

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING
COMMONWEALTH OF DOMINICA
11th February – 14th February 2019

JUDGMENTS

Case Name:

[1] Outlook Asset Management LP
[2] Stanhope Overseas Limited
[3] Concord International Investment Group LP
v
Capstone Corporate Limited (Respondent)

[1] Capstone Advisory Services SAE
[2] Mr. Sherif Raafat
(Defendants)

[BVIHCMAP2018/0016]
(TERRITORY OF THE VIRGIN ISLANDS)

Date: Monday, 11th February 2019

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:

Appellants: Mrs. Dawn Yearwood-Stewart holding papers for Mr. Nicholas Brookes

Respondent: Ms. Cara Shillingford holding papers for Mr. Peter Ferrer and Ms. Sarah Thompson

Issues: Civil appeal – Interlocutory appeal – Striking out – Whether trial judge erred in striking out the appellant's claim pursuant to rule 20.1 of the Civil Procedure Rules 2000 – Draft judgment – Amendment – Power of judge to amend judgment – Amending the statement of claim – Passing off

– Inverse passing off – Goodwill

**Result and
Reasons:**

Held: dismissing the appeal; striking out the statement of claim and affirming the order of Justice Adderley dated 28th March 2018 and awarding costs to Capstone in this appeal to be assessed, if not agreed within 21 days, that:

- 1. A court adjudicating on a statement of claim has power to strike out the statement of claim and consequentially the action. The statement of claim being considered by the Court can only be substituted if the Court decides to treat the action as subsisting while striking out the statement of claim and to give the claimant permission to file a fresh statement of claim, usually in terms of an approved draft amended statement of claim.**

Rule 26.3(1)(b) of the Civil Procedure Rules 2000 applied.

- 2. The judge is not bound by the terms of the draft judgment which has been circulated in confidence. A draft judgment was not an open invitation to embark upon an additional round of litigation, remedying lacunae in their own evidence and raising further arguments. It is clear that after circulation of the draft judgment and before a sealed order giving effect to the judgment, the learned judge retained a power to alter his judgment.**

Regina (Mohammed) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) (Guardian News and Media Ltd and Others intervening) [2011] QB 218; Altus Group (UK) Limited v Baker Tilly Tax and Advisory Services LLP and another [2015] EWHC 411; Gosvenor London Ltd v Aygun Aluminium UK Ltd [2018] EWHC 277 (TCC) applied.

- 3. Before delivery of the judgment, as in the present case, where an application to amend the statement of claim is made the court has a wide discretion to permit amendment in the interests of justice. The court will often grant an opportunity to save the action by amendment of the pleading. The judge is required to give the party who has a defective pleading an opportunity of putting right the defect, if**

there is reason to believe that he will be in a position to put the defect right. Such an opportunity was given to the appellants.

Kim v Park [2011] EWHC 1781 (QBD) applied.

4. The statement of claim fell afoul of the ruling in **Starbucks Ltd and another v British Sky Broadcasting Group Plc and others**. It was not enough for the claimant in a passing off action to merely establish reputation in the jurisdiction where the claim was being brought. A claimant was required to show goodwill (in the form of paying customers) in the relevant jurisdiction in order to succeed in a passing off claim.

Starbucks (HK) Ltd and Another v British Sky Broadcasting Group Plc and others [2015] 1 WLR 2628 applied.

5. It is now settled law that inverse passing off falls within the tort of passing off. The idea of transnational goodwill is rejected. The document submitted to the learned judge, a draft amended statement of claim after he had circulated his draft judgement, did not remedy the defect in the pleading or save the action. The Court has examined the proposed amendments to the statement of claim, especially paragraphs 14, 37 and 44. The appellants, in order to save the action, were required to show that each of the appellants possessed a reputation arising out of the Track Record, its investment methodology and private equity team and that 4 such reputation was represented by goodwill in the BVI among actual customers within the BVI. Instead, what was pleaded is the existence of transnational goodwill.

Starbucks (HK) Ltd and Another v British Sky Broadcasting Group Plc and Others [2015] 1 WLR 2628 applied; Rule 62.20 of the Civil Procedure Rules 2000 considered.

Case Name: Ciban Management Corporation
v
1. Citco (BVI) Limited
2. Tortola Corporation Company
Limited

**[BVIHCVAP2013/0001]
(TERRITORY OF THE VIRGIN ISLANDS)**

Date: Wednesday, 13th February, 2019

Coram: The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:
Appellant: Mrs. Heather Felix-Evans holding for papers for Mr. Ben Hubble, QC
Respondents: Ms. Cara Shillingford holding papers for Mr. Steven Thompson, QC

Issues: Civil appeal — Breach of duty of care — Whether learned judge erred in finding that there was no duty of care owed as director — Whether learned judge erred in finding that there was no breach of tortious duties — Applicability of principle of ostensible authority — Breach of statutory duty

Result | and Reason: Held: dismissing the appeal; allowing the -counter appeal; awarding costs in the court below and two-thirds of those costs on the appeal and the counter appeal to the respondents to be assessed, if not agreed within 21 days of this judgment, that:

1. The test for the determination of whether a person is a de facto director is one of fact and degree. The question to be answered is whether the individual was part of the governing structure of the company. The learned judge, having heard and seen Mr. Byington, made critical findings about him and his “scheme”. In view of the totality of the circumstances, the learned judge correctly concluded that Citco was not a de facto director

of Spectacular as there is no basis upon which Citco could be said to be a part of the governing structure of Spectacular.

Revenue and Customs Commissioners v Holland and Another; In re Pay Check Services 3 Ltd. and Others [2010] 1 WLR 2793 applied.

2. There is no basis for the contention that the learned judge ignored the relevant principles of directors' duties in relation to TCCL. The case at bar had very little to do with the general duties of directors. Accordingly, the judge correctly concluded that TCCL had breached no duty of care to Spectacular.

Re Barings Plc and others (No.5), Secretary of State for Trade v Baker & Others (No.5) [1999] 1 BCLC 433; Re Westmid Packing Services Ltd, Secretary of State for Trade and Industry v Griffiths and Others [1998] 2 BCLC 646; Weaving Macro Fixed Income Fund Limited (In Liquidation)v Peterson and Ekstrom Cause No. FSD 113 of 2010; and Weaving Capital (UK) Ltd. (In Liquidation)v Peterson and Others [2012] EWHC1480 (Ch) distinguished.

3. Since Mr. Byington had utilised Mr. Costa to communicate instructions for three previous powers of attorney prior to the relevant one, the learned judge correctly found that there was no duty of care imposed on Citco, as registered agent, to make enquires about the fifth power of attorney. Accordingly, the judge's finding that Citco had not been negligent in providing the fifth power of attorney to Mr. Costa, given the system which Mr. Byington had set up, cannot be fairly criticised.

Beacon Insurance Company Limited v Maharaj Bookstore Limited [2014] UKPC 21 applied; Yates Associates Construction Company Limitedv Blue Sand Investments Limited BVIHCVAP2012/0028 (delivered 20th April 2016, unreported) followed.

4. Where a principal, by words or conduct, represents

that an agent is authorised to act on his behalf, he is bound by the acts of the agent, notwithstanding the termination of authority, to the same extent as he would have been if the authority had not been terminated, when it was reasonable for the third party to deal with the agent, on the faith of any such representation, without notice of such termination. The present case clearly evidences the ostensible authority of Mr. Byington upon which Citco and TCCL could have relied in taking instructions from his agent, Mr. Costa. The learned judge ought to have upheld Citco and TCCL's defence of ostensible authority and insofar as he failed to do, he erred as a matter of principle. This Court should uphold the decision of the judge on the additional basis that Mr. Costa's instructions were ostensibly authorised and provided by Mr. Byington.

Newcastle International Airport Ltd. v Eversheds LLP
[2014] 1 WLR 3073 applied.

APPLICATIONS AND APPEALS

Case Name: Elwin Bedneau
v
Verdun David

[DOMHCVAP2012/0013]

Date: Monday, 11th February 2019

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: Mr. Kondwani Williams
Respondent: Mr. Michael Bruney

Issues: Civil appeal – Application to strike out the appeal for want of prosecution – Failure of appellant to serve notice of appeal

Type of Order: Oral Judgment

Result: IT IS HEREBY ORDERED THAT:
The notice of appeal is struck out.

Reasons: This was an application to strike out the notice of appeal for want of prosecution. The application was argued on the grounds that the appellant has shown no interest in prosecution the appeal, and since filing the appeal in 2012 had taken no steps to serve the notice of appeal or file any further documents in support of the appeal. The Court was satisfied that the appellant had shown no interest in prosecuting this matter and that it was an appropriate case to exercise its discretion to strike out the notice of appeal.

Case Name: Richardson Fontaine
v
The State
[DOMHCRAP2015/0007]

Date: Monday, 11th February 2019

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: Mrs. Dawn Yearwood-Stewart
Respondent: Ms. Evelina Baptiste, Director of Public Prosecutions

Issues: Criminal appeal – Appeal against conviction and sentence – Unlawful sexual intercourse with a person under fourteen years – Corroboration warning in sexual offence cases – Section 28 of the Sexual Offences Act – Whether trial judge erred by failing to assist jury in determining what evidence amounts to corroboration in a sexual offence case – Whether interruptions by trial judge

of defence counsel had effect of preventing counsel from fully and forcefully addressing the jury and/or prejudicing the jury's mind against appellant – Whether trial judge failed to give a balanced and impartial summary of the cases for the prosecution and the defence –Whether trial judge failed to adequately direct jury on elements of credibility and propensity when giving good character direction – Whether verdict was unsafe and unsatisfactory – Whether sentence imposed was manifestly excessive

Type Order: N/A

Result: [Oral delivery]

IT IS HEREBY ORDERED:
The Court reserves its decision.

Case Name: Franklyn Frederick
v
The Police

[DOMMCRAP2018/0007]

Date: Monday, 11th February 2019

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:	Mr. Wayne Nordé appearing amicus curiae
Respondent:	Ms. Sherma Dalrymple on behalf of the Director of Prosecutions

Issue: Criminal Appeal – Appeal against sentence – Whether sentence imposed by the magistrate was excessive – Whether magistrate took sufficient account of the appellant's guilty plea and relevant mitigating factors

Type of Order: Oral Judgment

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

1. The appeal against sentence is allowed.
2. The term of 2 years is substituted with 11 months without hard labour commencing 10th October 2018.

Reasons: The appellant was sentenced to 2 years' imprisonment at hard labour on a guilty plea for a single charge of theft of agricultural produce.

The Court noted that the appellant had expressed remorse for the commission of the offence at the first opportunity he appeared before the Magistrate and that he pleaded guilty at an early stage in the proceedings. The Court took the view that those circumstances warranted a reduction of the appellant's sentence in the circumstances, having not been taken into account by the learned Magistrate.

Case name: **Andrew Joseph**
v
The Police

[DOMMCRAP2015/0008]

Date: **Monday, 11th February, 2019**

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:	No appearance
Respondent:	Ms. Anne Riviere on behalf of the Director of Public Prosecutions

Issues: **Criminal appeal – Time already served by the appellant – No appearance by appellant to prosecute appeal**

Type of Order: **Oral Judgment**

Result / Order: **IT IS HEREBY ORDERED:**
The appeal is struck out.

Reason: In exercising its discretion to strike out the appeal, the Court noted that: (i) the appellant's had completed his term of imprisonment and was released sometime in 2017; (ii) the appellant did not appear before the Court to prosecute the appeal despite being served with a notice of hearing; (iii) the appellant's sentence had been served; and (iv) the appellant did not take any steps to prosecute the appeal. The Court concluded that the appellant was no longer interested in prosecuting the appeal and therefore that it was an appropriate case to exercise the discretion to strike out the appeal.

Case Name: Clinton Austrie
v
The Police
[DOMMCRAP2018/0009]

Date: Monday, 11th February 2019

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	Mrs. Dawn Yearwood-Stewart
Respondent	Ms. Evelina Baptiste, Director of Public Prosecutions

Issues: Criminal appeal – Whether sentence imposed by magistrate excessive in the circumstances – Whether magistrate erred in law by using maximum penalty as the notional starting point for the sentence

Type of Order: Oral Judgment

Result/Order: IT IS HEREBY ORDERED:

1. The appeal is allowed.
2. The sentence of 3 years and 2 months without hard labour shall be substituted for the period of 5 years and 2 months imposed by the Magistrate.
3. The sentence shall run from the date it was imposed by the Magistrate, that is, from 16th October 2018.

Reason: This was an appeal against the sentence imposed by a learned magistrate, for a single charge of theft. The sentence imposed by the magistrate was 5 years and 2 months with hard labour. The complaint by the appellant was that the sentence imposed was unduly severe. Particularly, the appellant contended that the learned magistrate was wrong to have used the maximum sentence permitted by statute as a starting point for computing the sentence imposed.

The Court accepted the appellant's argument and found that the learned magistrate erred by using the maximum penalty permitted by statute as the starting point rather than commencing the sentencing exercise with the notional sentence of four years, which the Court accepted was appropriate.

Case name: Tommy Henry
v
The Police
[DOMMCRAP2017/0016]

Date: Monday, 11th February, 2019

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. Gina Abraham and Mr. Wayne Nordé
Respondent: Ms. Carlita Benjamin on behalf of the Director of Public Prosecutions

Issues: Criminal appeal – Whether sentence imposed by magistrate excessive in all the circumstances – Whether the magistrate erred in law by using the maximum penalty as the notional starting point for the sentence – Whether magistrate took sufficient account of the appellant's guilty plea and relevant mitigating factors

Type of Order: Oral Judgment

Result / Order: IT IS HEREBY ORDERED:

1. The appeal against sentence is allowed and the fine of \$33,000.00 is hereby substituted for a fine of \$45,000.00, which is to be paid in monthly instalments of \$3500.00, commencing on Friday 1st March, 2019 until the fine has been paid in full. Thereafter, on the 1st day of every month until 1st November 2019 and the payment of the balance of \$1500.00 by 1st December, 2019.
2. In the event that the appellant defaults any instalments, he shall be imprisoned for a term of 4 months.
3. The imposition of hard labour in respect of any default order by the Magistrate is quashed.

Reason:

This was an appeal against the sentence imposed by a learned magistrate, for illegal possession of firearm, possession of ammunition, possession of cannabis, possession of cannabis with intent to supply and cultivation of cannabis. The sentence imposed by the magistrate was as follows:

- (i) Possession of firearm – a fine of \$7,500 payable by 29th December 2017 in default twelve (12) months hard labour, with the firearm to be forfeited to the state.
- (ii) Possession of ammunition – a fine of \$2,500 payable forthwith, in default three (3) months hard labour, with the ammunition to be forfeited to the state.
- (iii) Possession of cannabis – a reprimand.
- (iv) Possession of cannabis with intent to supply & cultivation of cannabis – a fine of \$45,000 being the equivalent of three (3) times the street value of drugs, the fine being payable in nine (9) monthly installments of \$5000 each, beginning from 29th September 2017 and ending on 31st May 2018, default of any installment resulting in imprisonment for four (4) months on each breach, with the cannabis to be forfeited to the State and destroyed.

The complaint by the appellant was that the \$45,000 fine for possession of cannabis with intent to supply and cultivation of cannabis, being the highest sentence imposed by the magistrate, was unduly severe. Particularly, the appellant contended that the learned

magistrate was wrong to have used the maximum sentence permitted by statute as a starting point for computing the sentence imposed.

The Court accepted the appellant's argument and found that the learned magistrate erred by using the maximum penalty permitted by statute as the starting point rather than commencing the sentencing exercise with an appropriate notional sentence.

The Court examined the factors in mitigation and noted that the appellant pleaded guilty, had good behaviour prior to conviction, no previous convictions, and cooperated with the police. The Court also noted that the Magistrate erred by ordering that the sentences terms of imprisonment in default would be at hard labour, if imprisonment were to be served.

Case name:

Kelvin James

v

The Police

[DOMMCRAP2017/0018]

Date:

Monday, 11th February, 2019

Coram:

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

The Hon. Justice Mario Michel, Justice of Appeal

The Hon. Justice Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant:

Mr. Kelvin James, in person

Respondent:

Ms. Sherma Dalrymple on behalf of the Director of Public Prosecutions

Issues:

Criminal appeal – Adjournment

Type of Order:

Adjournment

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED:

The matter is adjourned to Wednesday 13th February 2019.

Reason: The Court was informed that Mr. Peter Alleyne was on record for the appellant. Mr. Alleyne was absent. The Court granted an adjournment to permit the appellant to make contact with Mr. Alleyne.

Case name: Kelvin James
v
The Police

[DOMMCRAP2017/0018]

Date: Monday, 11th February, 2019

Coram: The Hon. Davidson Kelvin Baptiste, Justice of Appeal
The Hon. Justice Mario Michel, Justice of Appeal
The Hon. Justice Paul Webster, Justice of Appeal [Ag.]

Appearances:
Appellant: Mr. Peter Alleyne
Respondent: Ms. Sherma Dalrymple on behalf of the Director of Public Prosecutions

Issues: Criminal appeal – Whether sentence imposed by magistrate excessive in all the circumstances – Whether magistrate took sufficient account of the appellant’s guilty plea and relevant mitigating factors

Result / Order: IT IS HEREBY ORDERED:
1. The appeal is allowed.
2. The sentence of 3 years is set aside and substituted for a sentence of 1 year and is to be suspended for 1 year. If any offence is committed within the year, the appellant will serve the remainder of sentence.

Reasons: This was an appeal against the sentence imposed by a Magistrate for a guilty plea to a single charge of theft. The sentence imposed by the magistrate was 3 years’ imprisonment with hard labour. The appeal was presented on ground that the sentence was excessive in the circumstances. The Court considered the following factors in mitigation: (i) the appellant was a first-time offender; (ii) he pleaded guilty at the first instance; and (iii) he co-operated with the police. As an aggravating factor, the Court took note of the fact that the appellant in committing the offence took advantage of the emergency situation in

the Commonwealth of Dominica following the passage of Hurricane Maria. In all the circumstances, the Court was of the view that the sentence was excessive in the circumstances.

Case Name: **Eloi Bethelmie**
v
The Police

[DOMMCRAP2018/0004]

Date: **Tuesday, 12th February, 2019**

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: **Mr. Tiyani Behanzin**
Respondent: **Ms. Anne Riviere on behalf of the Director of Public Prosecutions**

Issues: **Criminal appeal – Appeal against conviction and sentence – Appeal against conviction withdrawn – Term of imprisonment already served by appellant**

Type of Order: **Oral Judgment**

Result / Order: **IT IS HEREBY ORDERED:**
1. The appeal against conviction is withdrawn with the leave of the Court.
2. The appeal against sentence shall be time served in respect of these offences i.e. threatening, battery and insulting language.

Reason: **The appellant appealed both his conviction and sentence. At the time the appeal came on for hearing, the appellant had already served his term of imprisonment and no longer wished to pursue the appeal against conviction. The appellant therefore made an application to withdraw the appeal against conviction. The Court was minded in the circumstances to grant leave to withdraw.**

Case Name

Aadan Andre Bernard

v

The Police

[DOMMCRAP2018/0010]

Date: Tuesday, 12th February, 2019

Before: 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: Mr. Ronald Charles appearing amicus curiae

Respondent: Ms. Carlita Benjamin on behalf of the Director of Public Prosecutions

Issue: Criminal appeal – Whether sentence imposed by the Magistrate excessive in all the circumstances – Whether sufficient weight placed on factors in mitigation

Type of Order: Oral Judgment

Result / Order: IT IS HEREBY ORDERED:
1. The appeal is allowed.
2. The sentence is varied by reducing the term of 5 years and 2 months to 3 years to run from the date of sentence 8th October 2018.

Reasons: This was an appeal against the sentence imposed by a learned Magistrate for a guilty plea for 1 count of theft. The sentence imposed by the Magistrate was 5 years and 2 months' imprisonment. The appeal was presented on the ground that the Magistrate's sentence was excessive in the circumstances.

Counsel for the State agreed with the appellant's general position on appeal, that the sentence imposed was excessive in the circumstances, and submitted that it be substituted with a sentence of 3 years and 2 months' imprisonment.

The Court's attention was drawn to the following factors in

mitigation: (i) the appellant had pleaded guilty at the first instance; (ii) the appellant had apologised and shown some genuine remorse; and (iii) the appellant offered to effect restitution of the money he stole. The main factors in aggravation were that the appellant had a long list of previous convictions and spent the money that was stolen. Taking account of all the circumstances, the Court took the view that the sentence imposed was excessive.

Case name: **Cletus Valmond**
v
The Police

[DOMMCRAP2018/0005]

Date **Tuesday, 12th February, 2019**

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	Mr. Ronald Charles appearing amicus curiae
	Respondent	Ms. Carlita Benjamin on behalf of the Director of Public Prosecutions

Issue **Criminal appeal – Appeal against sentence – Whether sentence imposed by learned magistrate excessive in all the circumstances – Whether learned magistrate took sufficient account of factors in mitigation – Whether appellant had good prospects of rehabilitation**

Type of Order: **Oral Judgment**

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

- 1. The appeal is allowed and the sentence is reduced from 4 years and 8 months, to 3 years.**
- 2. The 3 year sentence is to be served as a suspended sentence.**
- 3. The Court imposes a fine of \$1000.00 to be paid on or before 12th August 2019. Failure to pay will result in a default term of imprisonment of 6 months.**

Reasons

This was an appeal against sentence imposed by a learned Magistrate for a guilty plea to 2 counts of battery and one count of theft. The sentence imposed by the learned magistrate was a total of 4 years and 8 months' imprisonment.

The Court considered the factors in mitigation: (i) the appellant was a young person; (ii) the appellant pleaded guilty; (iii) the appellant cooperated with the police in their investigation; (iv) the appellant expressed a desire to repay the virtual complainants; (v) the appellant was inebriated at the time of the incident; (vi) the appellant stayed away from conflicts with the law since 2011. The Court underscored that its role in sentencing is not premised solely on the need for about punishment and retribution, but also the rehabilitation and reintegration of offenders into society. The Court was satisfied that factors in mitigation and the overall circumstances of the case evidenced that appellant had good prospects of rehabilitation and therefore that the sentence imposed ought to be reduced.

Case name:

Claire Seraphine Wallace

v

Michael E. Bruney

[DOMMCVAP2018/0001]

Date:

Tuesday, 12th February, 2019

Before:

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

Appearances:

Appellant: Mrs. Jo-Anne Xavier-Cuffy

Respondent: Mrs. Hazel Johnson holding papers for Ms. Lisa de Freitas

Issue:

Civil Appeal – Application for adjournment – Application for extension of time to file and serve submissions and authorities

Type of Order: Oral Decision

Result / Order: IT IS HEREBY ORDERED:

1. The Respondent is hereby granted an extension of time to file and serve submissions with authorities in response to the submissions of the appellant by 1st March 2019. In the event, that the Respondent fails to file and serve the submissions by the date hereby granted, the Respondent shall not be heard on the hearing of the appeal.
2. The appeal is adjourned to the sitting of the Court in Saint Lucia during the week 1st July 2019. The hearing is fixed for 9:00 am.

Reason: The applications for an adjournment and for an extension of time were presented on the basis of the illness of counsel for the respondent, Ms. Lisa de Freitas. Counsel holding papers for Ms. De Freitas, Mrs. Hazel Johnson, presented two medical certificates in support of the applications. The Court was satisfied that it was appropriate in the circumstances to grant both the adjournment and the extension of time. The Court however, was also of the view that, serious default of the respondent's counsel in failing to file and serve skeleton arguments, that the respondent's right to make representations at the hearing of the appeal ought to be restricted in the event that the skeleton arguments were not filed within the time extended for their filing.

Case Name: Levi Maximea
v
[1]The Chief of Police
[2]The Police Service Commission
[3]The Attorney General

[DOMHCVAP2017/0003]

Date: Tuesday, 12th February 2019

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: Mr. Levi Maximea, in person

Respondents: Ms. Tameka Burton, Solicitor General and Mrs. Joanne Xavier-Cuffy

Issue:

Civil appeal — Approach of appellate court to trial judge's findings of fact — Entitlement to damages for breach of Police Service Regulations — Loss of chance of promotion — Whether breach was sole cause of appellant's loss of chance of promotion through the ranks to Chief of Police — Whether learned judge erred in finding that there was insufficient evidence to demonstrate causal link between breach and loss of chance of promotion — Quantum of damages awarded — Whether damages inordinately low

Type Order:

N/A

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED:

The Court reserves its decision.

Case Name:

[1] Marinor Enterprises Limited

[2] Michael Astaphans

v

First Caribbean International Bank

[DOMHCVAP2013/0003]

Date:

Wednesday, 13th February 2019

Coram:

The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal

The Hon. Mr. Mario Michel, Justice of Appeal

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

Appearances:

Appellants: Mr. Hugh Marshall, QC, with him, Ms. Zara Lewis and Ms.

Kemba Benjamin

Respondent: Mrs. Heather Felix-Evans

Issue: Civil appeal – Whether 2nd appellant liable for full amount of judgment sum or only up to the extent of the guarantee for the principle amount of the loan issued by the respondent – Rate of interest payable on sums owing

Type of Order: Oral Judgment with written reasons to follow

Result / Order: IT IS HEREBY ORDERED:

1. The Appeal is allowed to the extent that the Judgment of Justice Cottle is varied as follows:
 - a. The Defendants are jointly and severely liable to the claimant in the sum of \$650,000.00 whilst the 1st defendant only is liable for the full amount of the judgment with interest and cost over and above the sum of \$650,000.00.
 - b. The interest on the sum of \$1,238,024.34 shall be at the rate of 9% per annum up to the date of Judgment and at the rate of 5% per annum from the date of Judgment to the date of full payment.
2. In all other respects the appeal is dismissed.
3. Cost to be paid in the sum of \$75,000.00 from the Court below and cost in the Court of Appeal, \$40,000.00.

Reasons: This was an appeal against the judgment of Cottle J made on 13th December 2012. There were extensive submissions filed by the parties including extensive speaking notes received by the court on the morning of the appeal. At the outset of the hearing of the appeal, the Court considered what was in effect an application by counsel for the appellant to set aside by the 2012 judgment of Cottle J and a previous order made by the Cottle J in September 2009 by which the judge denied an application by the appellants, now the defendants in the court below to amend their defence.

The essential ground upon which the Court was invited to set aside both orders by Cottle J, is section 32 of the Eastern Caribbean Supreme Court (Dominica) Act Cap. 4:02, Laws of Dominica. Counsel for the appellant also referred the Court to and relied on a judgment of the Caribbean Court of Justice (“the CCJ”) pronounced in this matter in January 2017 wherein the CCJ stated at paragraph 15 that the Court of Appeal in relation to this case is given the power to determine the merits of the real question in controversy between the parties even when the notice of appeal omits to specify such ground for allowing the appeal. Counsel further sought to raise a constitutional point on the denial of the right of the appellant to be heard arising from the same issue of the court’s striking out of the appellant’s amended defence.

The Court did not regard either section 32 of the Eastern Caribbean Supreme Court (Dominica) Act or paragraph 15 of the judgment of the CCJ as enabling this Court to do that which counsel sought. The Court further stated that even if it were empowered to set aside either or both orders of Cottle J’s on the basis of section 32 of the Eastern Caribbean Supreme Court (Dominica) Act and/or paragraph 15 of the judgment of the CCJ, the Court would in any event decline to do so.

The Court further declined counsel’s invitation to entertain a constitutional point not canvassed in the court below. The Court regarded the application made by counsel, no matter how termed, at such a late stage in the proceedings, on the basis of section 32 of the Eastern Caribbean Supreme Court (Dominica) Act and the judgment of the CCJ, as well as the constitutional breach issue, as being an attempt to abuse the processes of the Court. In this regard, the Court made reference to the statement of the CCJ stated at paragraph 8 of its judgment and well as paragraph 7 of Cottle J’s judgment, and stated that Cottle J did address the issue issues proposed to be canvassed in the amendment of the defence, which is whether the respondent was in breach of the Bank/Customer Relationship Agreement as modified by the Pre-shipment Guarantee Scheme. The Court further noted as instructive on this point paragraphs 7, 8, 13 and 15 of the CCJ’s judgment to which counsel for the respondent referred.

Having regard to all of the above, the application made by counsel for the appellant, not foreshadowed by any submissions or other documents placed by this Court, was refused. The Court ordered that the hearing of the appeal would accordingly proceed on the basis of the documents already before the court (the amended notice of appeal filed on 12th March 2015, the submissions of the appellant made in support of the notice and the submissions of the respondent in opposition).

In relation to the substantive appeal, the Court indicated that written reasons for its decision would follow.

Case Name: **Emerson International Corporation**
v
Renova Holding Limited
[BVIHCMAP2019/0001]

Date: **Thursday, 14th February 2019**

Before: **The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal**
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant: **Mr. Phillip Marshall, QC with Mr. Robert Weekes and Ms. Colleen Farrington**

Respondent: **Mr. Michael Fay, QC**

Issues: **Civil appeal – Preliminary objection to notice of appeal – Leave to appeal – Whether leave is required to appeal the variation of a disclosure order contained is a freezing injunction**

Type Order: **Oral Judgment**

Result: **IT IS HEREBY ORDERED:**

- 1. The Notice of Appeal is struck out.**
- 2. The Respondent shall have the cost of the strike out**

application and 80% of the cost of the Appeal, such cost to be assessed if not agreed within 21 days by a Commercial Court Judge.

Reasons:

The Court heard an application by the respondent to strike out the notice of appeal on the basis that it was filed without the leave of the Court and therefore was a nullity. The question before the Court was whether leave was required to appeal a decision to vary a disclosure order made in the context of an injunction.

The Court noted that the situation before the Court was an unusual one, that regrettably research by Counsel on both sides did not produce any authorities to assist the Court in resolving the point, and therefore the Court would have to decide the matter on the basis of first-principles.

The Court indicated that it was trite law that disclosure orders are not injunctions notwithstanding the fact that a failure to comply with the terms of a disclosure order can make the respondent to the Order liable to be proceeded against for contempt of Court.

The Court noted that the Appellant referred to the case of Grupo Torras SA v Al-Sabah [2014] 2 CLC 636 to the judgment of Steyn LJ at page 643 for the proposition that the making of a disclosure order arises from both the statute, section 37 in the UK statute and section 24 in the BVI statute and from the Courts inherent jurisdiction and that there is a link between a Mareva injunction and a disclosure order. The link between the two orders was not disputed however the Court was not of the view that the fact that the disclosure order that is granted in conjunction with a freezing order for the purpose of policing the freezing order made the disclosure order an injunction it is only ancillary to it (the Injunction).

The Court was of the view that the appellant, Emmerson International Corporation, required leave to appeal against the December Order which extended the time for complying with the disclosure obligation in the November Order and set up the confidentiality Clause. Leave having been neither sought nor granted the Court concluded that the notice of appeal is a nullity and ought to be struck out.