions, and the High Court is to a greater

extent bound by those decisions, as an inferior court. While the Court of Appeal's decision in *Saint Lucia Furnishings Ltd. v Saint Lucia Co-operative Bank* and another does not clearly explain the reasoning which underpinned the conclusion that default judgment was available to a counterclaimant, it was simply not open to the learned master to conduct what was essentially a review of the correctness of the decision, and conclude that the decision was decided per incuriam and that she was not bound to follow it. The master erred in so doing.

Young v Bristol Aeroplane Company Limited [1944] KB 718 referred.

4. The general rule is that costs follow the event unless the justice of the case demands otherwise. In this case, it is appropriate to depart from the general rule, as the appeal was occasioned primarily by a lacuna in the rules, the fact of the counterclaim provisions having been lumped in with ancillary claims under the CPR, and the failure of the rules to speak clearly to the manner in which a counterclaimant may obtain judgment where no defence has been filed. Neither the parties nor the learned master in this case can be faulted.

APPLICATIONS AND APPEALS

Case Name:

**Kaz Penn
v
Ameera Robinson-Penn**

[BVIMCVAP2017/0001]

Date:

Monday, 23rd November 2020

Coram:

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

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

Appearances:

Appellant: Ms. Mary-Lou Creque

Respondent: Ms. Ruthilia Maximea

Issues: Civil appeal – Application for adjournment – Appellant outside of jurisdiction

Type of Order: Adjournment

Result / Order: [Oral Delivery]

IT IS HEREBY ORDERED THAT:

- 1. The adjournment is granted on condition that the appellant pays the sum of \$2200.00 on account of the arrears of maintenance in respect of the child of the marriage as ordered by the magistrate no later than 31st December 2020, failing which his appeal shall stand dismissed without further order.**
- 2. The appellant shall pay the costs of this adjournment fixed in sum of \$500.00 no later than 31st December 2020.**
- 3. In the event that the appellant complies with the payments as stated, the appeal shall be heard at the next sitting of the Court of Appeal in the Territory of the Virgin Islands scheduled for the week commencing 22nd February 2021.**

Reason: The Court heard an application by the appellant for an adjournment of the appeal on the basis that the appellant was outside the Territory of the Virgin Islands, and therefore could

not attend the hearing of the appeal. The appeal challenges an order made by a learned magistrate in 2017 for the appellant to pay certain sums in maintenance to the respondent and her minor child.

The respondent objected to the application for an adjournment on the basis that the appeal is of vintage having been filed in 2017; three previous adjournments had been granted in the matter; and that, given that the appeal operates in law as a stay of the learned magistrate's order, the appellant has paid only USD \$100.00 in maintenance to the respondent since the appeal was filed.

The Court noted that it should very reluctantly proceed with the hearing of an appeal in circumstances where a party is desirous of attending the hearing, but has good reason for not being able to do so. In light of the circumstances as outlined by counsel for the appellant, the Court was satisfied that an adjournment should be granted. The Court however noted, given the procedural background to the appeal, including the delay in prosecuting the appeal, and the injustice occasioned by the appellant's non-payment to the respondent, that it was in the interest of justice to grant the adjournment on condition that the appellant pays to the respondent a portion of what would have been the outstanding maintenance sums under the learned magistrate's order, along with the costs of the adjournment.

Case Name:

Kevin Moorehead

v

Aliston Wheatley

[BVIHCVAP2020/0008]

Date:

Monday, 23rd November 2020

Coram:

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

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

Appearances:

Appellant: Mr. Kevin Moorehead, in person

Respondent: Ms. Karen Reid and Ms. Mandy Harnarinesingh

Issues: Civil appeal – Notice of discontinuance – Costs

**Type of
Order: Oral Decision**

**Result /
Order: IT IS HEREBY ORDERED THAT:
The appellant shall pay costs to the respondent on the
appellant's notice of discontinuance fixed in the sum of
\$1000.00, said sum to be payable by 31st December 2020.**

**Reasons: The Court considered the question of costs arising from a
notice of discontinuance filed by the appellant who was
unrepresented.**

**The respondent sought costs in the sum of \$2,500.00. The
sum proposed by the respondent included the costs for
preparing an application to strike out the appeal, an affidavit
in support and a hearing bundle, all of which had been filed,
but which had been overtaken by the appellant's notice of
discontinuance.**

**On the question of quantum, the appellant, Mr. Moorehead
indicated that he would not be in a position to pay the amount
requested by the respondent given the sporadic nature of his
employment and income. The Court was satisfied, in light of
the circumstances of the case, including the stage at which
the proceedings had reached and the steps which had been**

taken by the respondent in resisting the appeal, that \$1,000.00 was an appropriate sum to be paid in costs.

Case Name: Victorija Fetaimia
V
[1]Albert Court (Westminster) Management
Company Limited
[2]Dondore Incorporated (In Liquidation)

[BVIHCMAP2020/0018]

Date: Monday, 23rd November 2020

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Paul Webster, Justice of Appeal [Ag.]

Appearances:
Applicant: Mr. John Carrington, QC
Respondents: Mr. Jonathon Addo for Albert Court (Westminster)
Management Company Limited
Ms. Lisa Walmisley for the Liquidators of Dondore
Incorporated (In Liquidation)

Issues: Application for extension of time to appeal – Appeal against
order winding up company – Length of delay – Whether delay
inordinate – Reasons for delay – Whether appeal has good
chances of success – Whether the respondents would suffer
any prejudice from grant of extension of time

**Type of
Order:**

Oral Decision

**Result /
Order:**

IT IS HEREBY ORDERED THAT:

- 1. An extension of time is granted to the applicant to appeal the order of the High Court made on 18th November 2019 appointing liquidators of Dondore Incorporated.**
- 2. The applicant shall file and serve the notice of appeal within 7 days of the date of this order.**
- 3. The 1st respondent's costs of the application for an extension of time to appeal shall be borne by the applicant in accordance with CPR 65.11(3)(b), such costs to be assessed if not agreed within 21 days of the date of this order.**
- 4. The application of the liquidators for imposition of a condition for the grant of the extension of time to appeal, is refused.**
- 5. The parties shall submit to the Court an agreed timetable for an expedited appeal within 14 days of the date of this order.**

Reason:

The Court considered an application for an extension of time to appeal against an order of the High Court dated 18th November 2019, appointing liquidators for Dondore Incorporated (In Liquidation) (the second-named respondent in the extension of time application), as well as an application by the liquidators of Dondore Incorporated Ltd (In Liquidation) for an order that, if the extension of time to appeal is granted, it be made subject to a condition that the appellant pays security for the liquidators' costs on the appeal. The application for extension of time was made by Victorija Fetaimia who, at the date of the application, was acknowledged to be the sole beneficial owner of the shares in Dondore Incorporated, and by the date of the hearing of the application, was the registered owner of all of the issued shares in the company.

The Court considered a preliminary issue raised by the extension of time application, which was whether leave to appeal was required to appeal the 18th November 2019 order of the High Court. If leave to appeal as required, then the application before the Court would have to be an application for extension of time to seek leave to appeal, and not an application for extension of time to appeal. The first respondent, Albert Court (Westminster) Management Company Limited, which successfully applied for the appointment of the liquidators of Dondore Incorporated, argued that leave was required appeal the order appointing the liquidators. The basis of this argument was two-fold. Firstly, that the applicant had no standing to appeal the 18th November 2019 order because she was not a party to the proceedings in which the order was granted and could therefore only appeal the order if this Court granted her permission to do so. Secondly, because, in making the application for extension of time to appeal, the applicant must also apply for relief from sanctions which she did not do. The first respondent advanced the first ground of its argument on the basis of an excerpt from French on Applications to Wind Up Companies (3rd Edn. Sweet & Maxwell Ldn.) in which the authors state at section 6.58 that “any person who was a party on the record to the proceedings, has standing to appeal. Another person who is either bound by the order or is aggrieved by it or is prejudicially affected by it if the appeals tribunal gives permission.” The first respondent argued that the authors referred to the case of Re Securities Insurance Co [1894] 2 Ch 410 as authority for that proposition. In reply, counsel for the applicant, Mr. John Carrington, QC submitted that Re Securities Insurance Company is an 1894 English case which speaks to an old Chancery practice requiring a party to seek leave to appeal, but that section 28 of the Eastern Caribbean Supreme Court Act states that the practice and procedure in relation to appeals shall be exercised in accordance with the provisions of the Act and that English practice would only apply where no special provisions are contained in the ordinance or rules of court. Mr. Carrington, QC further submitted that sections

30(3) and 30(4) of the Eastern Caribbean Supreme Court Act deal with the instances in which leave to appeal is required, which do not include appeals from orders appointing liquidators, and that there is no reason to follow the old English Chancery practice.

The first respondent advanced the second aspect of its argument on the basis of the case of Pendragon International Limited & Ors. v Bacardi International Limited Anguilla Civil Appeal No. 3 of 2007 (delivered 23rd November 2007, unreported) which it argued holds that where an applicant applies under rule 26.1(2)(a) of the Civil Procedure Rules 2000 (“CPR”) for an extension of time to file a notice of appeal, that party must apply for relief from sanctions. In reply to this second ground, Mr. Carrington, QC submitted that in the case of Attorney General v Keron Matthew [2011] UKPC 38 the Privy Council ruled that the rules concerning relief from sanctions were inapplicable when no sanction had been expressly imposed by a court order or rule. He contended that CPR 62.5 states the time limits within which an appeal must be filed but provides no express sanction for a failure to do so. Accordingly, CPR 26.8 on relief from sanctions has no application in the present case. Mr. Carrington, QC advances, is supported his contention with this Court’s decisions in Rose v Rose Saint Lucia Civil Appeal No. 19 of 2003 (delivered 22nd September 2003), C.O. Williams Construction (St. Lucia) Limited Inter-Island Dredging Co. Ltd. Saint Lucia HCVAP 2011/017 (delivered 19th March 2012) and several other cases since decided by this Court. The Court accepted Mr. Carrington’s replies to both the need for leave and relief from sanctions and ruled that leave is not required to appeal against an order appointing liquidators of a company and no relief from sanctions is necessary in seeking an extension of time within which to appeal against an order in the absence of some specific sanction contained in the rules of Court or in an order of the Court; the implied sanctions argument had been jettisoned by this Court more than once.

The Court then considered the main issue of whether, on the facts of the case, an extension of time ought to be granted to the applicant to appeal against the November 2019 order of the High Court. The Court noted that the factors to be considered in determining whether to grant an extension of time to appeal are well-known and are set out in several of its judgments, with the most quoted being that of Byron CJ in Rose v Rose. The factors are the following: (i) the length of the delay in filing the appeal; (ii) the reasons the delay; (iii) the chances of the appeal succeeding if the extension is granted; and (iv) the degree of prejudice to the other side if the extension of time is granted.

The Court noted that its approach is to consider all of these factors against the circumstances of the case, and to grant an extension if, in undertaking the balancing exercise, it considers that the grant of an extension is a just order. Furthermore that, although there is no established hierarchy of the factors to be considered, the Court possesses a wide discretion to grant an extension of time when an applicant has good prospects of succeeding on the appeal even though he or she was guilty of inordinate delay without good explanation.

In the instant case, the Court noted that although the delay in filing the appeal was inordinate, it considered that these delays were to a large extent, satisfactorily explained. Moreover, the Court took the view that the applicant has good prospects of succeeding on the appeal, and that the respondents would not suffer substantial prejudice if the time for filing the appeal was extended. The Court was satisfied therefore that an extension of time should be granted.

The Court considered that the application by the liquidators of Dondore Incorporated for the grant of any extension of time in the matter to be conditioned on the payment into court of the sum of \$170,000.00 to abide the outcome of the appeal, in relation to the costs and expenses of the liquidators. The Court was however not satisfied that such an order was either

necessary or appropriate and therefore declined to impose such a condition or make any such order.

In terms of costs on the application for extension of time, the Court noted that CPR 65.12 directs that, on an application to extend time, the costs ought to be borne by the applicant unless there are special circumstances. In the Court's view, there were no special circumstances in this case justifying a departure from the rule.

Case Name: **Novel Blaze Limited (In Liquidation)**
v
Chance Talent Management Limited

[BVIHCVAP2020/0006]

Date: **Monday, 23rd November 2020**

Coram: **The Hon. Mde. Louise Esther Blenman, Justice of Appeal**
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]

Appearances:
Appellant: **Mr. Robert Nader and Ms. Sophie Christodoulou**
Respondent: **Mr. Grant Carroll and Mr. Daniel Mitchell**

Issues: **Civil appeal – Insolvency law – Section 9(2) of Insolvency Act, 2003 – Whether respondent was a secured creditor within meaning of 9(2) of Insolvency Act, 2003 – Judge's failure to follow judgment in Ex p West Riding Union Banking Co (1881) 19 Ch D 105 – Whether the respondent had standing pursuant to sections 9(1)(8) and 162(2) of Insolvency Act, 2003 to wind up appellant-company – Whether learned judge erred in finding that respondent had admissible claim in liquidation of the appellant – Whether costs order should be made against**

non-party – Whether director of Novel Blaze should be made to pay costs for resisting the winding up application and for bringing the appeal

**Type of
Order:**

N/A

**Result /
Order:**

[Oral delivery]

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

Case Name:

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

v

[1] Adina Whitrod

[2] Martin Whitrod

[BVIHCVAP2020/0003]

Date:

Monday, 23rd November 2020

Coram:

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

Appearances:

Appellant: Mr. Lewis Hunte, QC with Mr. Paul Edwards

Respondents: Ms. Marie-Lou Creque

Issues:	Civil appeal – Land law – Joint proprietorship – Section 100 of Registered Land Ordinance – Transfer of property – Principles of interpretation – Interpretation of instrument of transfer – Whether learned judge failed to consider claim for a declaration on the interpretation of instrument of transfer – Whether learned judge erred in failing to consider legal authorities relied on by parties – <u>Jenner v Jenner</u> (1866) LR 1 EQ 361 – Whether learned judge failed to adequately interpret instrument of transfer in arriving at decision – Whether it was permissible to admit extrinsic evidence in order to ascertain the intention of parties – Declaration contained in instrument of transfer – Whether declaration sufficient to convey any interest in the property – Whether learned judge misdirected herself regarding the legal effect of the Will of Eric Donovan
Type of Order:	N/A
Result / Order:	[Oral delivery] IT IS HEREBY ORDERED THAT: Judgment is reserved.

Case Name: **Myett's Enterprises Limited**
v
[1] Kimberly Cooke Leigh
[2] Cheryl Couture
[3] Cora Liburd
[4] Veronica Bailey
[5] Rudolph Stone
[6] Luz Adell Francisco de Callwood
[7] Sofia Small
[8] Xiomara Luisa Rhymer Mason
[9] Alexander Carina Henriquez
Industrus
[10] Carina Industrus
[11] Davina Gordon
[12] Ernie Carol Claxton

[BVIHCVAP2020/0005]
formerly BVIHCVAP2019/0004]
(Territory of the Virgin Islands)

Date: **Tuesday, 24th November 2020**

Coram: **The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal [Ag.]
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]

Appearances:
Appellant: **Mrs. Dancia Penn, QC with Ms. Astra Penn**
Respondents: **Mr. Richard Rowe and Mr. Daniel Davies**

Issues: **Civil appeal – Application by appellant for adjournment –**
Application by respondent for costs of adjournment and
costs thrown away

**Type of
Order:**

Adjournment

**Result /
Order:**

[Oral delivery]

IT IS HEREBY ORDERED THAT:

- 1. At the request of the appellant, the hearing of the appeal is adjourned to the next sitting of the Court of Appeal for the Territory of the Virgin Islands during the week commencing 22nd February 2021.**
- 2. Costs of the adjournment agreed in the sum of US\$2,500.00 to the respondents to be paid by 31st December 2020.**
- 3. Failure to pay the full amount of US\$2,500.00 by 31st December 2020 will result in the appeal standing dismissed without further order.**
- 4. This is a final adjournment of this appeal.**

Reason:

The Court considered an application by counsel for the appellant, Mrs. Dancia Penn, QC for an adjournment on the basis that the appellant had not received reply submissions to the appellants' supplemental submissions; and (counsel had not been sufficiently instructed by her clients. Mrs. Penn, QC stated that she provided to both the Court and Mr. Richard Rowe, on Friday 20th November 2020, written notification of her intention to apply for an adjournment of the hearing of the appeal.

Mr. Richard Rowe opposed the application on the bases that he was not desirous of filing reply submissions to the appellant's supplemental submissions and that no notice had been received of the appellant's intention to apply for an adjournment and that consequently counsel had spent considerable effort in ensuring their readiness to proceed with the appeal. Following exchanges with counsel, Mr. Rowe conceded that his office had in fact received notice of the

intention to apply for an adjournment *via* email on 20th November 2020.

The Court considered the reasons for the application advanced by Mrs. Penn, QC and the circumstances underlying the appeal as advanced by Mr. Rowe, that the judgment on appeal is in favour of the respondents who have not been employed by the appellant for a substantial period, having lost their jobs in the aftermath of Hurricane Irma. The Court also noted that there was no evidence of any mitigation of the damages which the respondents are said to have suffered.

In all the circumstances, the Court was satisfied that the application for adjournment should be granted, but that the adjournment should be conditional, and that the appellant should pay the respondents' costs of the adjournment.

Case Name:

Marcussi Continental Inc.

V

Roberto Arauz Sam

[BVIHCMAP2020/0005]

Date:

Tuesday, 24th November 2020

Coram:

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

The Hon. Mr. Mario Michel, Justice of Appeal

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

Appearances:

Appellant: Mr. Paul Dennis, QC with Ms. Asha Johnson-Willins

Respondent: Mr. John Carrington, QC

Issues:	Interlocutory appeal – Appeal against order refusing to set aside default judgment pursuant to rule 13.3(2) of Civil Procedure Rules 2000 – Whether there were exceptional circumstances pursuant to CPR 13.3(2) to warrant setting aside of default judgment – Whether strength of appellant’s defence amounted to exceptional circumstances
Type of Order:	Oral Judgment
Result / Order:	IT IS HEREBY ORDERED THAT: 1. The appeal is dismissed. 2. The appellant shall bear the costs of the proceedings, to be assessed by the court below if not agreed within 21days, which costs shall not exceed two-thirds of the assessed costs in the court below.
Reason:	This was an appeal against the order of a learned judge refusing to set aside a default judgment entered against the defendant/appellant on the basis that the defendant/appellant had not shown that the case fell into the category of ‘exceptional circumstances’ under rule 13.3(2) of the Civil Procedure Rules 2000. The Court noted that what amounts to ‘exceptional circumstances’ under CPR 13.3(2) is now well-settled by the case of <u>Meyer v Baynes [2019] UKPC 3</u>, which is a decision of the Privy Council affirming this Court’s decision in the said case. In the instant case, the appellant’s proposed defence hinged upon an assertion that, in the circumstances, it was not the company that should have been sued. The appellant argued that based on the evidence it sought to place before the judge, its defence was unanswerable such that the matter could properly be classified as an ‘exceptional circumstance’ to warrant the setting aside of the default judgment pursuant

to CPR 13.3(2). Upon a review of the record, the Court found that the learned judge did not have undisputed evidence to show conclusively that the defence was unanswerable and accordingly accepted the learned judge's reasoning that while the appellant's proposed defence was 'arguable' it did not amount to 'exceptional circumstances' under CPR 13.3(2).

The Court noted that the learned judge in his oral judgment reasoned that it was quite common for the wrong company in a particular group of companies to be sued and that there was no particular injustice or flagrant injustice as was suggested by learned counsel, as both the defendant company and the company which ought to have been sued on the appellant's case, had the same beneficial ownership. On this particular point the Court made clear that it was not in agreement with the learned judge's reasoning. In the Court's opinion, had this reasoning been the only basis for the learned judge's decision and, had the learned judge made a finding that the wrong company had in fact been sued, the possibility might have arisen for appellate interference with the judge's reasoning. The Court however found that this reasoning by the judge was not the true basis upon which his decision was made, and that, on the record before the Court, there was no finding by the judge or evidence such as to cause him to conclude definitively, that the appellant was wrongly sued.

In all the circumstances, the Court found that the learned judge did not err in principle in arriving at his decision or in the exercise of his generous discretion under CPR13. 3(2). There was therefore no basis for disturbing the learned judge's decision.

Case Name:

Emmerson International Corporation

v

ABC Grandeservus Limited

[BVIHCMAP2019/0017]

Date: Wednesday, 25th November 2020

Coram: The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]

Appearances:

Applicant: Mr. Andrew Ayres, QC with Ms. Lisa Walmisely

Respondent: Mr. Phillip Marshall, QC with Mr. Robert Weekes and Mr. Iain Tucker

Issues: Application for leave to appeal to Her Majesty in Council – Application for stay of proceedings – Section 3(2)(a) of Virgin Islands (Appeal to Privy Council) Order 1967 – Whether proposed appeal raises question of great or general public importance – Proposed appeal from construction of interlocutory case management order

Type of Order: Oral Decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. The application for leave to appeal to Her Majesty in Council is refused.
2. Consequent on the refusal of the application for leave to appeal, the application for a stay falls away.
3. Costs to be paid by the applicant to the respondent to be assessed by a judge of the Commercial Court if not agreed within 21 days of the date of this order.

Reason: This was an application made by notice of motion for conditional leave to appeal to Her Majesty in Council against

the decision of the Court of Appeal delivered on 30th September 2020. The Court noted that the background to the application and appeal are outlined in the Court of Appeal's 30th September 2020 decision.

The appellant seeks conditional leave pursuant to section 3(2)(a) of the Virgin Islands (Appeals to Privy Council) Order 1967 S.I. 1967/234 on the basis that the appeal raises some question of great general or public importance.

What amounts to a question of great general or public importance has been considered in the Court's decisions in Martinus Francois v The Attorney General of Saint Lucia [2004] ECSCJ No. 126, Controller of Bank Crozier Limited (in Liquidation) v Louison, Liquidator of Bank of Crozier Limited et al [2008] ECSCJ No.80, Renaissance Ventures Ltd et al v Comodo Holdings Ltd BVIHCMAP2018/0005 (delivered 8th October 2018), Pacific Wire & Cable Company Ltd. V Texan Management Ltd. BVIHCVAP2006/0019 (delivered 15th October 2007) and The Supervisory Authority v Cresswell Overseas SA et al ANUHCVP2017/0003 (delivered 30th October 2019).

The Court considered the questions identified by the applicant, as outlined in the notice of motion, in relation to which leave to appeal was being sought. The Court considered the written submissions of counsel for the applicant and respondent, and the oral submissions of counsel for the applicant. The Court noted that the question before the Court of Appeal in its 30th September decision was as to the interpretation of a case management order by Wallbank J. That order was relevant only to the parties before the learned judge. Having regard to the authorities, the Court was satisfied that the interpretation of the learned judge's order and the questions posed in the notice of motion, were not questions of great general or public importance and refused the application for leave to appeal. The Court accordingly took the view that the applicant had not met the threshold requirements for an appeal to Her Majesty in

Council under section 3(2)(a) of the Virgin Islands (Appeals to Privy Council) Order. Consequentially, the applicant's application for a stay fell away.

Case Name: **Throne Capable Investment Limited**
V
Agile Star Group Limited

[BVIHCMAP2020/0014]

Date: **Wednesday, 25th November 2020**

Coram: **The Hon. Mde. Louise Esther Blenman, Justice of Appeal**
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]

Appearances:

Appellant: **Mr. Andrew Ayres, QC instructed by Ms. Daisy Bovingdon**

Respondent: **Mr. Paul Chaisty, QC with him, Mr. Jerry Samuel**

Issues: **Interlocutory appeal – Appeal from refusal to award costs – Exercise of discretion – Whether learned judge properly exercised discretion to refuse application for costs – Whether learned judge ought to have taken into account circumstances surrounding statutory demand in determining whether to award costs**

Type of Order: **N/A**

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

IT IS HEREBY ORDERED THAT:
Judgment is reserved.

Case Name: **Reniston Limited**
v
Nedlands Overseas Inc.
[BVIHCMAP2020/0016]

Date: **Thursday, 26th November 2020**

Coram: **The Hon. Dame Janice M. Pereira, DBE, Chief Justice**
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal [Ag.]

Appearances:
Appellant: **Mr. Michael Adkins with Ms. Daisy Bovingdon**
Respondent: **No appearance**

Issues: **Interlocutory appeal – Whether learned judge erred in striking down contractual interest clause on the basis that it constituted a contractual penalty – Whether contractual interest clause contained in a guarantee agreement was a secondary obligation – Whether rate of interest imposed by contractual interest clause was unreasonable or unconscionable – Costs – Whether learned judge erred in making award for fixed costs in commercial court proceedings – Whether learned judge was required to give effect to contractual provision for costs**

Type of **N/A**
Order:

Result: **[Oral delivery]**

IT IS HEREBY ORDERED:
Judgment is reserved.

Case Name: **Net International property Limited**
v
Adv. Etian Erez

[BVIHCMAP2020/0010]

Date: **Thursday, 26th November 2020**

Coram: **The Hon. Dame Janice M. Pereira, DBE, Chief Justice**
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mde. Vicki-Ann Ellis, Justice of Appeal [Ag.]

Appearances:

Appellant: **Mr. John Carrington, QC**

Respondent: **Ms. Tameka Davis and Ms. Allana-J Joseph**

Issues: **Commercial appeal – Jurisdiction of court to grant recognition and assistance to trustee – Recognition by virtue of common law or under inherent jurisdiction – Parts XVIII and XIX of BVI Insolvency Act , 2003 – Whether Insolvency Act, 2003 expressly or by necessary implication, abrogated common law principles of recognition, notwithstanding that Part XVIII is not yet effective – Whether common law power to grant assistance survives having regard to provisions of Part XIX of the Insolvency Act – Res judicata – Whether issues raised by appellant in its defence are res judicata – Entry of judgment on fixed date claim – Whether judge erred in exercise of discretion to try fixed date claim form summarily at first hearing – Rule 27.2(3) of the Civil Procedure Rules 2000 – Whether learned judge erred in ordering registered agent of the company to rectify the register of members**

Type of Order:	N/A
Result / Order:	[Oral Delivery] IT IS HEREBY ORDERED THAT: 1. Judgment is reserved 2. The stay of proceedings granted in this matter shall continue until the delivery of the judgment.
Case Name:	Doyle Guishard v The Queen [BVIHCRAP2015/0004] Denzil Wheatley v The Queen [BVIHCRAP2015/0005] Samuel Harris v The Queen [BVIHCRAP2015/0006]
Date:	Thursday, 26th November 2020
Coram:	The Hon. Mr. Mario Michel, Justice of Appeal The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]
Appearances:	
Appellants:	Mr. Patrick Thompson Jr. for Doyle Guishard and Samuel Harris

Mr. Michael Maduro for Denzil Wheatley

Respondent: Mrs. Tiffany Scatliffe-Espirit, Director of Public Prosecutions

Issues: Criminal appeals – Appeals against conviction and sentence – Whether learned judge erred in admitting evidence of self-identification tendered by one of the appellant – Whether learned judge erred in refusing no case submission – Whether appellants’ conviction was unsafe – Whether the Court of Appeal should order a retrial of the appellants

**Type of
Order: Oral Judgment**

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

- 1. The appeal of all the appellants, Mr. Guishard, Mr. Harris and Mr. Wheatley are allowed.**
- 2. Their convictions are quashed and sentences set aside.**

Reason: These were three appeals against conviction by Doyle Guishard, Denzil Wheatley and Samuel Harris who were jointly tried and convicted for one count of aggravated burglary.

The Court heard oral submissions from counsel for the appellants and from the Director of Public Prosecutions. The appellants contended that the learned trial judge erred in law and materially misdirected the jury on the admissibility of self-identification evidence in relation to Mr. Guishard. They contended that this error by the judge affected the safety of all three convictions, as this was a case of joint enterprise and the learned judge did not give separate consideration to the evidence in relation to each of the defendants. Furthermore, the trial judge ought to have upheld the no case submission on the basis that the evidence was tenuous. The

Director of Public Prosecutions conceded that the judge's decision to admit the evidence of self-identification in relation to Mr. Guishard was a material misdirection which affected the convictions of all three appellants.

The Court was of the view that the learned trial judge ought to have upheld the no case submission on the basis that the evidence was tenuous. In addition to the issues related to the self-identification evidence, the other identification evidence, albeit based on recognition by a police officer who said he had known the appellants for some time, came from an identification made in extremely difficult circumstances, particularly that the video footage upon which it was based was only 3 to 4 seconds long, blurry, and there was poor lighting. Having regard to poor quality of the conditions in which the identification was made, the learned trial judge ought not to have allowed the case to proceed before the jury.

The Court further considered the applicability of the proviso to Section 37(1) of the Eastern Caribbean Supreme Court (Virgin Islands) Act to the appeal. The proviso permits the Court to dismiss an appeal even when satisfied that points raised by an appellant are determined in their favour, but that no miscarriage of justice actually occurred. The Director of Public Prosecutions did not seek to have the Court apply the proviso. The Court was satisfied that the proviso did not apply and that the Director of Public Prosecutions was correct in not seeking to have the Court apply it, and that the appeal should be allowed. In all the circumstances, the Court concluded that the convictions of all three appellants were unsafe and the Director of Public Prosecutions was correct in conceding the appeal.

The Court considered in the circumstances of this case that it was not appropriate to order a retrial as the incident which occasioned the criminal charges against the appellants occurred in 2014, some 6 years ago, and that the interests of justice did not support an order for retrial.

Case Name:

**1. International Trading Holding Co.
Limited**
2. Intraco UAE Limited

V

Med Trading Limited

[BVIHCMAP2020/0002]

Date: Thursday, 26th November 2020

Coram: The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mr. Gerard St. C. Farara, QC, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. Andrew Willins

Respondent: Mr. John Carrington, QC

Issues: Interlocutory appeal — Summary judgment — Refusal of application for summary judgment — Test of summary judgment — Realistic prospect of defending claim — Whether learned judge erred in refusing application for summary judgment — Whether learned judge misapplied the test of summary judgment — Permission to file amended defence and counterclaim — Whether learned judge erred in exercise of discretion in granting permission to file amended defence and counterclaim — Validity of shareholder resolution amending articles of association — Interpretation of arbitration clause in articles of association — Whether judge erred in concluding that there were questions of law and fact better suited for determination at trial

Type of Order:	N/A				
Result / Order:	IT IS HEREBY ORDERED THAT: Judgment is reserved				
Case Name:	Loretta Frett (as executrix of the estate of Jeuel Simeon Frett, deceased) V J. S. Archibald & Co. (a trading name) [BVIHCVAP2017/0004] (The Territory of the Virgin Islands)				
Date:	Thursday and Friday, 26th and 27th November 2020				
Coram:	The Hon. Mr. Mario Michel, Justice of Appeal The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]				
Appearances:	<table border="0" style="width: 100%;"> <tr> <td style="vertical-align: top;">Appellant:</td> <td>Mr. Jamal Smith and Ms. Keah Glasgow</td> </tr> <tr> <td style="vertical-align: top;">Respondent:</td> <td>Mrs. Patricia Archibald- Bowers</td> </tr> </table>	Appellant:	Mr. Jamal Smith and Ms. Keah Glasgow	Respondent:	Mrs. Patricia Archibald- Bowers
Appellant:	Mr. Jamal Smith and Ms. Keah Glasgow				
Respondent:	Mrs. Patricia Archibald- Bowers				
Issues:	Civil appeal – Non-appearance of counsel – Professional negligence – Default judgment entered against law firm for damages to be assessed – Nominal damages awarded – Whether master applied proper test to determining damages for professional negligence – Nominal damages to be awarded to claimant represented by negligent lawyer where claim was bound to fail – Whether master erred in his quantification of quantum for nominal damages				

**Type of
Order:**

Oral Judgment

**Result /
Order:**

IT IS HEREBY ORDERED THAT:

- 1. The appeal against the judgment of Master Ventose is dismissed and his orders affirmed.**
- 2. Each party shall bear its own costs.**

Reasons:

This was an appeal against the judgment of Ventose M (as he then was) in which he made an award of nominal damages of USD \$500.00 to Loretta Frett, the widow and executrix to the estate of Jeuel Simeon Frett, deceased, and awarded interest and costs based on the damages award of USD \$500.00. The award of damages, interest and costs was made on an assessment of damages undertaken by the master, arising from a default judgment against the law firm J. S. Archibald & Co., for professional negligence. J. S. Archibald & Co. had been sued by Mrs. Frett for breach of contract and/or professional negligence arising from the retention of the firm by Mrs. Frett to represent her in a negligence claim against the Attorney General and the non-appearance by counsel at court, on the date fixed for trial of the case, resulting in the case being dismissed. In the suit brought by Mrs. Frett against J. S. Archibald & Co. the firm entered an appearance but did not file a defence, resulting in a default judgment being entered against the firm for damages to be assessed.

Mrs. Frett appealed against the judgment of Ventose M on four grounds seeking to have the judgment of the master set aside and for damages to be assessed against J. S. Archibald & Co., the respondent in the appeal. The appellant did not file any skeleton arguments in support of her appeal as required by rule 62.11 of the Civil Procedure Rules 2000.

At the case management conference for the appeal, orders were made for the filing of the record of appeal and the parties' submissions. The respondent filed submissions in opposition to the appeal on 16th June 2017. The appellant did not file any submissions in support to her appeal, but by an

email to the court office on 17th November 2017, counsel for the appellant stated that: “I confirm that the claimant’s submissions on assessment of damages found in the record of appeal are the submissions which the appellant intends to rely on for the conduct of the appeal.”

These undated submissions would have been filed some time prior to the assessment of damages undertaken by the master just under 4 years ago. In her written submissions for her hearing of the assessment of damages, the appellant claimed that she was entitled to the sum of USD \$80,000.00 for breach of contract, being the amount which she claimed that she had paid to the respondent for representation in the case, and a further sum of USD \$186,050.23 by way of damages for professional negligence. The Court narrowed down the issues on appeal to the following two questions:

1. whether the master applied the proper test to determining damages for professional negligence; and
2. whether the master erred in his calculation of the quantum of nominal damages.

No issue was taken in the notice of appeal with the master’s award, or lack of an award, in relation to damages for breach of contract but only for his award of damages for professional negligence. Counsel for the appellant attempted at the hearing of the appeal, to transform the award of nominal damages of US\$500.00, into an award of damages for breach of contract. This was not however accepted by the Court, because the award of nominal damages was very clearly an award premised on a finding on liability for professional negligence having been made against the respondent but with no actual loss being established against the respondent arising from the liability.

On the first issues, the Court noted that the appellant, in the submissions on which she relied, states at paragraph 16, that the manner for calculating damages for professional negligence is for the claimant, the appellant in this appeal, to prove that her claim against the defendant, in the suit in

which she was represented by the respondent, had a real and substantial prospect of success and not just a negligible one.

In paragraphs 24 and 25 of the submissions, the appellant contended that, if the Court found that there was a realistic prospect of success, “the Court must then go on to give a percentage of the overall prospect of success in the claim”. At paragraph 26 the appellant then stated that the Court, had to assess the likely level of damages which the appellant might have recovered, if the original litigation had gone to trial and then “applied to that said level of damages, the calculation to take account to the uncertainty of receiving the full amount.”

In the submissions in opposition to the appeal, the respondent referred to a number of the significant authorities on damages for professional negligence against lawyers, including Kitchen v Royal Air Force Association [1958] 1 WLR 563, Mount v Barker Austin (a Firm) [1998] EWCA Civ 277, Hatswell v Goldbergs (a Firm) [2004] EWCA Civ 1005, Perry v Raleys Solicitors [2019] UKSC 5 and Allied Maples Group v Simmons and Simmons (a Firm) [1995] 4 All ER 907. The Court referred to Kitchen V Royal Air Force Association, where Lord Evershed MR stated:

“In my judgment, assuming that the plaintiff has established negligence, what the court has to do in such a case as the present is to determine what the plaintiff has lost by that negligence. The question is: Has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best it can.”

In the same case Parker LJ stated:

“If the plaintiff can satisfy the court that she would have had some prospect of success, then it would be for the court to evaluate those prospects, taking into consideration the difficulties that remained to be surmounted. In other words,

unless the court is satisfied that her claim was bound to fail, something more than nominal damages fall to be awarded.”

The Court noted that, of the cases referred to by the respondent, the one which is most in line with the facts of the case at bar, is the case of Hatswell v Goldbergs. In that case, the claimant as in the present case, had sued a law firm for professional negligence arising from a case in which the law firm had represented him in a negligence action. It was determined that the firm was liable for professional negligence, with the assessment of damages, being handled separately by a different judge. The judge hearing the assessment of damages concluded, that the chances of the claimant recovering damages in the claim in which he was represented by the negligent lawyer were ‘nil’ and so he awarded no damages to the claimant. The claimant appealed against the decision of the judge on the assessment of damages. The Court of Appeal dismissed his appeal on the basis that the judge had adopted the right approach. The Court of Appeal held that the judge doing the assessment of damages, had to find some right of value, in which case he would have to assess its worth or some claim which was bound to fail, in which case, no or at least nominal damages could be awarded. In giving his judgment in the Court of Appeal, Sir Murray Stuart- Smith stated that:

“The process for the court is a two-stage process. First, the court must be satisfied that the claimant has lost something of value...It is only if the claim passes that test that the court has to evaluate in percentage terms of the full value of the claim what has been lost.”

Sir Murray Stuart- Smith also stated that:

“If the judge trying the issue of quantum in the solicitors' negligence case has available to him substantially the same evidence as that which would have been available to the trial judge on the notional medical negligence case, he may be entitled to come to a clear conclusion that the claim would

have failed and is of no value” which the court determined was the case of the matter before it.

In the case at bar, Ventose M in his judgment examined in some detail the evidence on which the appellant’s claim against the defendant was based and determined that the appellant had no prospect of being awarded damages against the defendant in the case, in which she was represented by the respondent. At paragraph 30 of his judgment the master stated:

“Applying the principles set out at [16]-[21], the Claimant has not shown that she has lost something of value because of the negligence of the Defendant, as the court is of the considered opinion that the claim was one that was bound to fail.”

The master accordingly held that there was no need for him to go to the second stage of trying to determine the percentage of the overall prospect of success which the appellant’s claim had on the basis of which he would calculate the level of damages which the appellant would get after taking account of the uncertainty of recovering the full amount. On the basis of the recognised authorities of professional negligence claims against law firms, which authorities were referred to by both sides in this appeal, and by the master in his judgment in the court below, the Court found that the master applied the proper test to be used when determining damages for professional negligence and so, ground 1 of the appellant’s grounds of appeal, must be dismissed.

In terms of the second question concerning the calculation of nominal damages, the Court noted that there was nothing in the appellant’s written submissions on the assessment of damages, which addresses this question. The Court observed that it having been determined that the respondent was liable for professional negligence, and it having been determined by the master that appellant’s claimant for

damages in the trial was one that was bound to fail, the appropriate award to be made on the assessment of damages is an award of nominal damages.

The Court noted that this indeed was the holding of the Court of Appeal in the case of Hatswell v Goldbergs, that if the claim for damages in which the claimant was represented by a negligent lawyer was bound to fail, then no damages, or only nominal damages ought to be awarded to the claimant. The master in the exercise of his discretion decided to make an award of nominal damages in the sum of USD \$500.00. The Court concluded that it had not been shown that the master was plainly wrong in so doing and no basis was given by counsel for the appellant for us to interfere with the master's finding.

The appeal failed on both issues and was accordingly dismissed.

Case Name: **Handell Martin Bartholomew**
v
Kimberly Bartholomew nee Alexander
[GDAHCVAP2020/0016]
(Grenada)

Date: **Friday, 27th November 2020**

Coram: **The Hon. Mr. Mario Michel, Justice of Appeal**
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]

Appearances:

Appellant:	Mr. Deloni Edwards
Respondent:	Ms. Claudette Joseph

Issues: Application for leave to adduce fresh evidence – Adjournment

Type of Order: Oral decision

Result / Order: IT IS HEREBY ORDERED THAT:

1. Leave is granted to both parties to adduce fresh evidence.
2. The affidavits filed by the respondent on 26th November, 2020 and by the appellant on 27th November, 2020 are deemed properly filed.
3. Leave is granted to the respondent to file an affidavit in reply to the affidavit filed by the appellant on 27th November 2020, on or before 11:20 am on 27th November 2020, such affidavit to be limited to the two matters raised in the appellants affidavit filed on 27th November, 2020.
4. The appellant shall exhibit the order of Magistrate Teddy St. Louis referred to in his affidavit dated 27th November 2020.
5. The hearing of the appeal is adjourned to 11:30 am on 27th November, 2020.

Reason: The Court noted that this appeal was listed as an urgent appeal, to be heard on 27th November 2020. The Court noted that an affidavit in support was filed by the respondent on 26th November 2020 and an affidavit filed by appellant on 27th November 2020. The Court noted that neither party had made an application to adduce fresh evidence. The Court took into account the period of time within which the order of this Court determined that this appeal should be heard as an urgent appeal and was of the view in the circumstances that leave should be granted to both sides to rely on further evidence and deemed the affidavits filed to be properly filed.

Case Name:

**Handell Martin Bartholomew
v
Kimberly Bartholomew nee Alexander**

**[GDAHCVAP2020/0016]
(Grenada)**

Date:

Friday, 27th November 2020

Coram:

**The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Esco Henry, Justice of Appeal [Ag.]**

Appearances:

Appellant Mr. Deloni Edwards

Respondent Ms. Claudette Joseph

Issues:

Civil appeal – Occupation order – Section 7(2)(b)(iv) of Domestic Violence Act – Whether learned judge erred in granting an occupation order pursuant section 7(2)(b)(iv) of Domestic Violence Act excluding the appellant from occupation of the matrimonial home

**Type of
Order:**

Oral judgment

**Result /
Order:**

IT IS HEREBY ORDERED THAT:

- 1. The appellant's appeal is allowed.**
- 2. The referenced paragraph of the learned judge's order is replaced with the following: "The appellant Handell Bartholemew is permitted to remain in occupation of the matrimonial home situated at River Road in the**

Parish of Saint George. The respondent is permitted to access the matrimonial home until determination of the ancillary matrimonial relief proceedings. The appellant Handel Bartholomew is to directed to cause his girlfriend to cease her occupation of the matrimonial home within 24 hours of today's date until further order."

3. The respondent's legal practitioner shall forthwith provide the appellant's legal practitioner with a complete set of all keys to the matrimonial home.
4. The parties shall within 7 days of this order report to the Head of Social Services Department within the Ministry of Social Services and shall undergo at that time and/or at such further dates directed by the Head of Social Services or delegated or relevant officer at that Ministry, professional relationship counselling from a reputable and recognized person or agency approved by the Ministry pursuant to section 7 (2) of the Domestic Violence Act.
5. Each party shall bear his or her own costs.

Reason:

This was an appeal against the decision of a learned magistrate to grant an occupation order pursuant section 7(2)(b)(iv) of Domestic Violence Act excluding the appellant from occupation of the matrimonial home. The Court noted that the appellant filed a notice of appeal against a final protection order made by the learned Magistrate under the Domestic Violence Act. The considered the affidavits filed and was of the view that the learned Magistrate's decision was plainly wrong and therefore made the orders above.