

COURT OF APPEAL SITTING

**ANTIGUA AND BARBUDA
16TH SEPTEMBER TO 20TH SEPTEMBER 2019**

JUDGMENT

Case Name: Prudence Robinson
v
Sagicor General Insurance Inc.
[SLUHCVAP2017/0034]

Date: Wednesday, 18th September 2019

Coram: The Hon. Mr. Davidson Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant: Mr. Lenworth Johnson holding papers for Mrs. Lydia B. Faisal

Respondent: Ms. Amina Byron holding papers for Mr. Mark Maragh

Issues: Civil appeal – Insurance – Non-compliance with Form C of Motor Vehicles (Third Party Risks) Regulations – Effect of non-compliance – Different versions of cover note – Whether valid cover note existed at time of accident.

Result and Reason: Held: Allowing the appeal, setting aside the order of the learned judge dismissing the claim of the appellant, remitting the matter to the High Court and awarding costs to the appellant to be assessed by a master of the court if not agreed within 21 days, that:

1. *Regulation 3 of the Motor Vehicles (Third Party Risks) Regulations* requires that every covering note issued by an insurer shall have printed in front or at the back of it a certificate of

insurance in the form set out in Form C. The Act does not state the effect of non-compliance with the specified form. However, section 24 of the *Interpretation Act of Saint Lucia* provides that, where a form is prescribed or specified by any enactment, deviations therefrom not materially affecting the substance nor calculated to mislead shall not invalidate the form used. In the present case, there is a certificate of insurance in front of the cover note as required by regulation 3. There was no finding in any event by the judge that the form of the cover note in question was materially different in substance from Form C or was calculated to mislead. In the absence of such a finding, the effect of section 24 of the *Interpretation Act* is that, contrary to the conclusion of the learned judge, the cover note relied on by Sagicor was not invalidated.

2. The contract of insurance contained in a temporary covering note should be enforceable against the insurer. In this case, any failure of the insured to pay the premium could not have caused the cover note to change from providing cover for 4 months to providing cover for 30 days. An implied or express promise to pay the premium would therefore have been sufficient consideration to render the contract enforceable once there had been offer and acceptance of the cover. In the absence of such an implied promise, the failure to pay the premium may have entitled the insurer to cancel the coverage under the terms of the contract between the insurer and the insured but unless it did so, the coverage would have continued for the periods stated on the face of the note. Sagicor could not raise non-payment of the premium as a defence to the claim made by the appellant under the Act as the Act does not permit the insurer to raise contractual defences under the policy against the claim of a third-party judgment creditor. Further, the learned judge erred in his implicit finding that the premium had not been paid as Sagicor led no evidence at the trial of such non-payment

and the conclusion therefrom that the cover note never took effect and the coverage never came into existence.

Taylor v Allon [1965] 1 All ER 557 applied.

3. The motor truck was being used on the road and was subject to a bill of sale from the bank. The presumption must be that it was insured at some point in time at the minimum in accordance with the terms of the cover note produced by the insurer. However, by virtue of section 6 of the Act the policy would have remained valid unless and until the insurer notified the Licensing Authority of its expiration. There was no evidence that Sagicor (or its predecessor) had notified the Saint Lucia Licensing Authority of the expiration of the cover note after the 30-day period. There was no evidence that the cover note had been avoided or a claim had been made within the statutory period under section 9 of the Act to avoid the cover note for non-payment of premium. The result is that the cover note had to be treated as having been valid originally and as having expired under its terms before the date of the injury to the appellant but by virtue of section 6 of the Act, the absence of evidence of notification to the Licensing Authority meant the only finding available to the judge was that it remained valid as at the date of the appellant's injury.

APPLICATIONS AND APPEALS

Case Name:

Big Banana Holding Company Limited

v

ABI Bank Limited (In Receivership)

[ANUHCVP2019/0020]

Date: Monday, 16th September 2019

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant: Mr. Kendrickson Kentish

Respondent: Ms. Safiya Roberts and with her, Mrs. Andrea Roberts-Nicholas

Issues: Civil appeal – Leave to appeal — Interim injunction pending determination of the appeal or alternatively a conservatory order

Type of Order: Oral Decision

Result / Order:

Order:

1. The application for leave to appeal is dismissed, no leave being required, given the nature of the order which is an injunction having regard to the order of 18th July 2019 and having regard to section 31 of the Supreme Court Act.
2. No order as to costs

Reason: The appellant's application for leave to appeal is dismissed on the basis that what was sought and what the judge in essence did on the application that the effect of the order of 18th July 2019 was in the nature of an injunction restraining the auction from taking place, and that when she discharged that order, it amounted to a discharge of the order. The appeal would lie to the court of appeal without the leave of the court and on that basis, the court does not consider that leave is required. In relation to application for conservatory order, the court dismisses the application and the parties are allowed to take the necessary steps in the matter.

Case Name:

**Cable and Wireless
(Antigua and Barbuda) Limited**

v

Antigua and Barbuda Workers Union

[ANULTAP2016/0003]

Date:

Monday, 16th September 2019

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**

Appearances:

Appellant:

**Mr. Roger Forde QC and with him Ms. Kari-Ann
Reynolds**

Respondent:

Mr. Justin L. Simon QC

Issues:

**Industrial appeal – Motion for leave to appeal to Her
Majesty in Council**

Type of Order:

Oral Decision

Result / Order:

Order

1. Leave to appeal to Her Majesty in Council is granted to the applicant pursuant to sections 122 (1) (a) or 122 (2) (c) of the Antigua and Barbuda Constitution against the judgment of the Court of Appeal issued herein on May 23, 2019 upon the following conditions that:

a. The applicant do within ninety (90) days of the date of the hearing of this application for leave to appeal enter into good and sufficient security in the sum of Five Hundred Pounds (500.00) for the due prosecution of the appeal and the payment of all such costs as may be payable by the Appellant in the event of this appeal being dismissed, such security to consist of the deposit of the said amount in the Court;

- b. The applicant do take such steps for the purpose of procuring the preparation of the record, settling such record with the solicitors for the respondent and transmitting of such record to the Registrar of the Privy Council within ninety (90) days of the date of hearing of this application for leave to appeal;
- c. The record shall be comprised of the record used at the hearing of the appeal, excluding documents of a formal nature and those omitted by consent, and shall include the judgment and orders of the Court of Appeal, and the Order granting conditional leave to appeal;
- d. The applicant shall make application to this Court for final leave to appeal to Her Majesty in Council Supported by the Certificate of the Registrar that the security for costs herein ordered has been given within the time prescribed by this Order to the satisfaction of the Registrar;
- e. The costs of this Motion do abide the final determination of the appeal.
- f. The Order be submitted to the Registry for sealing and approved within seven (7) days.

Case Name:

**Kenard Byron
v
Eastern Caribbean Amalgamated Bank (ECAB)**

[ANUHCVP2012/0010]

Date:

Monday, 16th September 2019

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**

Appearances:

Appellant: Dr. David Dorsett with him Mr. Jarid Hewlett

Respondent: Ms. E. Ann Henry, QC

Issues: Civil appeal – Privy Council remitted case to the Court of the Appeal to consider what was documented in the supporting books and documents of the Bank as it relates to the employment of the Applicant with the Bank of Antigua — Additional documents

Type of Order: Adjournment

Result / Order: Order
 1. The appeal is adjourned for further hearing limited to one hour in total on Monday 11th November 2019, the start of the sitting of the court in St. Kitts and Nevis, the hearing to be by video conference, if convenient.

Case Name: [1] Steadroy Benjamin
 [2] Janice Powell
 v
 Dawnlyn Henry aka Dawn Henry
 [ANUHCVP2018/0001]

Date: Monday, 16th September 2019

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

Appearances:
 Appellant: Mr. Lawrence Daniels
 Respondent: Mr. Justin L. Simon QC

Issues: Civil appeal – Incorrect judgment sum — Whether the judge erred in making the Order dated 14th December 2017 for the sum of EC\$452,043.34 — Judgment debtor made payments toward the debt

Type of Order: Oral Judgment

Result / Order: It is hereby ordered by consent:

1. The Appeal is allowed to the extent that the total sum now due and owing to the respondent as at the 16th September 2019 is in the total sum of \$300,494.82 being the balance due in respect of the debt inclusive of interest as at that date.
2. The balance of \$300,494.82 shall be liquidated within 6 months thereof.
3. No further interest shall accrue on the balance hereby stated following today's date.
4. No order as to costs

Case Name: The Supervisory Authority
v
[1] Cresswell Overseas SA
[2] MEINL Bank (Antigua) Ltd.
[ANUHCVP2017/0003]

Date: Monday, 16th September 2019

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

Appearances:

Appellant: Mr. Anthony Armstrong, Department of Public Prosecutions holding for Mr. Reginald Armour, SC

Respondent: Mr. Frank Walwyn with him Ms. Jacqueline Walwyn for first respondent
Mr. Loy Weste for second respondent

Issues: Civil appeal – Conditional leave to appeal to Her Majesty in Council

Type of Order: N/A

Result / Order: The judgment is reserved.

Case Name: Leonart Mathias

v

Antigua Commercial Bank

[ANULTAP2017/0002]

Date: Monday, 16th September 2019

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

Appearances:

Appellant: Mr. Justin L. Simon

Respondent: Mrs. Andrea Roberts Nicholas with her Ms. Safiya Roberts

Issues: Industrial appeal – Unfair dismissal — Section C59 (1) of the Antigua and Barbuda Labour Code — Whether the employee was guilty of gross misconduct which justified dismissal — Lack of procedural fairness — Failure of the employer to notify the employee of what was alleged against him and allowing him an opportunity to defend himself — Natural justice — Opportunity to defend against accusations during internal inquiry before summarily terminating employee’s services immediately following suspension — Whether the court misdirected itself by relying heavily on video footage of employee disconnecting the employer’s DVR in the absence of the display of the footage for purposes of examination and cross-examination — Breach of fiduciary

responsibility — Whether the evidenced showed that the employee acted recklessly by intentionally plugging out the DVR for the purpose of leaving the same unplugged indefinitely, placing the employer at risk of externally institute criminal activity — Retrial of the employee's unfair dismissal claim

Type of Order: N/A

Result / Order: Judgment is reserved.

Case Name: Vern Small
v
The Queen
[ANUHCRA2017/0006]

Date: Tuesday, 17th September 2019

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

Appearances:
Appellant: Mr. Cosbert Cumberbatch
Respondent: Mr. Anthony Armstrong with him Mrs. Shannon Jones-Gittens

Issues: Criminal appeal – Application to amend grounds of appeal (appellant did not have the benefit of Counsel when he filed grounds of appeal) — Appeal against conviction and sentence — Whether the appellant was put to the jury in a fair and balanced way — Fair trial — Whether the verdict was unsafe and unsatisfactory — Whether there was a doubt that appellant committed the offence for which he was convicted.

Type of Order:

Directions

Result / Order:

This is an application for Vern Small to add an additional ground of appeal, there being no objection by learned prosecution, it is hereby ordered by consent that:

1. Leave is granted to Mr. Small to add an additional ground of appeal, to wit, that there was material irregularity that impacted the fairness of the trial by reason of a member of the jury disclosed to the trial judge that she is connected to a party in the trial.
2. The appellant granted seven (7) days leave within which to file and serve the additional ground of appeal.

Reason:

There was no objection by the learned prosecution.

Case Name:

The Queen

v

Shane Williams

[ANUHCRA2018/0011]

Date:

Tuesday, 17th September 2019

Coram:

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

Appearances:

Appellant:

Mr. Anthony Armstrong with him Mrs. Shannon Jones-Gittens

Respondent:

No Appearance

Issues: Criminal appeal – Criminal appeal against sentence — Unlawful sexual intercourse — Whether the learned judge erred when he imposed a suspended sentence — Whether the sentence was manifestly lenient given the circumstances of the case

Type of Order: Adjournment

Result / Order: 1. The appeal is adjourned to the next sitting of the court of appeal in Antigua and Barbuda during the week which commences on 13th January 2020 in order for respondent Mr. Shane Williams to be personally served.

Reason: Based on the intimation of the earned prosecution that Mr. Shane Williams has evaded service, and the court having read affidavit evidence of Mr. Leroy Gittens, in particular paragraphs 4 and 5, and the court being of the view that it is prudent to adjourn the matter in order for the Crown to serve Shane Williams personally,

Case name: Washington Bramble
v
[1] The Commissioner of Police
[2] Conliffe Clarke
Magistrate for District “A”
[ANUMCRAP2017/0004]

Date: Tuesday, 17th September 2019

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

Appearances:

Appellant: In Person

Respondent: Mr. Anthony Armstrong with him, Mrs. Shannon Jones-Gittens for the Director of Public Prosecutions

Issue: Criminal appeal – Appeal against conviction and sentence — Insulting language — Disorderly conduct, making noise — Whether the decision is unreasonable or cannot be supported having regard to the evidence

Type of Order: Oral Decision

Result / Order It is hereby ordered:

1. Leave is granted to Ms. Bramble to file and serve skeleton submissions on or before 1st November 2019
2. Leave is granted to DPP to file and serve skeleton submissions in response on or before 9th November 2019.
3. The hearing of the appeal is adjourned to the next sitting of the court in Antigua and Barbuda during the week commencing 13th January 2020.
4. This is the final adjournment.

Case name: Washington Bramble
v
[1] The Commissioner of Police
[2] Dexter Wason
(Magistrate for District “A”)
[ANUMCRAP2016/0002]

Date: Tuesday, 17th September 2019

Coram: The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Paul Webster QC, Justice of Appeal

Appearances: In Person

Appellant:

**Mr. Anthony Armstrong with him, Mrs. Shannon
Jones-Gittens for the Director of Public Prosecutions**

Respondent:

Issue:

Criminal appeal – Appeal against conviction and sentence — Whether illegal evidence was admitted by the Court — Whether the decision is unreasonable or cannot be supported having regard to the evidence — Offensive weapon — Indecent language — Threatening language

Type of Order:

Directions

Result / Order

Upon the DPP indicating that he will speak to the Chief Magistrate Ms. Walsh and Mr. Wason today to have the record of appeal prepared, it is hereby ordered that:

- 1. His worship Mr. Wason is directed to prepare the record of appeal on or before the 17th October 2019.**
- 2. The Chief Magistrate is to ensure Mr. Wason cause the record of appeal to be prepared.**
- 3. The court office is ordered to have served on Mr. Bramble on receipt of the document.**
- 4. Ms. Bramble to file and serve skeleton submissions on her appeal on or before 24th of November 2019**
- 5. Director of Public Prosecution is to file and serve submissions by 13th December 2019.**
- 6. If the record is not prepared by the 17th October 2019, the appeal stands successful without further order.**
- 7. If the record is prepared in a timely fashion the hearing of the appeal is adjourned to the next sitting of the court of appeal in Antigua on 13th January 2019.**
- 8. The Registrar is to serve on Chief Magistrate and his Worship Mr. Wason and the appellant.**

Case Name:

**[1] Jasmine Browne Wilson
[2] Damion George Wilson**

v
[1] The Attorney General of Antigua and Barbuda
[2] The Chief Immigration Officer

[ANUHCVP2017/0022]

Date: Tuesday, 17th September 2019

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

Appearances:

Appellant: Mr. Kendrickson Kentish with him, Mr. Kyle Kentish

Respondent: Ms. Alicia Aska with her, Ms. Joy Dublin

Issues: Civil appeal –

[1] Whether the decision of the judge to accept the untested affidavit evidence of the respondents was wrong?

[2] Whether there is an arguable case that the decision of the Cabinet to declare the second appellant “*Persona Non-Grata*” is amenable to judicial review?

[3] Whether there is an arguable case that there was a breach of the appellants right to protection of the law contrary to section 3 (a) of the Constitution Order?

[4] Where there is an arguable case that the deportation of the second appellant will be a breach of the appellants right to protection of family life contrary to section 3 (c) of the Constitution Order?

[5] Whether there is an arguable case that it is permissible to remove or deport the second appellant, a non-citizen parent where the effect will be that the children who are citizens of Antigua and Barbuda will also have to leave?

[6] Whether there is an arguable case that there is a breach of the first appellant’s right to freedom of movement contrary to section 8(1) of the Constitution Order?

Type of Order: Oral Decision

Result / Order: Order:

1. The appeal is dismissed.
2. The decision of the learned judge is affirmed.
3. No order as to costs.

Reason: This is an appeal against the learned judge in which he discharged the injunction based on the fact that there was evidence before the learned judge that the Crown did not intend to deport Mr. Wilson before exhausting the court's processes. The court held that the learned judge in the exercise of his discretion committed no error in discharging the injunction, given that there was evidence that crown did not intend to deport Wilson without exhausting due process in the court. The appeal is dismissed with no order as to costs.

Case Name: Jenoure Craigg
v
The Queen
[ANUHCRA2017/0005]

Date: Tuesday, 17th September 2019

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

Appearances:

Appellant: Mr. Sherfield Bowen

Respondent: Mr. Anthony Armstrong and with him, Mrs. Shannon Jones-Gittens, for the Director of Public Prosecutions

Issues: Criminal appeal – Leave to amend grounds of appeal — Additional grounds of appeal — Appeal against conviction and sentence — Possession of a controlled substance to wit cocaine — Possession with intent to supply — Whether the sentence was too

severe in all of the circumstances — Whether the conviction was unsafe and unsatisfactory — Whether the learned judge in his summing up misdirected the jury in that he emphasized and more or less confused or directed the jury of the correctness of the inference that of “knowledge” but failed to remind them or even mention the equally available inference of “lack of knowledge” — Whether the judge erred in law when he failed to direct the jury on “proof of knowledge” to ground a finding of possession — Whether the judge failed to assist the jury with legal requirement to ground a finding of possession with intent to supply — Whether the judge misdirected the jury on the issue of possession — Whether there was no evidence or sufficient evidence to sustain a conviction of drug trafficking — Application for adjournment for appellant to seek Counsel

Type of Order:

Oral Decision

Result / Order:

Order:

1. Leave is granted to the appellant to amend grounds of appeal to include the additional ground.
2. The DPP is granted leave to file and serve skeleton arguments in response to the supplemental submissions on or before 8th November 2019.
3. The matter is adjourned and traversed to the next sitting of the Court of Appeal in Antigua and Barbuda during the week which commences 13th January 2020.
- 4.

Reason:

The Court having granted leave to amend the grounds of appeal and learned Counsel Mr. Bowen intimating that he has filed supplemental submissions that the Court and DPP have not has sight of.

Case Name:

[1] Althea Maynard
[2] Nathaniel Maynard

v

Eastern Caribbean Asset Management Corporation
(As Receiver of ABI Bank Ltd.)

[ANUHCVP2018/0047]

Date: Wednesday, 18th September 2019

Coram: The Hon. Mr. Davidson Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant: Dr. David Dorsett

Respondent: Ms. Kamilah Roberts with her Mrs. Andrea Roberts-Nicholas

Issues: Civil appeal – Appeal of interlocutory order — Extension of time to file submissions — Whether the judge erred by construing section 144 (1) (c) of the Banking Act 2015 in holding that section 144 (1) (c) covered legal proceedings against the named defendant — Antigua and Barbuda Banking Act, 2015

Type of Order: Oral Decision

Result / Order: Order:

1. The application for extension of time to file submissions is granted there being no objection by the appellant.
2. The hearing of the appeal is adjourned to 3:00 p.m. this afternoon.

Case Name: 1Globe Capital LLC
v
Sinovac Biotech Ltd.

[ANUHCVP2019/0005]

Date: Wednesday, 18th September 2019

Coram: The Hon. Mr. Davidson Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant: Mr. Stephen Houseman QC with him Mr. Lenworth Johnson and Ms. Andreen Vanreil

Respondent: Mr. Stuart Alford QC with him Mr. Rushaine Cunningham and Ms. Yoshodra Rampersaud
Mr. Craig Jacas holding a watching brief

Issues: Civil appeal – Section 122 of the Antigua and Barbuda International Business Corporations Act, CAP 22 (IBCA) — Validity of a vote taken at a meeting of the shareholders including the Annual General Meeting — Section 71 of the IBCA — Notice to directors — Amendments to motions at shareholder meetings — Whether the proxy forms were non-compliant with Antigua law, Regulation 15 of the IBCA Regulations — Whether the respondent waived any legal defect in the proxy forms used by the dissenting shareholders at the AGM — Whether the appellant had knowledge of a “secret plan” in advance of the AGM and whether this constituted “unfairness to other shareholders” and whether the court had sufficient reason for refusing to exercise discretion under Section 122 of the IBCA — Relevance and applicability of Section 163 of the IBCA.

Type of Order: N/A

Result / Order: The judgment is reserved.

Case Name: [1] Althea Maynard
[2] Nathaniel Maynard
v
Eastern Caribbean Asset Management Corporation
(As Receiver of ABI Bank Ltd.)
[ANUHCVP2018/0047]

Date: Wednesday, 18th September 2019

Coram: The Hon. Mr. Davidson Baptiste, Justice of Appeal

**The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

Appellant: Dr. David Dorsett

Respondent: Ms. Kamilah Roberts with her Mrs. Andrea Roberts-Nicholas

Issues: Interlocutory appeal – Appeal of interlocutory order — Whether the judge erred by construing section 144 (1) (c) of the Banking Act 2015 in holding that section 144 (1) (c) covered legal proceedings against the named defendant — Antigua and Barbuda Banking Act, 2015

Type of Order: N/A

**Result / Order: Order:
1. The judgment is reserved.**

**Case Name: [1] John Mussington
[2] Jacklyn Frank
v
[1] The Development Control Authority
[2] The Antigua and Barbuda Airport Authority
[3] The Attorney General
[ANUHCVP2019/0008]**

Date: Thursday, 19th September 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. Leslie Thomas QC with him Ms. Michelle Sterling

Respondent: Dr. David Dorsett for the first respondent and holding papers for Ms. Luann De Costa for the third

respondent.

Mr. Hugh Marshall with him Ms. Kema Benjamin for the second respondent

Issues:

Interlocutory appeal — Whether the learned judge erred in failing to consider the discretion under CPR 26.9 to remedy a procedural error instead of striking out the claim against the second respondent — Sanctions — Civil Procedure Rules 2000 ('CPR') 56.7 (3) — Procedural error — Whether costs were justified in reference to CPR 56.13 — Whether the learned judge's decision was plainly wrong and exceeded the generous ambit within which reasonable disagreement is possible — Whether appellant can rely on Affidavit of John Mussington filed on 6th July 2018 in support of present claim.

Type of Order:

Oral Judgment

Result / Order:

1. The court will allow the use by the Antigua and Barbuda Airport Authority of the skeleton submissions filed on 12th September 2019.
2. No order as to costs.

Order:

1. The appeal is allowed.
2. The claim against the second respondent is reinstated.
3. The appellants have liberty to rely on their earlier affidavits in support for the application for leave filed the 6th of July 2018.
4. The order for costs is hereby set aside.
5. There shall be no order as to cost on this appeal.

Reason:

The court's decision is unanimous. This appeal arises from the decision of the learned judge in which she granted the Respondent's [ABAA] application to strike out the judicial review claimed against it. The appellants had already been granted leave to bring a judicial review claim. The application to strike had been made on several grounds including that the claim serves no cause of action as against ABAA, that

the appellants had started to bring a judicial review claim, as well as the assertion that the judicial review claim being that the fixed date claim was not in compliance with the Civil Procedure Rules 2000 ('CPR') part 56, Rules 7 (3) in that an affidavit in support was not file with a fixed date claim. The learned judge in her judgment delivered on 7th March 2019, focused her attention mainly on the asserted non-compliance to the rules of court namely CPR 56.7 (3) as well as CPR Part 30 which deals with the contents of affidavits depending on the nature of the proceedings in respect of which the affidavits are filed. The appellants had filed short affidavits in support of the fixed date claim in which they sought to rely on their earlier affidavits filed in support of their application for leave to bring the judicial review claim. The learned judge considered that those affidavits were spent and that a furthermore, they had not sought the court's permission to rely on them prior to seeking to do so. Additionally, she found that the affidavits, particularly that of the second appellant, Ms. Frank, to be defective in that it contained some hearsay and otherwise matters information and belief rather than direct knowledge which was inappropriate in respect of a matter going to trial.

The court was told at this hearing of the application that the hearing of the application to strike was in essence a time when the claim came up for their first hearing which would normally be in the nature of a case management conference.

Based on the failure of the appellants to seek permission, coupled with a view that the prior affidavits had been spent, the claim as against ABAA was struck out. Additionally, the learned judge awarded cost against the appellants.

The appellants contend in the appeal that the learned judge failed to exercise her discretion or erred in so doing in not having regard to CPR Part 26.9 which empowers the court to put errors of procedure right and seemed not to have averted its mind to the draconian consequence of striking out the claim as a disproportionate response to a breach of the rules of procedure, and further, that she erred in awarding

costs against the appellants in circumstance where the Civil Procedure Rules Part 56.13 (6) says in effect that no order of costs may be made against an applicant unless that the court considered that the applicant in essence behaved unreasonably.

The decision in the cases of *The Attorney General et al v. Jon Miller et al* [MNIHCVAP 2012/0011], and also the case of *Savita Indira Salisbury v. The Director of the Office of National Drug and Money Laundering Control Policy* [ONDCP] [ANUHCVP2012/0044] demonstrate that where an error of procedure has occurred, the court has the power to put matters right.

At paragraph 32 of *Salisbury*, Blenman, JA stated in part and making claim that “*if there has been an error in the procedure adopted by a party, Rule 26.9 (3) stipulates that the judge has jurisdiction to put matters right. Contrary to what the trial judge had stated, it is precisely if there has been an error like the kind above that the legislation has made provisions to enable the trial judge to exercise his discretion in order to put matters right. What is more significant is that the trial judge is clothed with the jurisdiction, discretion to put things right whether or not a party had made an application to that effect.*”

There are several decisions of this court to similar effect. This court also adopts the opening statement of Lord Collins in the Privy Council decision of *Texan and Management and Others v Pacific Electric Wire & Cable Company Ltd.* [2009] UKPC 46] where Lord Collins said in his opening statement that it has often been said that in the pursuit of just procedure is the servant and not the master. Further, in the case of *Cedar Valley Springs Homeowners Association Incorporated v. Hyacinth Pestaina* [ANUHCVP 2016/0010], this court adopted the decision of the Privy Council in *Real Time Systems Limited v Renraw Investments Limited and CCAM and Company Limited, Austin Jack Warner* [2014] UKPC 6, where the Board held in relation to a strike out application that the court has an expressed discretion and power to

consider any alternatives short of taking the draconian step of striking out the claim. In *Cedar Valley Springs Homeowners Association Incorporated*, the court recited from the decision of the Privy Council in *Real Time Systems Limited* and at paragraph 17 of *Real Time Systems Limited*, the Board held the court has an expressed discretion under Rule 26.2 whether to strike (it “may strike out”)

“It must therefore consider any alternatives and Rule 26. 11 which is the court's management powers enables you to give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective which is to deal with cases justly. As the editors of the Caribbean Civil Court Practice 2011 state at Note 23.6, correctly in the Board's view the court may under this sub-rule make orders of its own initiative. There is no reason why the court faced with an application to strike out should not conclude that the justice of a particular case militates against this nuclear option and that the appropriate cause is to order the claimant to supply further details or to serve an amended statement of case including such details, within a further specified period.”

Similarly, here, it is clear to us that the learned judge failed to avert her mind to any alternatives available to her on the strike out application particularly in light of the fact that the respondent was not taken by surprise that the appellants were seeking to rely on their earlier affidavits all being without first obtaining the court's permission. It was open to the learned judge, based on the defects she found, to have ordered, for example, the filing of further affidavits and/ or supplemental affidavits within a certain time frame. She could have then caused what consequence by way of a sanction could have followed for failing to do that or ordering that their earlier affidavits which she considered was spent to be re-filed.

It is the court's view that the failure of the judge to avert her mind to the alternative available on this strike out application was an error in principle having

regard to the draconian effect of the strike out application compared to the breach of procedure.

This in our view was a wholly disproportionate response. As it relates to costs, the court held that the learned judge in awarding cost as against the appellants having regard to the expressed language in CPR part 56.13 (6), erred in that regard because she made no finding of unreasonableness on the part of the appellants in bringing or in the way that they conducted their claim.

For these reasons, the appeal is allowed. The claim against ABAA is reinstated, and the appellants have liberty to rely on their earlier affidavits in support for the application for leave filed the 6th of July 2018. The order for costs is also hereby set aside and there shall be no order as to cost on this appeal.

Case Name: Sol Aviation Services Limited
v
Rubis West Indies Limited
[ANUHCVP2019/0016]

Date: Thursday, 19th September 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. Douglas Mendes SC with him, Mr. Rushaine Cunningham and Ms. Satcha Kissoon
Respondent: Mr. Leslie Haynes QC with him Mr. Clement Bird

Issues: Civil appeal – Injunction pending appeal — Whether the learned judge erred in exercising her discretion — Improper exercise of discretion — Whether the learned judge failed to consider the evidence before her — Whether the court’s accepted definition of “forthwith” was erroneous — Whether the judge failed

to consider the nature and scope of the appellant's reputational damage — Whether the judge erred in finding that damages is an adequate remedy and failed to consider the appellant's reputational damage and the requisite case law — Right to be heard and right to a fair trial — Loss suffered by the appellant — Appellant's damages not limited to financial damages.

Type of Order:

N/A

Result / Order:

Judgment is reserved.

Case Name:

**Pavel Lazarenko
v
Eurofed Bank Limited (In Liquidation)**

[ANUHCVP2019/0013]

Date:

Thursday, 19th September 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:

Sir Richard Cheltenham QC with him, Mr. Colin Derrick and Mrs. Shelly-Ann Secharan

Respondent:

Mrs. Stacey-Ann Saunders-Osbourne

Issues:

Civil appeal – Whether the decision of the learned judge was irrational in that no just reasons were given and whether the decision has or is likely to have caused the appellant irreparable loss, prejudice and injustice — Whether the decision of the learned judge was manifestly wrong in law — Whether there was a basis in fact or in law to justify striking out of the appellant's application without hearing of the merits.

Type of Order: Oral Decision

Result / Order: Order:
1. The appeal is allowed.
2. The matter is remitted to the court below for a hearing of the application on its merits.

Case Name: Gaston Browne
v
Wilmot Daniel
[ANUHCVP2019/0006]

Date: Thursday, 19th September 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: Dr. David Dorsett with him Mr. Jarid Hewlett
Respondent: Mr. Charlesworth Tabor

Issues: Interlocutory appeal – Leave to appeal — Whether the learned master erred in law in holding that the words “in the course of proceedings” are to be implied into section 24 (2) (i) of the Defamation Act 2015

Type of Order: Oral Decision

Result / Order: 1. The appeal is allowed, and the decision of the Master is set aside.
2. No order as to costs

Case Name: Leroy King
v

The Commissioner of Police

[ANUHCVP2018/0035]

Date: Friday, 20th September 2019

Coram: The Hon. Mr. Davidson Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant: Dr. David Dorsett with him, Mr. Jarid Hewlett

Respondent: Mr. Anthony Armstrong, Director of Public Prosecutions

Issues: Civil appeal – Whether the learned judge erred in ordering the filing of submissions in matters he has no jurisdiction, matters that is within the province of the Court of Appeal — Whether the learned judge erred in holding that the respondent acted lawfully with a view to extradition and that based on that, no damages would be payable to the appellant — Section 15 (7) of the Antigua and Barbuda Extradition Act 1993 — Whether the learned judge erred in holding that in the event that the arrest of the appellant was lawful that damages would be assessable de minimis as so vanishingly small without regard for: CPR 57.6, and section 5 (7) of the Constitution of Antigua and Barbuda — Writ of habeas corpus — Award of costs — Whether the judge erred in failing to award costs

Type of Order: Oral Decision

Result / Order:

1. The appeal against the order of Hon. Justice Morley is allowed and to the extent that paragraphs 2, 4, and 5 of the order of 28th September 2018 is set aside.
2. The case is remitted to the high court for compliance with CPR 57.6 to be dealt by a different judge.
3. Costs reserved for the court below.

Reason: The reasons are that the judge erred in not paying regard to the CPR 57.6 and made orders which went beyond its remit.

Case Name: Ericsson AB
v
Ayesha Charles
[ANULTAP2018/0007]

Date: Friday, 20th September 2019

Coram: The Hon. Mr. Davidson Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:
Appellant: Mr. Rushaine Cunningham
Respondent: Mr. Michael Archibald

Issues: Civil appeal – Application to adduce fresh evidence — Whether the industrial exceeded its jurisdiction in ordering an ex parte trial — Employer not served — Industrial Court (Procedure) Rules, 2015 — Illegality — Opportunity to be heard — Whether exemplary damages should have been ordered where there was no evidence to support such an award — Whether costs should have been ordered

Type of Order: Oral Decision

Result / Order: The appeal is allowed by consent and the matter is remitted to the industrial court, the reason being that the appellant was not properly served.

Reason: By consent and the appellant was not properly served.

Case Name: Dolcie Christian (In her Capacity as Executory of the
Estate of Sydney Christian
v
King's Casino Limited
[ANUHCVP2018/0005]

Date: Friday, 20th September 2019

Coram: The Hon. Mr. Davidson Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant: Mr. Jason A. Martin

Respondent: Mrs. Kivinee Knight-Edwards

Issues: Civil appeal – Extension of time to file submissions —
Adjournment of the appeal — Whether the learned
judge misdirected herself in finding that the deceased
practice was a trademark practice prior to his
incapacitation — Whether the learned judge
misdirected herself in equating the claimant's
assertion in cross-examination that the main income
to the firm after the deceased's incapacitation was
from trademark component of his practice as this
could be conducted by staff.

Type of Order: Oral Decision

Result / Order:

1. The respondent is granted an extension of time to file its skeleton submissions on or before the 20th October 2019.
2. The appellant is to file submissions in reply, if required, on or before 28th October 2019.
3. The hearing of the appeal is adjourned to the next sitting of the court of appeal in Antigua and Barbuda during the week commencing 13th January 2020.

Case Name:

**Clive Oliveira
v
The Attorney General**

[ANUHCVP2018/005]

Date:

Friday, 20th September 2019

Coram:

**The Hon. Mr. Davidson Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal**

Appearances:

Appellant:

Dr. David Dorsett with him, Mr. Jarid Hewlett

Respondent:

Mrs. Carla Brookes-Harris, Deputy Solicitor General

Issues:

Civil appeal – Costs — CPR 65.13 — Whether the learned Master erred in properly awarding costs by misapplying CPR 65.13 and not having proper regard for CPR 56.13 (5)

Type of Order:

Oral Decision

Result / Order:

In these circumstances, it is by consent order that
1. The appeal is allowed to the extent that the order of the costs in the Court of Appeal is set aside and the costs are substituted in the following form, that namely that the cost are assessed at \$28,666.67 being two thirds of the High Court cost of \$43,000.00.

Reason:

This is an appeal against the decision of the learned master in which she assessed costs that were awarded to Mr. Clive Oliveira as a consequence of a decision of the Board in which the Board had remitted the matter for costs to be assessed in relation to both the appearances before the Board and in the lower court.

The court noted that no leave was required insofar as

the genesis of the cost application was the Board's decision; and the court further paid regard to the concession of learned Deputy Solicitor to the extent that the learned master erred in her assessment of costs and to utilise the wrong method in the quantification of the costs to Mr. Oliveira.

In these circumstances, it is by consent order that the appeal is allowed to the extent that the order of the costs in the court of appeal is set aside and the costs are substituted in the following form, that namely that the cost are assessed at \$28,666.67 being two thirds of the High Court cost of \$43,000.00.

Case Name:

Mehul Choksi

v

[1] The Minister Responsible for Citizenship

[2] The Minister Responsible for External Affairs

[ANUHCVP2018/0048]

Date:

Friday, 20th September 2019

Coram:

**The Hon. Mr. Davidson Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal**

Appearances:

Appellant:

Dr. David Dorset holding for Mr. Justin L. Simon QC

Respondent:

**Mrs. Carla Brookes-Harris, Deputy Solicitor General
holding for Mr. Anthony Astaphan SC**

Issues:

**Application for leave to appeal — Application to
adduce expert evidence — Whether the learned judge
erred by failing to grant application to adduce expert
evidence — Extradition to India**

**Type of Order
Delivered:**

Directions

Result / Order:

The court approved the consent order filed on 11th September 2019.

By consent of the parties, it is hereby ordered:

- 1. The respondent concedes and will not defend the appeal filed herein, and judgment will be entered for the appellant;**
- 2. That expert evidence should be heard upon the continuance of the matter before a High Court Judge, and that the parties be at liberty to file expert evidence as may be required or as directed by the High Court.**
- 3. No order as to costs.**