

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

TERRITORY OF THE VIRGIN ISLANDS
VIDEOCONFERENCE
20th – 23rd July 2020

JUDGMENTS

Case Name:

[1] Gregory Gilpin-Payne
[2] International Investments and Consulting
Ltd.

v

[1] Stephen First
[2] Corporate Capital (Asia) Ltd.

[SKBHCVAP2019/0028]

HEARD TOGETHER WITH:

[1] Keyapaha International Ltd.
[2] Dan Bilzerian

v

[1] Laura Getz
[2] Robert Getz
[3] Victor Doche
[4] Vistas International, LLC

[SKBHCVAP2019/0031]

AND

[1] Adam Bilzerian
[2] Lemon Grove Company Limited

[3] Caribbean Buildings Systems (St. Kitts) Ltd.

v

[1] Terrence V. Byron

[2] Byron & Byron

[3] Kevin Horstwood

[SKBHCVAP2019/0032]

AND

Adam Bilzerian

v

[1] Gerald Lou Weiner

[2] Kathleen Weiner

[SKBHCVAP2019/0033]

(Saint Christopher and Nevis)

Date: Tuesday, 21st July 2020

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard Farara QC, Justice of Appeal [Ag.]

Appearances:

Applicants: Mr. D. Victor Elliot Hamilton

Respondents: Mr. Sydney Bennett, QC holding papers for Mr. Terrence V. Byron on his own behalf and for the second and third respondents in SKBHCVAP2019/0032
Ms. Jean Dyer for the respondents in SKBHCVAP2019/00033
Mrs. Angelina Gracy Sookoo-Bobb holding a watching brief for the third respondent in SKBHCVAP2019/0031

Issues:

Applications to admit fresh evidence — Refusal by judge to recuse himself — Principles in Ladd v Marshall — Application of Ladd v Marshall principles to interlocutory applications — Whether applicants can rely on events and documents coming into existence after judge's refusal to recuse himself as fresh evidence in satisfaction of first limb in Ladd v Marshall — Whether applicants satisfied the second limb in Ladd v Marshall — Whether Court can grant leave to rely on a judgment and orders of the lower court without a transcript of the proceedings — Whether in all the circumstances the court ought to grant the application to admit fresh evidence to give effect to the overriding objective to do justice

Result and Reason:

HELD: allowing the applications to admit fresh evidence in all five matters; and directing the filing of written submissions on costs within 7 days of the date of the judgment, that:

1. The criteria in Ladd v Marshall for the admission of fresh evidence are principles and not special rules to be strictly applied by the court. It is no longer necessary for an applicant to show some special ground for the grant of permission to rely on fresh evidence upon the hearing of an appeal. They are principles which must be broadly applied, but relaxed in appropriate cases to give effect to the overriding objective of the court to do justice. This is especially so when considering an appeal from a decision on an interlocutory application. However, an applicant must produce strong grounds to merit the appellate court exercising its discretion in its favour. Accordingly, these being appeals from a decision on interlocutory applications, are appropriate cases in which the principles for adducing fresh evidence set out in Ladd v Marshall should be applied in a more flexible and relaxed manner.

Hertfordshire Investments Ltd v Bubb [2000] 1 LR 2318 applied; Langdale and Another v Danby [1982] 1 WLR 1123 applied; Star News Shops Ltd v Stafford Refrigeration Ltd [1998] 1 WLR 536 applied; Honourable Guy Joseph (in his personal capacity and in his capacity as Parliamentary representative for Castries South East) v The Constituency

Boundaries Commission et al SLUHCVP2015/0013 (delivered 1st October 2015, unreported) applied.

- 2. As to the first limb of the Ladd v Marshall principles, that the evidence which is sought to be adduced at the appeal stage must be evidence which could not have been obtained with reasonable diligence for use at the hearing below, fresh evidence is not limited to evidence which was in existence at the time of the hearing in the court below, but also includes evidence which came into existence subsequent to the hearing below. Accordingly, the documents satisfy the first limb of the Ladd v Marshall principles.**

Staray Capital Limited and another v Cha, Yang (also known as Stanley) [2014] ECSCJ No. 172 applied.

- 3. There is no rigid rule or principle that, absent the transcripts of the hearing below, an appellate court must refuse an application to rely on a judgment and/or orders of a lower court as fresh evidence. The fundamental principle is that an application to adduce fresh evidence must satisfy the Ladd v Marshall principles which are to be approached in a somewhat relaxed or less rigid manner in the instant appeals from interlocutory applications. In doing so, the court must consider all relevant factors, including the cumulative effect of the judgment and orders sought to be admitted as fresh evidence upon the hearing of these appeals.**
- 4. The argument by the respondents in SKBHCVAP2019/0033 that the documents ought not to be admitted as fresh evidence because those respondents were not parties to the proceedings in which the judgment and orders were made and, hence, would be at a disadvantage or would be prejudiced upon the hearing of the appeal, is not correct. The fundamental issue, which is not in dispute, is whether the documents are credible evidence, and whether, taken individually or in combination with other evidence, they would probably have an important influence on the result of the recusal applications.**

5. In deciding whether the appellants have satisfied the second limb of the Ladd v Marshall principles, that the evidence sought to be adduced would probably have an important influence on the result of the hearing below, this Court is entitled, and ought to consider, whether the documents, when considered individually or weighed cumulatively, in combination with each other or with other admissible evidence, would tend to show, to the informed fair-minded observer, a lack of fairmindedness or apparent bias on the part of the learned judge.

Marie Joseph Charles Robert Lesage v The Mauritius Commercial Bank Ltd [2012] UKPC 41 applied.

6. The documents sought to be relied on by the applicants satisfied the second limb of the Ladd v Marshall principles in that, when they are considered objectively and in the light of the Court's overriding objective to do justice between the parties, they would probably have had an important influence, as distinct from a definitive influence, on the outcome of the recusal applications. These documents which, inter alia, speak to prohibiting Mr. Paul Bilzerian from appearing and making representations for and on behalf of parties in these five matters, can be utilised to buttress the applicants' case that the learned judge probably lacks the impartiality or fairness necessary to continue to preside over and to determine issues in relation to these five matters before the High Court of Justice. In this Court's view, the justice of these matters requires that the applicants be permitted to rely on the documents as fresh evidence at the hearing of their respective appeals from the order of the learned judge refusing to recuse himself.

Ladd v Marshall [1954] 3 All ER 745 applied; Marie Joseph Charles Robert Lesage v The Mauritius Commercial Bank Ltd [2012] UKPC 41 applied.

APPLICATIONS AND APPEALS

Case Name: Kaz Penn
v
Ameera Robinson-Penn
[BVIMCVAP2017/0001]
(Territory of the Virgin Islands)

Date: Monday, 20th July 2020

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard St. C. Farara QC, Justice of Appeal
[Ag.]

Appearances:

Appellant: Ms. Marie-Lou Creque

Respondent: No appearance (Ms. Ruthilia Maximea on record)

Issues: Magisterial civil appeal — Adjournment

Type of Order Adjournment

Result / Order: [Oral Delivery]
IT IS HEREBY ORDERED BY CONSENT THAT:
The hearing of the appeal is adjourned to the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 23rd November 2020.

Reason: The matter was adjourned by consent of the parties due to the absence of the appellant from the jurisdiction.

Case Name: Allin Allington Durand

v

**[1] The Superintendent of Prisons
[2] The Attorney General**

[AXAHCVAP2020/0009]

(Anguilla)

Date: Monday, 20th July 2020

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard Farara QC, Justice of Appeal [Ag.]

Appearances:

Applicant: Ms. Merlanih Lim

Respondents: Mrs. Nakishma Rogers-Hull

Issues: Application to revoke order of single judge pursuant to rule 62.16A of the Civil Procedure Rules 2000 — Decision of single judge dismissing application for leave to appeal on the basis that application was filed out of time — Whether application for leave to appeal filed out of time — Rule 62.2A(2) of the Civil Procedure Rules 2000 (CPR)— Computation of time for periods 7 days or less under CPR 3.2

Type of Order Oral Decision

Result / Order: [Oral Delivery]
IT IS HEREBY ORDERED THAT:
The order of the single judge made on 30th June 2020 which ruled that the application for leave to appeal was filed out of time is set aside.

Reason: The Court, having regard to CPR 3.2, considered that the application for leave to appeal against the decision of the learned judge refusing leave to apply for judicial review was filed within the time prescribed by CPR 62.2A(2). Accordingly, the Court set aside the order of the learned

single judge dismissing the application for leave to appeal on the basis that it was filed out of time, and proceeded with the hearing of the application.

Case Name: **Allin Allington Durand**
v
[1] The Superintendent of Prisons
[2] The Attorney General

[AXAHCVAP2020/0009]

(Anguilla)

Date: **Monday, 20th July 2020**

Coram: **The Hon. Dame Janice M. Pereira, DBE, Chief Justice**
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard Farara QC, Justice of Appeal [Ag.]

Appearances:

Appellant: **Ms. Merlanih Lim**

Respondents: **Mrs. Nakishma Rogers-Hull**

Issues: **Application for leave to appeal — Decision of learned judge refusing leave to commence judicial review of decision of Superintendent of Prisons suspending appellant from duty as a prison officer — Whether proposed appeal has reasonable prospect of success — Whether learned judge misapplied the threshold requirements of ‘good arguable case’ in considering the application for leave to apply for judicial review — Whether learned judge misconstrued section 5(1) of the Code of Discipline for Prison Officers made under the Prison Regulations as not importing a requirement for a hearing before referring charges against the appellant to the Governor General — Whether learned judge misapplied the cases of Superintendent of Prisons and another v Hamilton and Carl Palmer v Superintendent of Prisons and another in determining the application of section 5(1) — Whether hearing of application for leave to appeal should be treated as hearing of appeal**

Type of Order

Oral Judgment

Result /
Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

1. The application for leave to appeal is treated as the hearing of the appeal.
2. The appeal is allowed.
3. Leave is granted to the applicant to commence judicial review proceedings in the court below, on the condition that the applicant files his claim for judicial review within 14 days of the date of this order granting him leave pursuant to rule 56.4(11) of the Civil Procedure Rules 2000, such proceedings to be heard before a different judge.
4. The respondents shall bear the costs of this appeal in the sum of EC\$4,000.00 to be paid to the applicant on or before 10th August 2020.

Reason:

The Court was satisfied that leave to appeal ought to be granted having regard to sections 5 and 7 of the *Code of Discipline for Prison Officers* made under the *Prison Regulations, Revised Statutes of Anguilla, c P75-1* and also having regard to the fact that full arguments for both sides have been made on the merits of what would be the appeal itself, the Court considered that the application for leave to appeal ought to be treated as the hearing of the appeal. The Court was of the considered view that the learned judge erred in principle in two material respects: (1) that he went further than was required in determining the question whether the application raised an issue for determination with a realistic prospect of success; and (2) his reliance on the decisions of the cases of *Superintendent of Prisons and another v Hamilton [2016] UKPC 23* and *Carl Palmer v The Superintendent of Prisons and the Attorney General AXAHCV2018/0010* (delivered on 30th July 2018, unreported), which are different on the facts and which did not engage a determination of the application of section 5 of the *Code of Discipline for Prison Officers*. The proper construction or interpretation of sections 5 and 7 of that Code and their correlation raised a question upon which permission to commence judicial review proceedings ought to have been granted.

Accordingly, the learned judge erred in principle which led him to the wrong conclusion in refusing to grant permission to commence judicial review proceedings. The Court therefore allowed the appeal, granted the applicant leave to commence judicial review proceedings in the court below, such proceedings to be heard before a different judge.

Case Name: Grain-Trans Limited
v
Ample Seed
[BVIHCMAP2019/0022]
(Territory of the Virgin Islands)

Date: Monday, 20th July 2020

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard Farara QC, Justice of Appeal [Ag.]

Appearances:
Appellant: Mr. Robert Nader
Respondent: Mr. Andrew Gilliland

Issues: Interlocutory appeal — Decision of learned judge refusing application to stay proceedings in the Virgin Islands in favour of Ukraine on forum non conveniens grounds — Whether learned judge applied incorrect test in determining whether Ukraine was the more appropriate forum than the Virgin Islands for trial of claim — Whether the learned judge erred in applying the principles in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460 in determining the more convenient forum — Whether learned judge erred in finding that claim had no real connection with Ukraine and was more closely connected to Latvia on the basis of a purported loan transaction, made through Latvian banks, underlying the substantive

claim

Type of Order

N/A

Result /
Order:

[Oral Delivery]
IT IS HEREBY ORDERED THAT:
Judgment reserved.

Case Name:

**Emmerson International Corporation
V
ABC Grandeservus Limited
[BVIHCMAP2019/0017]
(Territory of the Virgin Islands)**

Date:

Monday, 20th July 2020

Coram:

The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant/
Counter-
Respondent:

Mr. Philip Marshall, QC with him, Mr. Ajay Ratan, Mr. Daniel Burgess, Mr. Oliver Clifton and Ms. Colleen Farrington

Respondent/
Counter-
Appellant:

Mr. Andrew Ayres, QC with him, Mr. Timothy Wright and Ms. Lisa Walmisley

Issues:

Commercial appeal – Interlocutory appeal – Application by appellant to amend pleadings and add parties – Application for freezing order and Chabra injunction - Whether learned judge erred in finding that appellant was not permitted to amend statement of ancillary claim – Service of amended ancillary claim form and statement of ancillary claim outside of the jurisdiction – Application by respondent to set aside service of amended statements of

case – Interpretation of earlier order made by different judge – Whether order of learned judge dated 2nd January 2019 granted appellant leave to make personal claims against respondent on both the *TSB Private Bank International SA v Chabra* basis and tort gateway provided in rule 7.3(4) of the Civil Procedure Rules 2000 – Whether learned judge in determining the set aside application erred in holding that the order did not grant leave to make personal claim against respondent – Rule 18.12 of the Civil Procedure Rules 2000 – Failure to file defence to ancillary claim within permitted time – Whether failure of respondent to file defence to ancillary claim within the permitted time amounted to admission of all claims against it – Whether learned judge erred in refusing to grant declaration in accordance with rule 18.12 of the Civil Procedure Rules 2000 – Orders made by judge of own motion – Rule 26.2 of the Civil Procedure Rules 2000 – Whether learned judge erred in making orders of his own initiative without notice to the parties and without giving the parties an opportunity to make representations on the matter in accordance with rule 26.2 – Costs – Whether learned judge erred in ordering appellant to pay costs – Counter appeal – Whether learned judge erred in granting leave to amend the ancillary claim form to join parties and seek declarations against them

Type of
Order:

N/A

Result /
Order:

[Oral Delivery]
IT IS HEREBY ORDERED THAT:
Judgment reserved.

Case Name:

Magwitch LLC
v
Pusser's West Indies Limited

[BVIHCMAP2019/0015]

(Territory of the Virgin Islands)

Date: Tuesday, 21st July 2020

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard Farara QC, Justice of Appeal [Ag.]

Appearances:

Applicant/ Respondent:	Mr. Sydney Bennett, QC
Respondent/ Appellant:	Mr. Michael Fay, QC

Issues: Application for security for costs of appeal pursuant to rule 62.17 of the Civil Procedure Rules 2000 — Respondent/appellant an external company registered in the United States of America — Whether appellant has assets within the jurisdiction against which an order for costs may be enforced — Whether respondent/appellant will be unable or unwilling to pay respondent's costs of the appeal should appeal be unsuccessful — Whether in all the circumstances it is just to make an order for security for costs, particularly in light of the considerable expense which would be incurred in recovering, to the extent possible, costs against respondent/appellant in the United States of America — Whether CPR permits the Court, having made an order for security for costs, to hear an appeal before the security is provided

Type of Order Oral Decision

**Result /
Order:** [Oral Delivery]
IT IS HEREBY ORDERED THAT:

1. The respondent/appellant, Magwitch LLC, shall provide security for the costs of the respondent in this appeal in the sum of US\$72,000.00, said security to be by way of deposit of that amount by certified cheque drawn on a bank in the Virgin Islands into the High Court of the Virgin Islands on or before 15th September 2020.
2. In the event that the said security is not paid within the time and manner as stipulated, the appeal shall

stand dismissed without further order.

3. The costs of this application shall be borne by the respondent/appellant to be assessed unless agreed within 21 days.
4. The hearing of this appeal is accordingly stayed meantime.

Reason:

This was an application by the applicant/respondent for the respondent/appellant to provide security for the costs of its appeal. The Court, having heard learned Queen's Counsel for both sides, and having regard to the principles and factors to which the Court must have regard, was satisfied that the respondent/appellant should provide security for the costs of the appeal from the decision of the court below in which the learned judge granted summary judgment to the applicant/respondent on the basis that the claims made by the respondent/appellant are statute barred.

As stated in the case of *Nasser v United Bank of Kuwait [2002] 1 WLR 1868*, the Court must take a common-sense approach to the matter. There was no doubt that the respondent/appellant is an external company registered in the United States of America. That factor by itself was not of course sufficient. The applicant/respondent had also averred that the respondent/appellant has no assets within the jurisdiction or rather, no assets that they are aware of in the jurisdiction. The respondent/appellant had not put in any evidence in response to the application but had, in essence, taken the position that the applicant/respondent should be put to proof as to their assertions that the respondent/appellant has no assets either in the jurisdiction or elsewhere. However, the Court was of the opinion that such an approach runs counter to the exercise which the Court is required to carry out in deciding whether in all the circumstances it is just to make an order for security for costs.

The Court also had regard to the position taken by the parties in respect of the litigation. One of the matters to which the Court must have regard is the likely ability of the party to pay the costs ordered. This factor is important in deciding whether it is just, not only from the point of view of impecuniosity of the party and their determination to pursue a matter, but also to ensure that the security does

not operate so as to stifle a legitimate claim or appeal. From the correspondence between the parties, the Court inferred that there is, at the very least, an unwillingness on the part of the respondent/appellant to pay any costs in respect of the ongoing litigation, notwithstanding that it has itself been the recipient of costs in an application in the proceedings. The appellant is also determined to pursue the matter.

Additionally, the Court took notice of the fact that the respondent/appellant, being a United States entity, would give rise to a situation where the applicant/respondent would be put to considerable expense to recover such costs, if at all, in the United States of America, which operates as it does in respect of costs judgments on different principles to this Court. Viewed in the round, and although there has been some delay, not wholly explained, the Court was satisfied that it was just in all the circumstances that an order for security for costs be made.

Case Name:

Shamoi Dagou

v

The Queen

[BVIHCRA2019/0002]

(Territory of the Virgin Islands)

Date:

Tuesday, 21st July 2020

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mde. Vicki Ann Ellis, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. Patrick Thompson Jr. and Ms. Reynela Rawlins

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

Issues:	Criminal appeal against sentence – Whether sentence manifestly excessive in the circumstances – Burglary – Whether learned judge erred in using the maximum sentence as a starting point or notional sentence
Type of Order:	Oral Judgment
Result / Order:	[Oral Delivery] IT IS HEREBY ORDERED THAT: 1. The appeal against sentence is allowed. 2. The sentence is varied in the following terms: i. The appellant shall serve the period of imprisonment 17th July 2019 to 19th December 2019. ii. The appellant will pay the sum of \$288.76 within 1 month of today's date, in default of which the appellant shall serve a period of 1 month's imprisonment.
Reason:	This was an appeal against conviction and sentence. The appellant was convicted on a guilty plea for one count of burglary. On 17th July 2019, the appellant was sentenced to 26 months' imprisonment and ordered to pay compensation to the virtual complainant in the sum \$288.76. The appellant's counsel, Mr. Patrick Thompson Jr., indicated to the Court that the appellant did not intend to pursue an appeal against conviction, as previously indicated in a further amended notice of appeal. In relation to the appeal against sentence, the appellant's main contention was that sentence was manifestly excessive on account of the fact that the learned judge: (i) did not take sufficient account of the factors in mitigation; and (ii) erred in using the maximum sentence provided by law as a notional sentence or starting point in the computation of the sentence. Counsel on both sides agreed that the sentence imposed by the judge was manifestly excessive in the circumstances. The Crown agreed that the sentence of imprisonment should be varied

to the time already served by the appellant being the period 17th July 2019 to 19th December 2019. Counsel for both sides agreed that the order of compensation by the judge ought not be disturbed.

Case Name:

Jessroy McKelly

v

The Queen

[BVIHCRA2014/0002]

(Territory of the Virgin Islands)

Date:

Tuesday, 21st July 2020

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mde. Vicki Ann Ellis, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. Patrick Thompson Jr. and Ms. Reynela Rawlins

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

Issues:

Criminal appeal – Application for adjournment to settle representation of the appellant

Type of Order:

Adjournment

**Result /
Order:**

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

The appeal is adjourned to the sitting of the Court of Appeal in the Territory of the Virgin Island during the week commencing 23rd November 2020.

Reason:

This matter came before the Court on the issue of the assignment of counsel in a murder appeal. At a previous sitting of the Full Court, PST Law was assigned as counsel for the appellant, Mr. Jessroy McKelly. Mr McKelly had written to the Legal Aid Board essentially requesting that the Legal Aid Board assign him new counsel to prosecute his appeal. The Legal Aid Board did not acquiesce to Mr. McKelly's request, stating that they found no proper basis to honour his request for reassignment. The Court noted the contents of the letter from Mr. McKelly and took note of the response from the Legal Aid Board, and was also of view that there was no proper basis to assign different counsel to Mr. McKelly. As far as the matter stands, PST Law remains as counsel assigned to Mr. McKelly in this matter.

Mr. Thompson apprised the Court of a number of matters and intimated his continued willingness to assist with the prosecution of the appeal. Mr. McKelly said that he understands that the Legal Aid Board's hands are tied but that he cannot accept Mr. Thompson as his lawyer. However, he indicated that he was willing to work towards retaining counsel of his own choosing and that, if his efforts were to fail, he would endeavour to represent himself in the appeal.

Mr. McKelly also stated his wish to have the matter stand in indefinite abeyance until he could retain counsel of his choosing. The Court stated that it, for obvious reasons, could not acquiesce to such a request in the interests of doing justice to Mr. McKelly. Having found that new counsel ought not be assigned in the matter, and noting the indication by Mr. McKelly of his intention to seek new counsel or to prosecute the appeal on his own, the Court repeated its finding that there was no proper basis to assign new counsel and adjourned the matter to the next sitting of the Court of Appeal in the Territory of the Virgin Islands.

Case Name:

Joel Gumbs

v

The Commissioner of Police

[BVIMCRAP2017/0002]

(Territory of the Virgin Islands)

Date:

Tuesday, 21st July 2020

Coram:

**The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mde. Vicki Ann Ellis, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. Jamal Smith and Ms. Kia Glasgow

Respondent:

Mrs. Tiffany Scatliffe-Esprit, Director of Public Prosecutions

Issues:

Magisterial criminal appeal – Appeal against conviction and sentence – Common assault – Whether decision of magistrate was against the weight of the evidence – Whether evidence given by the virtual complainant was unreliable for being given under improper and unlawful pressure by the magistrate – Whether sentence manifestly excessive in the circumstances – Whether magistrate erred in law by using the maximum sentence as the starting point for computing the sentence – Whether magistrate paid sufficient regard to mitigating factors

**Type of
Order:**

Oral Judgment

**Result /
Order:**

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

- 1. The appeal against conviction is dismissed.**
- 2. The appeal against sentence is allowed to the extent that the sentence of \$1,000.00 is varied and a sentence of \$750.00, payable in 2 months, is substituted.**

Reason:

The appellant, Joel Gumbs, appealed his conviction by a magistrate for the offence of common assault. He was fined \$1,000.00 or, in default, 2 months' imprisonment. The virtual complainant was his daughter who reported that the assault occurred at the family home. The assault complained of was that the appellant had pushed and hit her several times. The Crown's case was that the appellant was incensed by the fact that the virtual complainant had, on the day of the incident, confronted a woman with whom he was said to be having an extra-marital affair and this triggered the assault. Based on the report made by the virtual complainant to the police, Sergeant Francia Liburd attended on the appellant's home and apprised him of the report made against him to which he replied that he had "disciplined" his daughter and assisted her in leaving his home.

The appellant filed various grounds of appeal in respect of his conviction and sentence. The critical ground advanced in relation to the conviction was that the magistrate's decision was unreasonable and could not be supported having regard to the evidence. The appellant also advanced the ground that the magistrate acted maliciously during the course of the trial.

During the course of the trial, it became apparent that the virtual complainant was not willing to assist the prosecution in the trial against her father, to the extent that the prosecution successfully applied to the magistrate to treat the virtual complainant as a hostile witness. Excerpts from the statement of the virtual complainant were tendered into evidence. Quite apart from that, the magistrate had the evidence of Sergeant Liburd who had attended on the appellant and taxed him on the allegation made against him by his daughter.

The Court was of the view that the magistrate had before her adequate evidence to convict the appellant for the offence of common assault. The Court noted that there were certainly issues of credibility and issues as to the weight to be attached to the evidence before the magistrate, more so in the context of the virtual complainant having been deemed hostile. However, issues of weight and credibility are essentially within the province and purview of the magistrate who dealt with the trial, and these issues are without the competence of the Court of Appeal. The Court concluded therefore, that there was no basis upon which to impugn the magistrate's decision to find the appellant guilty of the offence.

With respect to the sentence, the appellant contended that the sentence imposed was manifestly excessive. The magistrate imposed the maximum fine of \$1,000.00 and apparently ignored the mitigating factors, namely: (i) that this was the appellant's first conviction; and (ii) his prior good character. The learned Director of Public Prosecutions conceded that the sentence imposed was excessive on the grounds that the magistrate failed to address the factors in mitigation, and had computed the appellant's sentence relative to a notional sentence of \$1,000.00 which is the maximum fine permitted for common assault. The learned Director of Public Prosecutions proposed that an appropriate starting point would have been \$500.00 and that in all the circumstances, a fine of \$750 would be appropriate. The Court agreed entirely with the submissions of the Director of Public Prosecutions and found that the magistrate erred in using the maximum sentence as the starting point, and in failing to pay proper regard to the factors in mitigation.

The Court also considered that it was important to comment on a ground of appeal which had been withdrawn by counsel upon instructions by the appellant. The ground concerned one of the bail conditions imposed upon the appellant – that the appellant be enrolled into the Partnership for Peace Programme, after he entered a plea of not guilty. The Court expressed that it was deeply troubled by the imposition of such an order in conditions of bail. Such a condition may very well raise fundamental issues as to the presumption of innocence and as to

whether there had been unlawful or improper prejudgment of the matter by the magistrate, which potentially go to the core of the propriety of the conviction. The Court found that this was a matter of importance worthy of comment, notwithstanding that the ground in relation to the bail condition had been withdrawn and there were no submissions on the matter, and expressed the hope that its comments would be useful in preventing similar conditions from being imposed in the future.

Case Name: Green Elite Limited (In Liquidation)

V

**[1] Mr. Fang Ankong
[2] Mr. Fang Anlin
[3] Ms. Ding Li
[4] Mr. Gu Liyong
[5] HWH Holdings Limited**

[BVIHCMAP2019/0030]

(Territory of the Virgin Islands)

Date: Wednesday, 22nd July 2020

**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. John Machell, QC with him, Mr. Peter Ferrer

Respondents: Mr. Andrew Ayers, QC with him, Mrs. Eleanor Morgan-Mourant for the first and fifth respondents

Issues: Commercial appeal – Interlocutory appeal - Appeal against discharge of freezing injunction by learned judge

on ground of no real risk of dissipation of assets by defendants – Whether learned judge erred in discharging freezing injunction on the ground that there was no real risk of dissipation in circumstances where this was not the basis of the respondent’s written or oral submissions and therefore not a live issue before the court – Whether learned judge erred in assessment of the significance of the underlying allegations of dishonesty of respondents in the substantive claim as evidence of risk of dissipation - Whether learned judge erred in assessing the significance of the respondents’ conduct in relation to liquidation proceedings – Costs – Whether learned judge erred in concluding that parties were equally successful and awarding each party 50% of its costs – Whether learned judge erred in failing to order issue-based assessment of costs – Rule 64.10 of the Civil Procedure Rules 2000 – Whether learned judge erred in granting third party costs to respondents

Type of Order

N/A

Result /
Order:

[Oral Delivery]
IT IS HEREBY ORDERED THAT:
Judgment reserved.

Case Name:

Wakeem Guishard
v
The Attorney General of the Virgin Islands
[BVIHCVAP2018/0006]
(Territory of the Virgin Islands)

Date:

Wednesday, 22nd July 2020

Coram:

The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard Farara, QC [Ag.], Justice of Appeal

Appearances:

Appellant: Mr. Jamal Smith and Ms. Keah Glasgow

Respondent: Ms. Maya Barry, Principal Crown Counsel

Issues:

Civil appeal — Appeal against assessment of damages — False imprisonment — Malicious prosecution — Whether pre-judgement interest has to be specifically pleaded — Whether master wrongly exercised discretion in making assessment award — Principles in *Takitota v The Attorney General* [2009] UKPC 11 — Whether master considered all the factors in assessing initial shock — Whether the master properly considered all aggravating factors when assessing the daily rate to be used for false imprisonment — Whether master applied the correct principles when determining the award for malicious prosecution — Whether award on assessment was outside the ambit of reasonable disagreement and should be disturbed — Costs on assessment

**Type of
Order:**

N/A

**Result /
Order:**

[Oral Delivery]
IT IS HEREBY ORDERED THAT:
Judgment reserved.

Case Name:

**Glanville Penn
v
The Attorney General
(BVIHCMAP2017/0009)**

(Territory of the Virgin Islands)

Date:

Thursday, 23rd July 2020

Coram:

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

**The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Vicki Ann Ellis, Justice of Appeal [Ag.]**

Appearances:

Applicant: Mr. Dave Marshall

Respondent: Mrs. Jo-Ann Williams-Roberts, Solicitor General

Issue: Application by legal practitioner to be removed from record

Type of Order: Oral Decision

**Result / Order: [Oral Delivery]
IT IS HEREBY ORDERED THAT:**

- 1. The firm Collas Crill be removed from the record as legal practitioners on behalf of the appellant.**
- 2. That the order of removal be personally served on the appellant, Glanville Penn, on or before Monday, 27th July 2020.**
- 3. That the applicant, Collas Crill, shall file with the Court a certificate of service of the order.**

Reason: Having read the application by the firm Collas Crill to be removed from the record as legal practitioners for the appellant, and being satisfied that the application was served on the appellant, who took no objection to the application, the Court was of the view that the application for removal from the record ought to be granted.

**Case Name: Glanville Penn
v
The Attorney General
(BVIHCMAP2017/0009)
(Territory of the Virgin Islands)**

Date: Thursday, 23rd July 2020

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Vicki Ann Ellis, Justice of Appeal [Ag.]

Appearances:

Appellant: In person

Respondent: Mrs. Jo-Ann Williams-Roberts, Solicitor General

Issues: Commercial appeal — Adjournment

Type of Order: Adjournment

Result / Order: [Oral Delivery]
IT IS HEREBY ORDERED THAT:
The hearing of this appeal is adjourned to the next sitting of the Court for the Territory of the Virgin Islands during the week commencing 23rd November 2020.

Reason: The appellant requested an adjournment as his previous counsel had been removed from the record and therefore he was not in a position to proceed with the hearing of the appeal considering that newly engaged counsel would require time to become familiar with the relevant documents filed in the matter. In the circumstances, and there being no objection from the respondent, the Court was of the view that an adjournment ought to be granted.

Case Name: Asiyah Grant
v
Javier Maduro

(BVIHCVAP2019/0001)

(Territory of the Virgin Islands)

Date: Thursday, 23rd July 2020

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Vicki Ann Ellis, Justice of Appeal [Ag.]

Appearances:

Applicant/ Respondent	Mrs. Asha Johnson-Willins
Respondent/ Appellant	Mr. Dave Marshall

Issues: Application for conditional leave to appeal to Her Majesty in Council — Section 3(2)(a) of The Virgin Islands (Appeals to the Privy Council) Order 1967- Statutory Construction of Section 11A(1) of Motor Vehicle Insurance (Third-Party Risks) Ordinance- Whether issue on appeal raises a question of great general and public importance

Type of Order: Oral Decision

Result / Order: [Oral Delivery]
IT IS HEREBY ORDERED THAT:

1. The motion seeking leave to appeal to Her Majesty in Council pursuant to section 3(2)(a) of The Virgin Islands (Appeals to the Privy Council Order) 1967 is hereby dismissed as raising no question of great general or public importance and accordingly does not meet the threshold for appeals to the Privy Council.
2. Costs shall be borne by the applicant to be assessed unless agreed within twenty-one days.

Reason: The Court was of the view that the appeal did not meet the threshold of raising any issues of great general and public importance as canvassed in the cases of *Martinus Francois v Attorney General SLUHCVAP2003/0047 (delivered 7th June 2004, unreported)* and *Pacific Electric Wire and Cable Company Limited v Texan Management Limited et al BVIHCVAP2006/0019 (delivered 15th October*

2007, unreported).

The Court also noted that there was no dispute as to the principles of interpretation applied in this case which warrants the leave of this Court to seek guidance from the Privy Council. The Court was also mindful of the authorities of *The Supervisory Authority v Cresswell Overseas S.A et al ANUHC VAP2017/0003 (delivered 30th October 2019, unreported)* and *Eastern Caribbean Collective Organisation for Music Rights (ECCO) Inc (Formerly Hewannora Musical Society (HMS) Incorporated) v Mega-plex Entertainment Corporation SLUHC VAP2017/0032 (delivered 4th July 2019, unreported)* which both support the position that matters of statutory construction are not suitable for an appeal to the Privy Council and are better dealt with by the local courts, particularly where the legislation is unique to the jurisdiction as it was in this case. Accordingly, the Court was of the view that the threshold for the grant of leave to appeal to Her Majesty in Council was not been met.

Case Name:

[1] Leilani Stevens-Roberts
[2] Lola Stevens
[3] Ziska Stevens
[4] Leona Stevens

v

[1] Elton Scatliffe
[2] Annette Scatliffe

[BVIHC VAP2019/0007]

(Territory of the Virgin Islands)

Date:

Thursday, 23rd July 2020

Coram:

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

Appearances:

Appellants: Ms. Ayodeji Bernard

Respondents: Mrs. Hazelann Hannaway-Boreland and Mr. Richard Parchment

Issues:

Civil appeal – Interlocutory appeal – Rule 62.10 of Civil Procedure Rules 2000 – Striking out of defence – Non-compliance with rule 10.5 of Civil Procedure Rules 2000 – Whether consideration of alternatives modes of sanctioning the appellants mandatory before making a striking out order - Whether failure of learned master to consider alternatives to striking out a defence rendered subsequent striking order incurably bad and as such should be automatically set aside – Whether unless order a more appropriate solution to meet justice of case – Whether struck out defence to counterclaim in fact constituted bare denial

Type of Order:

Oral Judgment

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

1. The order of the master striking out the appellants' defence to the counterclaim is set aside.
2. The appellants shall file an amended defence to the respondents' counterclaim within 14 days of the date of this order, failing which the appellants' defence to the counterclaim shall be struck out.
3. There shall be no order as to costs.

Reason:

This is an appeal against the order of the learned master whereby he struck out the appellants' defence to the respondents' counterclaim. The underlying case concerns what appears to be a long-running acrimonious dispute between neighbours which apparently led to quarrels, name calling, invasions of privacy, reports to the police and eventually litigation before the High Court.

The litigation was instituted by a claim form and statement

of claim filed by the appellants alleging all manner of neighbourly misconduct on the part of the respondents. Not to be outdone, the respondents replied with a defence denying the appellants' allegations and a counterclaim alleging even more and worse neighbourly misconduct on the part of the appellants. The appellants then filed a detailed reply to the respondents' defence and a defence to their counterclaim. Upon application made by the respondents, however, the learned master struck out several paragraphs of the appellants' reply and their entire defence. According to the order of the master, the paragraphs struck out from the appellants' reply were an abuse of the process of the court, whilst the defence was struck out because it consisted of a bare denial and was not therefore in conformity with rule 10.5 of the Civil Procedure Rules 2000 ("the CPR"). The appellants did not appeal the order striking out parts of the reply, but appealed the order striking out of the defence to the counterclaim.

The appellants first obtained the leave of this Court and then, on 7th January 2020, they filed their notice of appeal, together with a copy of the order being appealed, the record of appeal and submissions in support of the appeal. On 21st January 2020, the respondents filed submissions in opposition to the appeal, together with authorities in support, which submissions were responded to by the appellants on 11th March 2020.

The appeal was heard, with vigorous argument by learned counsel on both sides. Having read the written submissions and heard the oral submissions of counsel, the Court arrived at the conclusion that the master erred in the exercise of his discretion when he struck out the defence to the counterclaim without first considering alternative modes of sanctioning the appellants and progressing the trial of the matter.

Although counsel for the respondents strenuously argued that the appellants were required to have made available to the Court the judge's written reasons, or a transcript of the hearing, or a copy of the judge's notes or an affidavit, before it could be satisfied that the master had indeed failed to consider alternatives to striking out, the Court was of the unanimous view that the master's ruling, which contained both a preamble and his actual orders, state

clearly that the master had struck out the defence to the counterclaim, not after considering alternative modes of sanctioning the appellants for what he considered to be a defective defence to the counterclaim, but only after determining that the defence consisted of a bare denial and that it did not conform with rule 10.5 of the Civil Procedure Rules 2000 (the “CPR”).

The Court did not accept the submission of counsel for the appellants that the authorities go as far as to make it a mandatory requirement that the master first considers alternatives to a striking out order before he can exercise the discretion to strike out a statement of case, but the Court accepted that the justice of the case would better be served by the application of a much less draconian sanction than the striking out of a party’s defence with the effect of virtually driving him away from the seat of justice. The more so when the basis on which the master struck out the defence, that it consists of bare denials, is one that may very well be without merit, when the defence specifically states that it repeats paragraphs 1 to 28 of the reply, which would therefore incorporate all the details contained in the reply setting out the appellants’ response to the respondents’ defence and counterclaim.

In the circumstances, the Court found that the master erred when he failed to consider the obvious alternatives to deploying the court’s nuclear weapon when there were other more appropriate weaponry which could have been deployed to bring a deviant litigant into line and progress the case to trial fairly and justly in the interest of all the parties. In particular, the Court found that the making of an ‘unless order’ to bring into line a party whom the master considered had deviated from the rules, would meet the justice of the case. The Court also found that in failing to consider alternative sanctions to striking out the appellants’ defence to counterclaim, the master had exceeded the generous ambit within which reasonable disagreement among judicial officers is possible and his decision was therefore clearly wrong. Accordingly, the Court allowed the appeal and set aside the order of the master striking out the appellants’ defence to the respondents’ counterclaim.

Case Name:	Commercial Bank of Dubai PSC
	v
	[1] 18 Elvaston Place Ltd. [2] Fairmont Grand Holdings Limited
	[BVIHCMAP2020/0013]
	(Territory of the Virgin Islands)
Date:	Thursday, 23 rd July 2020
Coram:	The Hon. Mr. Mario Michel, Justice of Appeal The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
Appearances:	
	Applicant: Mr. Stuart Cullen and Mr. Christopher Pease
	Respondents: Mr. Tim Prudhoe and Mr. Mikhail Charles for the first respondent Mr. Richard Brown for the second respondent
Issues:	Application for stay pending determination of appeal — Likelihood that appeal will be rendered nugatory if stay is not granted – Risk of injustice – Real risk of dissipation of assets – Balance of harm – Irreparable harm to applicant Appeal against discharge of freezing order by learned judge — Whether appeal should be dealt with summarily in circumstances where the argument on appeal is that the learned judge erred in following the judgment of the Court of Appeal in Broad Idea International Limited v Convoy Collateral Limited (No. 2)
Type of Order:	Oral Judgment
Result / Order:	[Oral Delivery] IT IS HEREBY ORDERED THAT:

1. The appeal is summarily dismissed.
2. The Discharge Order be stayed until 4 p.m. on 31st July 2020. [1] [SEP]
3. Should the appellant, by 4 p.m. on 31st July 2020, notify the respondents that it will, by 4 p.m. on 7th August 2020, file and serve an application for Conditional Leave to Appeal to the Privy Council (the Leave Application), then the Discharge Order will be stayed until 4 p.m. on 7th August 2020. [1] [SEP]
4. Should the Discharge Order be stayed, in accordance with paragraph 3, until 4 p.m. on 7th August 2020, then, should the appellant, by 4pm on 7th August 2020, file and serve the Leave Application, together with an application for a further stay pending determination of the Leave Application (the Further Stay Application) and a Certificate of Urgency in respect of the Further Stay Application, the Discharge Order will be stayed until the determination of the Further Stay Application. [1] [SEP]
5. The appellant shall pay the respondents' costs of the appeal and the motion, to be assessed if not agreed within 7 days of receipt by the appellant of the respondents' respective schedules of costs.

Reason:

The appellant had been granted an ex parte freezing injunction in the court below against the respondents on 25th May 2020 which relied upon the 'Black Swan jurisdiction'. The order which was discharged by Jack J [Ag.] on 8th July 2020 on the basis of the decision of the Court of Appeal in *Broad Idea International Limited v Convoy Collateral Limited (No. 2) BVIHCMAP2019/0026 (delivered 31st July 2020, unreported)*. This matter came up for hearing on an application for a stay of the order of Jack J [Ag.] dated 8th July 2020 pending the determination of the appeal against the said order. During the course of the hearing, the parties agreed that the Court should determine the appeal summarily.

The thrust of the appellant's argument on the summary appeal was that the learned judge erred in relying on the decision of *Broad Idea (No. 2)*, the decision having been made per incuriam.

In the circumstances, the Court was satisfied that the

appeal in this case had no merit as the learned judge was bound by the decision of the Court in *Broad Idea (No.2)* and the appellant had failed to demonstrate that the learned judge had in any way improperly exercised his discretion to discharge the freezing injunction. Accordingly, the appeal was summarily dismissed.