

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

TERRITORY OF THE VIRGIN ISLANDS
25th – 29th March 2019

		<u>JUDGMENTS</u>
Case Name:		Kathryn Ma Wai Fong (as the personal representative, executrix and trustee, and in her personal capacity as a beneficiary of the estate of the late Wong Kie Nai) v [1] Wong Kie Yik [2] Wong Kie Chie [3] Successful Trend Investments Corporation [BVIHCMAP2018/0001 and BVIHCMAP2018/0002] (Territory of the Virgin Islands)
Date:		Wednesday, 27 th March 2019
Coram:		The Hon. Dame Janice M. Pereira, DBE, Chief Justice The Hon. Mde. Louise Esther Blenman, Justice of Appeal The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
Appearances:		
	Appellant:	Mr. John McCarroll, SC with him, Ms. Marcia McFarlane
	Respondents:	Ms. Jima Hill for the 1st and 2nd respondents Ms. Tamara Cameron for the 3rd respondent
Issues:		Commercial appeal — Conversion of non-voting convertible preference shares held by 3rd respondent company in Malaysian company — Validity of conversion — Appellant reduced to minority shareholder in Malaysian company —

		Whether conduct of 1st and 2nd respondents effecting conversion oppressive, unfairly discriminatory and/or unfairly prejudicial to appellant — Relief sought under section 181I of BVI Business Companies Act 2004 —Purpose of conversion — Whether conversion effected for commercial reasons or to affect balance of power in Malaysian company —Fiduciary duties of directors — Section 59 of Malaysia Companies Act —Appointment of liquidator under section 159(1) of BVI Insolvency Act 2003 on just and equitable ground Application to amend claim to include independent claims for appointment of a liquidator under section 162 of Insolvency Act on the just and equitable ground, and for breaches of sections 121 and 175 of the BVI Business Companies Act — Whether amendment purely cosmetic — Whether judge erred in refusing late amendment — Application to adduce fresh evidence — Whether appellant satisfies Ladd v Marshall requirements — Whether evidence if admitted would have had an important influence on trial — Appeal against findings of fact — Credibility — Approach of appellate court in reviewing such findings
Result and Reason:		HELD: dismissing the Fresh Evidence Application, the Amendment Appeal and the Main Appeal; affirming the orders made by the Judge; awarding costs of the Fresh Evidence Application to the respondents to be assessed, if not agreed, within 21 days of the date of this order and costs of both appeals to the respondents and STIC of two-thirds of the costs assessed in the lower court, that: 1. The Lismore Statement satisfies the first and third limbs of the Ladd v Marshall test because it could not have been obtained with reasonable diligence for use at the trial and it is presumably to be believed. The onus was on the appellant to demonstrate that, if admitted, the Lismore Statement would have an important influence on the result, though it need not be decisive. The three reasons advanced by Ms. Ma for submitting that the Lismore Statement is important do not demonstrate that the statement would have an important influence on the result of the trial and the application is therefore dismissed. Ladd v Marshall [1954] 1 WLR 1489 applied. 2. On an application under the BVI Insolvency Act on the just and equitable ground, once a member of a

		company satisfies the Court that it is just and equitable to appoint a liquidator for any of the reasons recognised by the decided cases, he can ask the Court to make an order appointing a liquidator. On the other hand, a member applying under section 184I of the BC Act for the appointment of a liquidator must satisfy the Court that he is or has been unfairly prejudiced or discriminated against to get relief, and that it is just and equitable to wind up the company. In this case, the appellant is seeking to move from having to prove unfairly prejudicial or discriminatory conduct to get a winding up order on the just and equitable ground, to one where she does not have to prove such conduct, only that it is just and equitable to wind up the company. If the proposed amendments were to be granted, the appellant would achieve this transition without adequate notice to the respondents and to STIC and without complying with the statutory regime in the insolvency legislation. The respondents and STIC would be facing a different case and the lateness of the application would be to them. The judge was therefore correct in recognising the differences between the procedures and in exercising his discretion to refuse the application. Section 184I(1) of the Business Companies Act, Act No. 16 of 2004, Laws of the Virgin Islands considered; Sections 162 and 168 of the Insolvency Act, Act No. 5 of 2003, Laws of the Virgin Islands considered. 3. An appellate court is rarely justified in overturning a finding of fact which turns on credibility of a witness as the trial judge would have had the benefit of hearing and seeing the witnesses give their evidence and would be in a far better position than an appellate court to assess their credibility and make findings of fact. However, the appellate court may interfere if it is satisfied that the judge did not take proper advantage of having seen and heard the witnesses and/or if the finding is plainly wrong. In this appeal, the judge made several findings of fact which led to the conclusion that the appellant was not unfairly treated by the respondents in their conduct of the affairs of STIC and the guiding principles relating to assessing a judge's findings of fact apply. Watt (or Thomas) v Thomas [1947]1 All ER 582 applied;
--	--	---

		Mark Byers and Mark McDonald (as joint liquidators Pioneer Freight Futures Company Limited) v Chen Ningning (also known as Diana Chen BVIHCVAP2015/0011 (delivered 12th June 2018, unreported) followed; Central Bank of Ecuador and others v Conticorp SA and others (The Bahamas) [2015] UKPC 11 applied; Janan Harb v Prince Abdul Aziz Bin Fahd Bin Abdul Aziz [2016] EWCA Civ 556 considered. 4. Under section 121 of the BC Act, directors are mandated to exercise their management powers for a proper purpose and not act in a manner that contravenes the BC Act or the memorandum or articles of the company. The issue in the instant appeal turns on what was the primary purpose of the respondents in causing the conversion of the CPS. It is clear from the judgment that the judge considered the evidence of both sides relating to the reason for converting the CPS and found as a primary fact that the dominant reason was Realty's need for financing. This is a sufficient and proper basis for finding that the Conversion was for a proper purpose within the meaning of section 121 of the BC Act. There was no breach of section 121 of the BC Act or the memorandum and articles of association of STIC. Further, the Conversion benefited STIC by enhancing its investment in Realty. The fact that Ms. Ma lost majority control of Realty was the natural consequence of a corporate act that benefitted both Realty and STIC. Accordingly, there is no basis for this Court to interfere with the judge's finding. Howard Smith Ltd v Ampol Petroleum Ltd. [1974] AC 821 applied. 5. The judge erred in not giving reasons for his finding on the expert evidence relating to the Malaysian Companies Act 1965 ("the MCA"). This Court, in its discretion, will make its own finding. There are no provisions in the MCA allowing companies to issue convertible shares, and consequently, no provisions on the procedure for converting the CPS to ordinary shares. The CPS were issued pursuant to the subscription agreement and Realty's memorandum of association (as amended). The experts on both sides were required to opine on whether the ordinary shares were issued at a discount or as fully paid shares. The reasoning and conclusions of the expert for the
--	--	---

		respondents is preferred. The ordinary shares were not issued at a discount, there was no reduction of the share capital of Realty and no breach of section 59 of the MCA. Therefore, court approval of the Conversion was not necessary. Even if there was a breach of section 59, the officers of Realty would be liable to punishment in separate criminal proceedings. A breach of section 59 of the MCA would not be unfairly prejudicial to the appellant in her capacity as a shareholder of STIC. Re Arrowfield Group Ltd. (1995) 17 ACSR 649 applied. 6. In relation to the breach of section 175 of the BC Act, the exercise of a contractual right attaching to the preference shares to convert them to ordinary shares is not a sale or other disposition of more than 50 per cent in value of the assets of STIC. The Conversion was not made outside the usual or regular course of its business, although STIC effected no other transaction during the period under reference. Therefore, the Conversion did not contravene section 175 of the BC Act. Ciban Management Corporation v Citco (BVI) Limited et al BVIHCV2007/0301 (delivered 27th November 2012, unreported) followed. 7. The appellant, though losing majority control of Realty, was not unfairly prejudiced by the Conversion or any of the other alleged actions by the respondents and/or STIC such as non-payment of dividends, withholding information, or breach of the alleged shareholders agreement and/or family agreement. Further, there is no proper basis to interfere with the judge's finding that STIC was not operated as a quasi-partnership and that there was no breakdown of trust and confidence between the alleged quasi-partners. In light of the role of the appellate court, there is no basis for disturbing the judge's findings on the Main Appeal. 8. Section 167(3) of the Insolvency Act provides that the Court should not appoint a liquidator on just and equitable grounds if it is of opinion that some other remedy is available to the applicant and he or she is acting unreasonably in pursuing the winding up of the
--	--	--

		IT IS HEREBY ORDERED THAT: 1. A stay is granted of the order of the Court of Appeal requiring the appellant to pay the costs of the appeal and in the court below, on the condition that the appellant pay to the legal practitioners of the respondents, Ogier the sum of \$750,000.00 to be held in an interest-bearing account pending the final determination of the appeal to Her Majesty in Council. 2. The appellant shall have carriage of this order. 3. Costs of the application to be costs in the appeal.
Reason:		On 1st November 2018, the Court of Appeal allowed the appeal of the respondents, set aside the judgment of the Commercial Court and ordered that the applicant pay the costs of the appeal and in the court below. The applicant appealed against the order of the Court of Appeal and has applied for a stay of the order requiring him to pay the costs ordered by the Court of Appeal. The applicant advanced two main grounds in support of his application for a stay. Firstly, he asserted that without a stay of the costs order of the Court of Appeal, his ability to pursue his appeal to the Privy Council would be stifled. The Court rejected this ground as the applicant had not satisfied the Court on the evidence that he would be stifled in the pursuit of the appeal if the costs order is not stayed. Secondly, he argued that if costs are assessed and paid to the respondents and he is successful in his appeal to the Privy Council, he may not be able to recover the costs paid. The Court noted that, although the respondents were the successful parties and are entitled to the fruits of their success in the litigation, the circumstances of the case required the Court to do justice between the parties and the balance of justice in this case favoured the grant of a stay. Accordingly, a stay of the order of the Court of Appeal requiring the applicant to pay costs of the appeal and in the court below to the respondents, pending the determination of the appeal to Her Majesty in Council.

Case Name:		Chu Kong v [1] David Yen Ching Wai [2] Chan Pui Sze [3] Roy Bailey [4] John Greenwood (As Joint Liquidators of Ocean Sino Limited (in liquidation)) [5] Lau Wing Yan [BVIHCMAP2018/0019]
Date:		Monday, 25th March 2019
Coram:		The Hon. Mr. Davidson K. Baptiste, Justice of Appeal The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
Appearances:		
	Applicant:	Mr. John Carrington, QC with him, Ms. Pauline Mullings
	Respondents:	Mr. Philip Jones, QC with him, Ms. Rosalind Nicholson for the fifth respondent
Issues:		Application for conditional leave to appeal to Her Majesty in Council — Whether question on appeal involves issue of great general and public importance or otherwise — Section 2(3)(a) of the Virgin Islands (Appeals to the Privy Council) Order 1967 — Jurisdiction of BVI court in insolvency proceedings — Insolvency Act, 2003 — Whether section 273 of the BVI Insolvency Act provides for only mechanism by which a stakeholder seeking directions in a liquidation can access the court — Whether a stakeholder in a liquidation in the BVI may invoke the court's inherent jurisdiction to give directions to the Liquidators regarding their future conduct
Type of Result/Order Delivered:		Oral Decision

Result:		IT IS HEREBY ORDERED THAT: [Oral Decision] 1. Conditional leave is granted. 2. The applicant has carriage of the order. 3. Costs in the appeal.
Reason:		The application for conditional leave to appeal to Her Majesty in Council was made pursuant to section 2(3)(a) of the <i>Virgin Islands (Appeals to the Privy Council) Order 1967</i> on the ground that the question on the proposed appeal raises an issue of great general and public importance or otherwise which ought to be submitted to Her Majesty in Council. The question that the applicant sought to submit to the Privy Council is set out in the applicant's written submissions, paragraph 7 of which states: "the primary question that arises on the proposed appeal is whether the Court of Appeal is correct in its conclusion that section 273 [of the Insolvency Act, 2003] provides the only access to a stakeholder to seek directions." The issue was dealt with in the judgment of the Court of Appeal at paragraphs 32 and 33 which the applicant argued suggested that there is some power outside section 273 of the Insolvency Act for a stakeholder to apply to seek directions from the court. The Court, having heard submissions from learned counsel on both sides, was satisfied that there is a question to be resolved with regards to the court's jurisdiction in terms of access by a stakeholder seeking directions in a liquidation. The Court was of the opinion that the issue is a matter of great general or public importance and also that it is a matter that falls under the "or otherwise" limb under section 2(3)(a) of the <i>Virgin Islands (Appeals to the Privy Council) Order 1967</i> in that, the jurisdiction could benefit from the guidance from the highest court as to the full extent of the court's jurisdiction in dealing with applications by stakeholders for directions in liquidation. In the circumstances, the Court granted conditional leave to the applicant to appeal against the judgment of the Court of Appeal to Her Majesty in Council.
Case Name:		Ciban Management Corporation v

		[1] Citco (BVI) Limited [2] Tortola Corporation Company Limited [BVIHCVAP2013/0001]
Date:		Tuesday, 26 th March 2019
Coram:		The Hon. Mde. Louise Esther Blenman, Justice of Appeal The Hon. Mr. Mario Michel, Justice of Appeal The Hon. Mde. Gertel Thom, Justice of Appeal
Appearances:		
	Appellant:	Mr. Tim Wright
	Respondents:	Mr. Stuart Cullen
Issues:		Application for conditional leave to appeal to Her Majesty in Council as of right pursuant to section 3(1)(a) of the Virgin Islands (Appeals to the Privy Council) Order 1967 — Application by respondents for condition to be imposed on appellant in addition to those provided for in the Virgin Islands (Appeals to the Privy Council) Order 1967 — Whether Court empowered to order applicant to pay costs ordered by the Court of Appeal as a condition of the grant of leave to appeal to Her Majesty in Council
Type of Result/Order Delivered:		
Result:		[Oral Delivery] IT IS HEREBY ORDERED THAT: 1. Conditional leave to appeal to Her Majesty in Council is granted upon the usual terms and conditions. 2. The application by Citco Limited BVI and Tortola Corporation Company Limited for conditions to be imposed on the appellant in addition to those that are provided for in the Virgin Islands (Appeals to the Privy Council) Order 1967 is refused. 3. The appellant is to prepare a draft order with the usual terms and conditions in accordance with the Virgin Islands (Appeals to the Privy Council) Order 1967 to be settled.

		4. A draft order in respect of costs is to be submitted to be settled.
Reason:		In relation to the appellant's application for conditional leave to appeal to Her Majesty in Council, the Court was satisfied that the applicant had met the requirements in section 3(1)(a) of the <i>Virgin Islands (Appeals to the Privy Council) Order 1967 (the "Order")</i> to appeal to Her Majesty in Council as of right and accordingly granted conditional leave to appeal. In relation to the respondents' application for additional conditions to be imposed on the appellant, the Court noted that the <i>Order</i> clearly sets out the conditions which are to be imposed on the grant of leave to appeal to Her Majesty in Council. The Court was of the opinion that it had no power to impose any other conditions that are not specifically provided for by the <i>Order</i>. The Court therefore granted the appellant leave to appeal upon the usual conditions that are set out in the <i>Order</i>. The Court was not in a position to order costs in the Court of Appeal to be paid by the appellant as a condition of the grant of leave to appeal to Her Majesty in Council as it not have the jurisdiction to do so. Accordingly, the application by Citco Limited BVI and Tortola Corporation Company Limited for conditions to be imposed on the appellant in addition to those that are provided for in the <i>Order</i> was dismissed.
Case Name:		[1] Lark Services Inc. [2] Jan-Erik Moe [3] Knut Iwan Heyderdahl-Larsen [4] TCC Technologies (formerly known as Lark Services (Norway)) v Sempacher Foundation [BVIHCMAP2018/0053]
Date:		Tuesday, 26th March 2019
Coram:		The Hon. Mde. Louise Esther Blenman, Justice of Appeal The Hon. Mr. Mario Michel, Justice of Appeal

		The Hon. Mde. Gertel Thom, Justice of Appeal
Appearances:		
	Appellants:	Mr. Robert Nader
	Respondent:	Mr. Andrew Willins
Issues:		Interlocutory appeal — Decision of trial judge refusing application for summary judgment or for part of the statement of claim to be struck out — Whether learned judge erred in principle in refusing application for summary judgment or striking out — Whether there are triable issues between the parties that ought to be ventilated at a full trial
Type of Result/Order Delivered:		Oral Judgment
Result:		[Oral delivery] IT IS HEREBY ORDERED THAT: 1. The appeal against the decision of Wallbank J is dismissed. 2. The costs of the appeal are awarded to the respondent to be assessed by the Commercial Court unless agreed within 21 days of the date of this order.
Reason:		This was an appeal by the appellants against the decision of the learned judge, Wallbank J, in which he refused an application for summary judgment or for part of the statement of claim to be struck out, and awarded costs to the respondent. The appellants were dissatisfied with the decision of the learned judge and have appealed against the decision. The Court had the benefit of written and oral submissions from learned counsel for the appellant and for the respondent. The Court, having reviewed the submissions and the authorities, was of the view that there is no discernible error of principle in the learned judge's decision not to strike out the statement of claim nor to award summary judgment. The Court agreed with the learned judge that there is a viable claim and that there are triable issues between the parties which ought to be ventilated at a full trial. Accordingly, the appeal against the decision of Wallbank J was dismissed.

Case Name:		Alexandra Vinogradova v [1] Mrs. Elena Vinogradova [2] Mr. Sergey Vinogradova [BVIHCMAP2018/0052]
Date:		Wednesday, 27th March 2019
Coram:		The Hon. Dame Janice M. Pereira, DBE, Chief Justice The Hon. Mde. Louise Esther Blenman, Justice of Appeal The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
Appearances:		
	Appellant:	Mr. Robert Levy, QC with him, Mr. Iain Tucker
	Respondents:	Mr. Brian Lacy and Mr. Alexander Muksinov
Issues:		Commercial appeal — Interlocutory appeal — Appointment of Receivers — Threshold test for appointment of Receivers — Good arguable case — Whether learned judge erred in exercise of his discretion in appointing Receiver and continuing his appointment — Appropriateness of appointing Receiver by local court where similar relief available in a foreign court closely connected to the disputes between the parties — Appropriateness of appointing Receiver where a freezing injunction could provide adequate protection for the claimant
Type of Result/Order Delivered:		N/A
Result:		[Oral Decision] IT IS HEREBY ORDERED THAT:

		The decision will be delivered on Friday, 29 th March 2019.
Case Name:		Ben Oldman Special Situations Fund LP Applicant v [1] Karver Investments limited [2] Hazeldene Finance Limited [3] Briarfield International Limited [4] Dunedin Finance Limited Respondents [5] CJSC “VMZ RED OCTOBER” (a company incorporated in the Russian Federation, in liquidation) [6] Mr. Igor Zavyalov [7] Mr. Nikolai Timokhin Defendants [BVIHCMAP2017/0023]
Date:		Thursday, 28 th March 2019
Coram:		The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal The Hon. Mr. Mario Michel, Justice of Appeal The Hon. Mde. Gertel Thom, Justice of Appeal
Appearances:		
	Applicant:	Mr. Tim Wright
	Respondents:	Ms. Tameka Davis
Issues:		Application by way of motion for conditional leave to appeal to Her Majesty in Council — Section 3(2)(a) of Virgin Islands (Appeals to the Privy Council) Order 1967 — Whether question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council — Decision of Court of

		Appeal that Russia and not the BVI was the forum conveniens
Result:		[Oral Delivery] IT IS HEREBY ORDERED THAT: 1. The motion for leave to appeal to Her Majesty in Council is dismissed. 2. Costs to the respondents in the sum of \$7, 500.00.
Reason:		This was an application by way of motion for conditional leave to appeal to Her Majesty in Council pursuant to section 3(2)a of the <i>Virgin Islands (Appeals to the Privy Council) Order 1967</i> on the basis that the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council. The application was opposed by the respondents who requested an adjournment. The Court highlighted that many decisions of this Court have explained the concept of great general, public importance or otherwise such as the case of <i>Martinus Francois v Attorney Saint Lucia Civil Appeal No. 37 of 2003 (delivered 7th June 2004, unreported)</i>. In <i>Martinus Francois</i>, Saunders JA stated that: “Leave under this ground is normally granted when there is a difficult question of law involved. In construing the phrase ‘great general or public importance’, the court usually looks for matters that involve a serious issue of law;...an area of law in dispute, or, a legal question the resolution of which poses dire consequences for the public.” The Court also referred to paragraph 15 of <i>Dmitry V. Garkusha v Ashot Yegiazaryan BVIHCMAP2015/0010</i> (delivered 12th June 2017, unreported) where Mendes JA [Ag.] stated that where there is no genuine dispute on the applicable principles of law, there can be no issue of great general or public importance, although even in such a case the Court may exercise a reserve discretion to determine “otherwise” that the case ought to be referred to the Privy Council. In the case of <i>Renaissance Ventures Ltd et al v Comodo Holdings Ltd. BVIHCMAP2018/0005 and BVIHCMAP2018/0008 (delivered 13th July 2018, unreported)</i> the principles were also explained by this Court. In that case, it was held that where there is no genuine dispute on the applicable principles of law

		underlying the question which the applicant wishes to pursue on its proposed appeal a question on great general or public importance does not ordinarily arise, especially where the principle of law is settled either by the highest appellate court or by longevity of application. Where the principle is established by the Court of Appeal but its either unsettled in the sense that there are differing views or conflicting dicta, surrounding the principle itself or is considered to be far reaching in its effect or given to harsh consequences or for some other reason would benefit from consideration at the highest appellate level, this Court would be minded to seek the guidance of Her Majesty in Council. However, where the real question on the proposed appeal is the way this Court has applied settled law to the facts of the case or whether the judicial discretion was properly exercised, leave will not ordinarily be granted. In support of the motion for conditional leave, learned counsel for the applicant referred to the four grounds of appeal and sought to persuade the Court that these grounds satisfied the test stated in <i>Martinus Francois</i> and other cases attracting great general or public importance or otherwise. Learned counsel for the respondent urged the Court to conclude that the matters set out in the various grounds of appeal do not rise to the level of public importance or otherwise and therefore leave ought not to be granted. The Court, having read the submissions and the authorities referred to and having heard the oral arguments advanced by both parties, was of the view that leave ought not to be granted because the applicant had not satisfied the test of the matter being one of great general, public importance or otherwise. Accordingly, the motion for leave to appeal to Her Majesty in Council was dismissed.
Case Name:		Kim Russell-Romney v John Chinnery [BVIHCVAP2017/0001]

Date:		Thursday, 28th March 2019
Coram:		The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal The Hon. Mr. Mario Michel, Justice of Appeal The Hon. Mde. Gertel Thom, Justice of Appeal
Appearances:		
	Appellant:	Ms. Ruthilia Maximea and Ms. Nellien Bute
	Respondent:	Mr. Patrick Thompson
Issues:		Civil appeal — Assessment of damages by master — Special damages — Whether learned master erred in assessing special damages — Whether special damages sufficiently proved — General damages for pain and suffering — Whether there was no reasonable proportion between the award of general damages and the loss sustained by the appellant — Future medical care — Whether the learned master justified in not making any specific award for the costs of future surgery when there was no evidence before him of any likely costs of surgery — Whether learned master ought not to have made nominal award of damages in respect of appellant's claim for compensation for gratuitous assistance in circumstances where there was no evidence in support of such a claim
Result:		[Oral Delivery] IT IS HEREBY ORDERED THAT: 1. The appeal is dismissed with costs to the respondent in the sum of \$4,000.00 agreed by the parties. 2. The award on the sum of \$45,540.00 attracts interest at the rate of 5% from the date of the claim to the date of judgment and the award on the sum of \$44,572.36 attracts interest at the rate of 2.5% from the date of the accident to the date of the judgment.
Reason:		This was an appeal against the judgment of Master Eddy Ventose on an assessment of damages delivered on 12th January 2017 in which he made the following orders: (i) the claimant is awarded special damages in the sum of \$44, 572. 36; (ii) the claimant is awarded general damages in the sum of \$45, 540; (iii) the total awarded is \$90,112.36 less \$37, 800 which amounts to \$52, 312. 36; and (iv) the claimant is entitled to prescribed costs based on the total awarded damages of

\$52, 312. 36.

The appellant, who was the claimant in the court below, appealed against the judgment of Master Ventose on the following grounds:

- 1. The learned master miscalculated and therefore erred in concluding that the special damages payable to the claimant by way of medical expenses, travel and associated expenses was \$31, 308. 12;**
- 2. Counsel for the appellant at the stage of assessment of damages did not adequately present the appellant's claim;**
- 3. Having regard to all the circumstances of the appellant's case there was no reasonable proportion between the amount awarded to the appellant and the loss sustained. Further, the award exceeded the general ambit in which reasonable disagreement is possible and was clearly and blatantly wrong; and**
- 4. The learned master erred in calculating prescribed costs based on the sum outstanding to the claimant and not based on the value which he awarded to the appellant in total.**

The Court observed that the appellant filed skeleton arguments on 19th November 2018 in which she abandoned her second ground of appeal. In her first ground of appeal, the appellant contended that the learned master miscalculated the special damages payable to the claimant by way of medical expenses, travel and associated expenses. In her written submissions and the oral submissions made by her counsel, the argument came down to the learned master not having made an award in favour of the appellant for expenses incurred which she paid for from the two loans she took and her two credit cards.

Learned counsel for the appellant, however, conceded that an award on this basis would result in double compensation and that, in any event, there was no evidence of what these loans or credit cards were used to pay for. She then sought to pursue this ground on the basis that the appellant should be compensated for the interest paid on the loans and on the credit cards, having accepted that this loss was not pleaded or proved and that in any event there was no evidence of the expenses which the loans and the cards were used to pay for. Learned counsel therefore conceded that there could not be any basis for such an award for special damages.

The second ground of appeal pursued by the appellant challenged the learned master's award of general damages for pain and suffering of \$10,000.00, \$15,000.00 for loss of amenities, and the award of \$5,000.00 for gratuity assistance given to the appellant by members of her family and the fact that the learned master made no awards specifically for future surgery to be undertaken by the appellant.

Learned counsel for the appellant submitted the award for pain and suffering should be \$20,000.00 instead of \$10,000.00 and \$25,000.00 for loss of amenities instead of \$15, 000. Counsel however, could advance no proper basis for the Court to interfere with the discretionary award made by the master. Learned counsel for the respondent, Mr. Thompson, argued that there were no bases to upset the learned master's award as the instant case was comparable with the injuries and awards made in the case of *Celia Hatchett v Frist Caribbean International Bank et al Claim No. BVIHCV2006/0227 (delivered 29th November 2007, unreported)*. He also stated that the master increased the quantum of the award by \$5,000.00 which would take into account the passage of 10 years between 2007 and 2017. The Court accepted the submission of Mr. Thompson that there is no basis to interfere with the learned master's award. Further, the Court stated that using the *Judicial Studies Board Guidelines for the Assessment of General Damages in Personal Injury Cases* referred to in *Celia Hatchett*, the injuries sustained by the appellant are in line with the moderate injuries category which attracts an award between \$9,000.00 and \$17,000.00 which is consistent with the learned master's award for pain and suffering.

Therefore, the Court declined to interfere with the learned master's award in that regard. The Court also considered the award of nominal damages of \$5,000.00 made by the learned master for gratuitous assistance by the appellant's husband in the absence of any evidential basis for the appellant's claim for \$10,500.00 to be unimpeachable.

Further, the Court was of the opinion that the learned master was justified in not making any specific award for the costs of future surgery when there was no evidence before him of any likely costs for the surgery. The Court considered that, in any event, the learned master did make a nominal award for future medical expenses.

		On the third ground of appeal pursued by the appellant, learned counsel conceded before the Court that the challenge to the learned master's award of prescribed costs was unimpeachable. Accordingly, in the circumstances, the Court dismissed the appeal with costs to the respondent. The Court took the opportunity to correct an error made in the master's judgment which was not a subject matter of the appeal. In paragraph 39 of the judgment, the learned master stated that the claimant is entitled to interest on the sum \$52,312.36 at the rate of 5% from the date of assessment until full payment. The Court, having regard to authority of <i>Martin Alphonso et al v Deodat Ramnath (1997) 56 WIR 183</i> which lays out the approach to be taken in the question of interest, stated that the award ought to be interest on the sum of \$45,540 at the rate of 5% from the date of the claim to the date of judgment and interest on the special damages award of \$44,572.36 from the date of the accident to date of the judgment. This correction will in fact amount to an increase to the final amount recoverable by the appellant.
Case Name:		Sherman Williams v The Queen [BVIHCRAP2015/0007]
Date:		Friday, 29 th March 2019
Coram:		The Hon. Dame Janice M. Pereira, DBE, Chief Justice The Hon. Mde. Louise Esther Blenman, Justice of Appeal The Hon. Mr. Mario Michel, Justice of Appeal
Appearances:		
	Applicant:	Mr. Michael Maduro
	Respondent:	Ms. Leslie Ann Faulkner, Senior Crown Counsel

Issue:		Application for leave to file a notice of appeal and corresponding documents out of time
Result and Reason:		[Oral Decision] IT IS HEREBY ORDERED THAT: 1. There being no objection to the notice of appeal filed on 18th December 2015; time is extended to 18th December 2015 and the notice of appeal is deemed to be duly filed. 2. The notice of appeal is also amended to reflect only the grounds of appeal as set out in the draft notice of appeal attached to the application for extension of time filed on 7th March 2019. Those grounds will be the grounds of appeal substituted for the grounds of appeal in the notice of appeal filed on 18th December 2015.
Case Name:		Jevonne Demming v The Queen [BVIHCRAP2015/0001] HEARD TOGETHER WITH: Sherman Williams v The Queen [BVIHCRAP2015/0007]
Date:		Friday, 29th March 2019
Coram:		The Hon. Dame Janice Pereira, Chief Justice The Hon. Mde. Louise Blenman, Justice of Appeal

		The Hon. Mr. Mario Michel, Justice of Appeal
Appearances:		
	Appellants:	Mr. Patrick Thompson for the first appellant Mr. Michael Maduro for the second appellant
	Respondent:	Ms. Leslie Ann Faulkner, Senior Crown Counsel
Issues:		High Court criminal appeal against conviction — Attempted murder — Joint enterprise — Whether evidence prejudicial and therefore deprived second appellant of a fair trial — Good character direction — Whether learned judge gave inadequate good character direction to jury
Result:		[Oral Delivery] IT IS HEREBY ORDERED THAT: 1. The appeal against conviction for the second appellant is dismissed and the sentence is affirmed. 2. On the appeal against conviction for the first appellant, the decision is reserved. Notice of delivery will be given at a subsequent date.
Reason:		In relation to the second appellant, Mr. Sherman Williams, the Court was of the unanimous view that the none of the grounds of his appeal against conviction were meritorious. In respect of the first ground of appeal, the evidence though prejudicial did not amount to the kind or reached the quality of prejudice that was fatal to the fairness of the trial one way or the other. In any event, the learned trial judge addressed the prejudicial statement made and asked the jury to disregard it and further she proceeded on the basis and treated him as a person of good character and gave him the benefit of a good character direction. The second ground of appeal was also without merit for the reason that the learned judge gave a good character direction albeit not in the expansive words as would be set out in cases such as <i>Locke v Queen</i>. Nonetheless, the Court was of the view that even though the learned judge did not use those words it was clear that she brought home to the jury how to treat the good character on both limbs in respect of the second appellant in relation to his caution statement, and in relation to the propensity limb, that is, whether the second

		appellant would be the kind of person to do this act and on that basis the Court did not consider that that ground prevailed. Even more so, even if the good character direction may be considered as being inadequate or not having been given at all, the facts of this case and the direct eye witness testimony was such compelling testimony that in any event had a fulsome good character direction been given, it would have made no difference to the outcome in respect of the verdict. For those reasons, the Court dismissed the second appellant's appeal against conviction and affirmed his sentence, there being no appeal against sentence.
Case Name:		Stitching Administratiekantoor Nems v [1] Anna Radchenko [2] Igor Borisovitch Gitlin [BVIHCMAP2019/0003]
Date:		Friday, 29th March 2019
Coram:		The Hon. Dame Janice M. Pereira, DBE, Chief Justice The Hon. Mde. Louise Esther Blenman, Justice of Appeal The Hon. Mr. Mario Michel, Justice of Appeal
Appearances:		
	Applicant:	Mr. Jerry Samuel for the applicant, Conyers Dill & Pearman
	Appellant:	Mr. John Carrington, QC with him, Ms. Pauline Mullings
	Respondent:	No appearance
Issue:		Application by Conyers, Dill & Pearman to be removed from the record as legal practitioners acting for the first respondent — Whether application ought to be determined on paper
Result:		[Oral Delivery]

		IT IS HEREBY ORDERED THAT: The Court is not in a position to consider the application on paper as it requires further evidence of service on the interested party. The application will therefore be considered after the hearing of the substantive appeal.
Reason:		The Court observed that it was unclear as to whether the application to be removed from the record had been served on the interested party. The Court therefore, requested counsel for the interested party to attend the appeal hearing. Further the application was opposed by counsel for the appellant on the basis that the application was filed on 26th March 2019, shortly before the hearing date of the appeal and as a result an order for counsel for the interested party to be removed from the record may delay the hearing of the substantive appeal listed to be heard today. The Court took note of the fact that the notice of appeal was filed on 10th January 2019 as well as of the nature of the substantive appeal and was satisfied that the interested party had sufficient notice of the pending appeal. While the position of counsel for the interested party was understood, the Court considered that allowing counsel to come off the record at the time would cause greater prejudice to the judgment creditor if the appeal were delayed. On that basis, the Court did not accede to learned counsel's request to be removed from the record before the hearing of the appeal.
Case Name:		Stitching Administratiekantoor Nems v [1] Anna Radchenko [2] Igor Borisovitch Gitlin [BVIHCMAP2019/0003]
Date:		Friday, 29th March 2019

Coram:		The Hon. Dame Janice M. Pereira, DBE, Chief Justice The Hon. Mde. Louise Esther Blenman, Justice of Appeal The Hon. Mr. Mario Michel, Justice of Appeal
Appearances:		
	Appellant:	Mr. John Carrington, QC with him, Ms. Pauline Mullings
	Respondent:	Mr. Jerry Samuel on behalf of the first respondent No appearance of or on behalf of the second respondent
Issues:		Commercial appeal — Jurisdiction of the High Court to grant charging orders – Section 7 of the Eastern Caribbean Supreme Court (Virgin Islands) Act — Service out of the jurisdiction — Service under the Hague Convention — Rules 7.8 and 7.9 of the Civil Procedure Rules 2000
Result:		[Oral Delivery] IT IS HEREBY ORDERED THAT: 1. The appeal is allowed. 2. The order of the trial judge is set aside in relation to the ruling that the court has no jurisdiction to grant charging orders. 3. Judgment is set aside. 4. The provisional charging order is restored. 5. The application for a final charging order shall be determined afresh by a different trial judge 6. The costs order in the judgment is set aside. 7. Costs to be awarded to the appellant in the appeal and in relation to the hearing on the initial application with respect to jurisdiction and service out.
Reason:		The Court indicated that written reasons for its decision would be provided at a later date.
Case Name:		Alexandra Vinogradova v [1] Mrs. Elena Vinogradova

		[2] Mr. Sergey Vinogradova
		[BVIHCMAP2018/0052]
Date:		Friday, 29th March 2019
Coram:		The Hon. Dame Janice M. Pereira, DBE, Chief Justice The Hon. Mde. Louise Esther Blenman, Justice of Appeal The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
Appearances:		
	Appellant:	Mr. Robert Levy, QC with him, Mr. Iain Tucker
	Respondent:	Mr. Brian Lacy and Mr. Nicholas Brookes
Issues:		Commercial appeal — Interlocutory appeal — Appointment of Receivers — Threshold test for appointment of Receivers — Good arguable case — Whether learned judge erred in exercise of his discretion in appointing Receiver and continuing his appointment — Appropriateness of appointing Receiver by local court where similar relief available in a foreign court closely connected to the disputes between the parties — Appropriateness of appointing Receiver where a freezing injunction could provide adequate protection for the claimant
Result/Order:		[Oral Decision] IT IS HEREBY ORDERED THAT: 1. The appeal be allowed and the orders below, appointing John Ayers as Receiver (the “Receiver”) over Grantway International Limited (“Grantway”) be set aside and the Receiver is discharged with immediate effect save for the further steps to be taken pursuant to this Order. 2. The Receiver shall direct and procure its Russian legal counsel (the “Receiver’s Counsel”): a. to sign, have notarised, attend to all necessary formalities and deliver to Mr. Boris Koysman forthwith and not later than 5 p.m. Moscow time on 29th March 2019 a power of attorney in the form requested by the Appellant, in favour of Mr. Koysman in respect of Bescant Enterprises Limited (“Bescant”);

		b. without prejudice to paragraph 2(a) above, to take any steps that may be requested by the appellant to enable Mr. Koysman to represent the interests of Bescant pending such power of attorney becoming effective particularly but not limited to in relation to enabling Mr. Koysman to represent Bescant at a hearing scheduled to take place in Moscow on Monday, 1st April 2019; c. not to take any other step pursuant to his power of attorney in respect of Bescant absent a written direction from Mr. Koysman in relation to such step. 3. The Receiver shall forthwith direct and procure the Receiver's Counsel immediately to provide and deliver by hand to Mr. Koysman the original Writs of Execution obtained in proceedings commenced by Bescant for repayment of amounts due from the estate of Alexander Vinogradova in the Moscow City Arbitration Court (the "Writs"). 4. The Receiver shall execute or cause to be executed forthwith all Board Resolutions, Directors' Resignations and other documents as may be requested by the appellant in order to restore the Boards of Directors of Bescant and Grantway International Limited to the status quo prior to the appointment of the Receiver. 5. The Receiver shall take or cause to be taken any steps as may be requested by the appellant to rescind all powers of attorney granted by him in respect of Bescant or Grantway, including the power of attorney in favour of the Receiver's Counsel. 6. The Receiver shall provide or cause to be provided forthwith to the appellant's russian legal counsel all documents (save for any privileged legal advice to him in his capacity as Receiver) in his possession or control as a result of his appointment as Receiver of Grantway and promptly answer any reasonable questions as may be put to him by the appellant as to any steps taken during his appointment. 7. The Receiver shall by 4 p.m. on 30th April 2019 file and serve upon the appellant a report detailing his activities in respect of Grantway and its subsidiaries since his appointment. 8. The order as to costs made by the learned judge below on 9th December 2018 shall be set aside. 9. The respondents shall pay the appellant's costs of the proceedings in the court below, such costs to be assessed if not agreed within twenty-one days.
--	--	--

		10. The respondents shall pay the appellant's costs of the appeal in the amount of two-thirds of the costs of the proceedings in the court below as assessed or agreed. 11. The respondents shall pay the costs of the Receiver, such costs to include costs incurred in complying with the order of the Court dated 27th March 2019, to be assessed by the Commercial Court.
Reason:		The Court indicated that written reasons for its decision would be provided at a later date.