

COURT OF APPEAL SITTING

**ANTIGUA AND BARBUDA
11TH JUNE TO 15TH JUNE 2018**

JUDGMENTS

Case Name:

Mark Byers

v

Chen Ningning (also known as Diana Chen

[BVIHCVAP2015/0011]

Territory of the Virgin Islands

Date:

Tuesday, 12th June 2018

Coram:

**The Hon. Mr. Davidson Baptiste, Chief Justice [Ag.]
The Hon. Mr. Tyrone Chong, Justice of Appeal [Ag.]
The Hon. Mr. Humphrey Stollmeyer, Justice of
Appeal [Ag.]**

Appearances:

Appellant:

Mr. Scott Cruickshank

Respondent:

**Ms. Fiona Murphy holding papers for Harney
Westwood and Reigals in BVI**

Issues:

Commercial appeal – findings of fact – Whether the learned trial judge erred in making factual findings – The appellate court’s approach to factual findings and findings of credibility – Virgin Islands Insolvency Act 2003 – Section 245 of the Insolvency Act 2003 – Unfair preference – Apparent predetermination – Whether predetermination was made out by learned trial judge – Shadow director – Fiduciary duties.

**Result and
Reason:**

The appellants are the joint liquidators of PFF and the Respondent Miss Chen was the sole beneficial owner of PFF and the de jure director on incorporation. PFF went into provision liquidation

and liquidators were appointed as joint liquidator on 15th February, 2010. In December 2013, a declared interim dividend of \$5.4 million payable to Miss Chen was withheld from her. Subsequently, Miss Chen filed claim against joint liquidators for the declared dividend. The joint liquidators in turn instituted a claim against Miss Chen. The liquidators in the court below raised issues on unfair preference, in which they claimed the repayment of an unsecured loan from Zenato, a BVI company, was unfair preference. The appellants also raised issues of a breach of fiduciary duty by Miss Chen. The appellants' primary case is that Miss Chen remained de jure director of PFF or alternatively de facto or shadow director from incorporation until liquidation. Justice Bannister dismissed the claim and in so doing made various findings of fact. Bannister J found that Miss Chen remained a de jure director of PFF until around the beginning of August 2009. He also found there was no evidence that she was involved in the affairs of PFF at any level or at all between then and the time when it came to put PFF into an insolvency procedure in November/December 2009 and then only in relation to the insolvency process itself. Bannister J considered all the parts and found that there was no evidence to support any finding that Miss Chen was a de facto director of PFF. He held that Miss Chen owed no fiduciary duties to PFF when the repayment of the loan was made to Zenato and that any claim based on unfair preference would therefore not succeed. Being dissatisfied, the liquidators appealed the judgement of Bannister J.

Held: dismissing the appeal:

1. A transaction will be deemed to be an unfair preference given by a company to a creditor if the transaction is entered into at a time when the company is insolvent, if it is entered into during the period commencing six months prior to the application for the appointment of a liquidator and ending on the appointment of the liquidator or if the transaction has the effect of putting the creditor in a position which is better than the position that the creditor would have been in if the transaction

had not been entered into. The repayments of the Zenato loan constituted an unfair preference and fell within the meaning of “unfair preference” found in the Insolvency Act (“The Act”). The Court has a broad discretion pursuant to the Act and may make orders against a creditor once it is satisfied that the transaction is an unfair preference. The court is only able to exercise its discretion against a third party, (in this case Ms Chen) if the order was required as part of the process of restoring the position of the company to what it would otherwise have been. In this case, an order is not required to restore PFF’s position to what it would have been in if it had not entered into the transaction with Zenato.

Sections 245 and 249 of the Insolvency Act 2003, Act No. 5 of 2003, Laws of the Virgin Islands applied; Oxford Pharmaceuticals Ltd, Re; Wilson v Masters International Ltd [2010] BCC 834 applied.

2. The reluctance of the appellate court to interfere with findings of fact unless compelled to do so applies not only to findings of primary facts but also to the evaluation of those facts and the inferences drawn from them. The mere fact that a judge did not discuss a point or certain evidence in depth is not sufficient ground for an appellate court to interfere. What matters is whether the decision under the appeal is one which no reasonable judge would have reached.

Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5 applied; Henderson v Foxworth Investments Limited [2014] UKSC 41 applied; re B (A Child) (FC) [2013] UKPC 33 applied.

3. The question whether a director is a shadow or de facto director, is a question of fact and degree. The question is whether that person was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make

himself responsible as if he were a director. The court must look at the circumstances in the round. Without actively assuming duties to act during the relevant period, fiduciary duties could not be imposed on the respondent.

Revenue and Customs Commissioners v Holland [2010] UKSC 51 applied; Vivendi SA and another v Richards and another [2013] EWHC 3006 (Ch) considered.

4. An appeal court is rarely justified in overturning a finding of fact by a trial judge which turns on the credibility of a witness. Any appellant, who challenges the judge's finding on credibility, has a particularly difficult task. In assessing the credibility of a witness it is unnecessary to accept or reject an account in its entirety or to find that a witness who is wrong in one or more respects is untruthful. The question of whether a witness' evidence was truthful is essentially one for the learned trial judge. A judge upon the review of all the evidence inclusive of documentary evidence can make a finding that a witness' evidence is reliable, despite being in conflict with other evidence.

Mutual Holdings (Bermuda) Limited and others v Diane Hendricks and others [2013] UKPC 13 applied; Langsam v Beachcroft [2012] EWCA Civ 1230 applied; Armogas v Mundogas (The Ocean Frost) [1985] 1 Lloyd's Report 1 applied.

5. Pre-determination on the part of a judge renders the decision unlawful. The learned trial judge did not show a closed mind, neither did he fail to apply his mind to the task before him. It cannot be said that the fair-minded and informed observer, having considered the facts would conclude that there was a real possibility that the learned judge had predetermined the case against the appellants. There is nothing wrong in a judge outlining the difficulties a party may face on issues before the court.

R (on the application of Persimmon Homes Ltd) v Vale of Glamorgan Council [2010] EWHC 535 applied.

6. The judge's conclusions on the central issues were supported by the evidence. It is clear from his reasoning that the learned judge grappled with all the potential difficulties presented by the evidence and came to conclusions which will not occasion appellate intervention. It cannot be said that his findings were such that no reasonable judge could have reached or his conclusions were plainly wrong. The conclusions were reasonably justifiable on the evidence. Accordingly, this Court will not interfere.

Thomas v Thomas [1947] AC 484 applied; Henderson v Foxworth Investments Limited [2014] UKSC 41 applied; re B (A Child) (FC) [2013] UKPC 33 applied; Central Bank of Ecuador and others v Centicorp SA and others [2015] UKPC 11 applied.

Case Name:

Fairfield Sentry Limited (in Liquidation)
V
Farnum Place LLC

[BVIHCMAP2014/0026]
Territory of the Virgin Islands

Date:

Wednesday, 13th June 2018

Coram:

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

Appearances:

Appellant:

Mrs. Stacy Richards-Roach holding papers on behalf

of Mr. Andrew Westwood

Respondent: Mr. Kwame L. Simon holding papers on behalf of Ms. Sue Prevezer, QC and Mr. Richards Evans

Issues: Commercial Appeal – Costs – Variation of costs order – Part 64 of Civil Procedure Rules 2000 – Whether there was a material change of circumstances to warrant revisiting the judge’s costs order – Whether the decision of the United States Court of Appeals constitutes a material change of circumstances – Whether the costs order can be sustained in view of the change of circumstances – Who was the overall successful party in light of the change of circumstances – Exercise of discretion afresh by Court of Appeal to vary costs order.

Result and Reason: Fairfield Sentry is a British Virgin Islands (“BVI”) incorporated company which operated as a feeder fund for Bernard L Madoff Investment Securities LLC (“BLMIS”). BLMIS went into liquidation under the United States Securities Investor Protection Act (“SIPA”) and the liquidation was conducted in the United States Bankruptcy Court under the supervision of Judge Lifland. Farnum Place LLC (“Farnum”) sought an order from the Commercial Court in the BVI (the “Commercial Court”) that Fairfield Sentry, by its liquidator, carry out certain obligations recorded in an agreement (the “Trade Confirmation”) entered into by Fairfield Sentry and Farnum, for the purpose of confirming the sale of Fairfield Sentry’s claim in the liquidation of BLMIS to Farnum. Farnum also sought the approval by the Commercial Court of the terms of the Trade Confirmation as well as approval by both the Commercial Court and the United States Bankruptcy Court of the assignment of Farnum’s claim brought under SIPA.

A learned judge of the Commercial Court approved the Trade Confirmation as well as the assignment of the SIPA claim. Farnum’s expert, Professor Axelrod, gave testimony before the Commercial Court in

favour of Farnum's position as to the nature and scope of United States Bankruptcy law. The judge accepted the opinion of Professor Axelrod that the BVI court was required to approve the Trade Confirmation. The judge directed Fairfield Sentry to make the relevant application to the United States Bankruptcy Court. This was done and that application was heard by Judge Lifland, who held, that there was no basis on which the Trade Confirmation should be disapproved because the sale of the SIPA claim was not reviewable under the United States Bankruptcy Code.

Thereafter, the learned judge of the Commercial Court, in dealing with the outstanding issue of costs in respect of the originating application, made an order awarding costs to Farnum on the basis that Farnum was overall the successful party before the Commercial Court and before Judge Lifland.

Subsequent to the decision of the judge on costs, Fairfield Sentry appealed Judge Lifland's decision to the First District Court. That court affirmed Judge Lifland's decision. A further appeal to the United States Court of Appeals for the Second Circuit (the "SCCA") held that the sale of the SIPA claim was subject to review, thereby overturning the previous decision of the District Court. The SCCA's decision is at variance with Professor Axelrod's expert opinion which was accepted in the Commercial Court.

As a consequence of the decision of the SCCA, Fairfield Sentry has appealed to this Court for a variation or reversal of the costs order of the judge of the Commercial Court on the basis of a material change of circumstances. Specifically, they assert that the learned judge had relied on and accepted Professor Axelrod's expert opinion, which was subsequently rejected by the SCCA and that in awarding costs to Farnum, the judge paid regard to that expert opinion and the judgment of Judge Lifland, the latter which has been ultimately overturned. The issue before this Court is whether this Court has jurisdiction to reverse or vary the costs order made by the learned judge in view of the

subsequent events and if so, whether the Court should exercise its discretion to do so.

Held: allowing the appeal to the extent of varying the costs order of the learned judge of the Commercial Court by disallowing the costs of the expert opinion of Professor Axelrod and; ordering that costs of this appeal be assessed if not agreed to within 21 days, that:

1. As a general rule, the successful party is entitled to receive its costs. In deciding who the successful party is, the court must have regard to all of the circumstances of the case. A successful party, for the purposes of the costs order, is to be determined in a commonsensical way and not as a technical term. Having determined who the successful party is, the court has the discretion to award only a specified proportion of the costs.

Delta Petroleum (Nevis) Limited v OOJJ'S Ltd (Doing business as OOJJ's Service Station) SKBHCVAP2013/0016 (delivered 10th October 2016, unreported) followed; Rule 64.6(2) Civil Procedure Rules 2000 applied; Rochamel Construction Limited v National Insurance Corporation SLUHCVAP2003/0010 (delivered 24th November 2003, unreported) followed.

2. The appellate court has the discretion to revisit the costs order of the judge of first instance if it can be shown that there was a material change of circumstances. In the present case, the judge relied on Professor Axelrod's expert opinion and accepted Judge Lifland's decision as correct in awarding costs to Farnum. As a consequence of the SCCA's decision, Professor Axelrod's opinion on United States Bankruptcy law has been rejected and Judge Lifland's judgment has been overturned. The present position is therefore different from what it was when the judge rendered his judgment on costs. Cumulatively, these amount to a material change of circumstances.

Chanel Ltd. v F. W. Woolworth & Co. Ltd. and Others [1981] 1 WLR 485 applied; Thevarajah v

Riordan and others [2015] UKSC 78.applied;
Rule 64.6 Civil Procedure Rules 2000 applied.

3. In light of the material change of circumstances, Farnum can no longer be regarded as the overall successful party. It therefore falls to this Court to exercise its discretion afresh, as a matter of principle. In doing so, it would be unfair to allow Fairfield Sentry to pay Farnum the costs of Professor Axelrod's expert opinion. Accordingly, Farnum should bear the costs of Professor Axelrod's opinion.

Adamson v Halifax plc [2002] All ER (D) 463 (Jul). applied; Rule 64.6(3) Civil Procedure Rules 2000 applied.

Case Name:

Marlon Mills
v
Stacey Mckie
(Executrix of the Will of Hughson McKie, deceased)

[SVGHCVAP2016/0001]
Saint Vincent and the Grenadines

Date:

Thursday, 14th June 2018

Coram:

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

Appearances:

Appellant:

Mrs. Ruth-Ann Richards-Simpson holding papers on behalf of Mr. Roger Forde QC

Respondent:

Mr. Kendrickson Kentish holding papers for Mr. Parnell Campbell, QC

Issues:

Civil appeal – Establishing title to land – Proving

factual possession and animus possidendi – Who is a paper owner or paper title holder of land - Whether trial judge erred by treating the respondent as the holder of a paper title and relieving him of the responsibility for proving factual possession and animus possidendi – Section 3 of the Statute of Frauds

Result and Reason:

The respondent, Stacey McKie, applied to the High Court for an injunction to restrain the appellant, Marlon Mills-Browne, and her servants or agents, from exercising any acts of possession and ownership over the disputed lands at Villa in the Parish of St. George in Saint Vincent and the Grenadines and an order that a survey plan prepared at the instance of the appellant be either cancelled or rectified so as to remove any inference arising from it as to ownership of the said lands by the appellant.

By consent order dated 8th June 2012, the court ordered the parties to maintain the status quo in relation to the disputed land until trial of the matter. On 6th June 2012, the respondent had filed a fixed date claim against the appellant seeking the same orders for injunction and cancellation or rectification, and seeking also a declaration that during his lifetime Hughson McKie was seized as owner in possession of the said land.

The trial judge granted all three of the orders sought by the respondent. The learned judge found that the portion of land of which the appellant was claiming adverse possession was not precisely identified by her and that the appellant had not established a sufficient degree of factual possession and animus possidendi to dispossess the respondent as the owner of the land. Further, the receipts produced by the respondent evidenced full payment of the purchase price of the land by Hughson McKie to the previous owner, Mr. L.M. Punnett, and made Mr. McKie the paper owner of the land.

Dissatisfied with the decision of the trial judge, the appellant appealed against the judgment, contending

that the learned judge wrongfully ascribed ownership of the disputed land to the respondent (as the personal representative of Mr. Hughson McKie) and treated the respondent as the holder of a paper title to the land, thereby relieving her of the responsibility for proving factual possession and animus possidendi.

The issues for this Court's determination were: (1) whether the deceased Hughson McKie was the paper owner of the land by virtue of having receipts evidencing payment made by him to the prior owner, Mr. Punnett; (2) did Hughson McKie purchase the land from Mr. Punnett and take possession of it and thereby become the owner of the land; (3) was the respondent required to prove that Mr. McKie had factual possession and animus possidendi continuously for 12 years prior to issuing the claim; (4) did the trial judge err in law in holding that the appellant had not been in factual possession of an exclusive nature of the whole or a part of the disputed land, with the requisite intention, since 1996; and (5) did the learned judge err by failing to properly analyse the evidence and give effect to the reasonable inferences to be drawn from a consent order dated 21st June 2013.

Held: dismissing the appeal and awarding costs to the respondent, that:

1. There is no Torrens land registration system in Saint Vincent and the Grenadines and so the transfer of title to land must be effected in accordance with the common law and applicable local and UK legislation. Having regard to section 3 of the UK Statute of Frauds, which remains law in Saint Vincent and the Grenadines by virtue of section 5(1) of the Application of English Law Act, and consistent with cases involving title to land which were decided with reference to the UK Statute of Frauds, the transfer of an interest in land in Saint Vincent and the Grenadines may be effected by a deed of conveyance or by a note in writing signed by the person transferring the interest or an agent of the transferor lawfully authorized to do so.

Auerbach v Nelson [1919] 2 Ch. 383 applied; In the matter of an application for a possessory title to land by Lyndon and Murlin Primus SVGHPT2014/0050 (delivered on 4th May 2015, unreported) applied; Section 3 of the UK Statute of Frauds (1677) Chamber 3 29 Cha 2 applied; Section 5(1) of the Application of English Law Act, Cap. 12, Revised Laws of Saint Vincent and the Grenadines, 2009 applied.

- 2. Title, in the context of property, refers to the right which a person has to the ownership of the property. In terms of title to land, the right may be established by long possession of the land, with the intention to possess it as owner to the exclusion of everyone else. Title may also be established by a deed or other note in writing signed by or on behalf of the transferor.**
- 3. If, in the context of a dispute as to the ownership of a portion of land, one of the parties to the dispute produces a note duly signed by the transferor or his lawfully authorized agent, identifying the transferor and the transferee and the location, size and price of the land, the transferee under the note can properly be considered by the court adjudicating the dispute to be the holder of the paper title to the disputed land, or the paper owner of the land, and to be entitled to the presumption in his favour that he has possession of the land. On the facts of this case, the trial judge was correct in finding that the receipts produced by the respondent evidencing payments made by Mr. Hughson McKie to the previous owner of the land for the purchase of the land constituted a note in writing which entitled the respondent (as the personal representative of Mr. McKie) to be considered by the court to be the holder of the paper title to the land or the paper owner of the land.**
- 4. By virtue of the finding that the respondent is**

the paper owner of the land, the court must ascribe possession of the land to her and she will not be required to establish factual possession of the land and animus possidendi in relation to it. Instead, the onus is on the appellant, as the party seeking to dispossess the paper owner, to establish that she was in adverse possession of the land for a period in excess of 12 years, by satisfying the court that she had exclusive possession of it with the intention of possessing it to the exclusion of all others, including the paper owner, for a continuous period of over 12 years immediately preceding the institution of the proceedings against her.

Hector Caesar Luke v Bernard Alexander
DOMHCV2001/0161 (delivered 28th October 2002, unreported) referred.

5. The authorities clearly establish that a person seeking to dispossess the owner of land by adverse possession must identify with precision the land being claimed and must establish a sufficient degree of factual possession and animus possidendi to prove his or her clear and unequivocal possession of the land to the exclusion of all others, including the paper owner. On the facts of this case, the land which the appellant was claiming adverse possession of was not precisely identified by her and she had not established a sufficient degree of factual possession and animus possidendi to dispossess the respondent as the paper owner of the land.

Case Name:

**Dion Friedland
v
Charles Hickox**

**[AXAHCVAP2017/0003]
*Anguilla***

Date:

Thursday, 14th June 2018

Coram:

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

Appearances:

Appellant:

**Mr. Kelvin John holding papers for Mr. J. Alex
Richardson**

Respondent:

**Mrs. Kalisia Marks holding papers for Mrs. T'ania
Small-Davis**

Issues:

**Interlocutory appeal – Registration of charges –
Settlement Agreement – Whether respondent acted
in breach of settlement agreement by exercising
power of sale by holding a public auction – Whether
settlement agreement “spent” prior to auction –
Counter notice – Estoppel – Whether appellant
estopped from bringing claim for damages for loss
as a result of sale of property**

**Result and
Reason:**

**Leeward Islands Resort Limited (“LIR”), an Anguillan
company, owned and controlled by a group of
companies led by the appellant (“the Friedland
Group”) obtained a lease of property with the
intention of developing it into a luxury resort. In
1988 LIR entered into a Stock Purchase Agreement
and a Pledge Agreement with HBLS LP (“HBLS”), a
United States limited partnership owned and
controlled by the respondent. HBLS also owned and
controlled the management company of the resort
(“MBM”). In the Stock Purchase Agreement, the**

Friedland Group agreed to sell the shares in LIR to HBLs for cash and two partnership units in HBLs and in the Pledge Agreement, HBLs pledged the LIR shares to the Friedland Group as security for the payments due under the Stock Purchase Agreement.

HBLs defaulted on the payments due under the Stock Purchase Agreement and the Friedland Group successfully brought proceedings against them in the New York courts which resulted in an order for the transfer of the shares. Subsequently, HBLs filed for voluntary bankruptcy and the Bankruptcy Court referred the matter to mediation. This resulted in a Settlement Agreement dated 6th May 1996 between HBLs, LIR, MBM (collectively “the Resort Entities”) and the Friedland Group.

HBLs defaulted on the payments under the Settlement Agreement and on 15th September 1997 the mediator sold the shares in LIR and MBM that he was holding in escrow by public auction. The sole buyer at the auction was the appellant. He went on to obtain a deficiency judgment in the New York courts for the difference between the amount due under the Settlement Agreement and the amount paid for the shares.

During the period 1986 to 1996 the respondent loaned substantial amounts of money to LIR and in January 1997 the respondent registered three charges against LIR’s leasehold interest in the property to secure repayment of the loans (“the Hickox Charges”). In October 2003 the appellant registered a charge against the property for the amount due under the deficiency judgment.

The mediator made a final award on 12th November 1997 and found that the registration of the Hickox Charges by the respondent was in breach of the Settlement Agreement. The mediator subsequently issued an amplification of his final award (“the Amplification Award”).

In October 2010 the new owners of LIR, Cap Juluca Properties Limited (“CJPL”) and its affiliated entities, entered into a Settlement Agreement with the

respondent for the payment of the monies owed to the respondent for the loans previously made to LIR. In February 2012 the monies due were still outstanding and the respondent sold the property by public auction. The appellant filed an action in the court below claiming that the respondent breached the Settlement Agreement by registering the Hickox Charges and then relying on those charges to sell the property. In response to two preliminary issues submitted to him for determination, the learned master found that the respondent did not breach the Settlement Agreement by selling the property and that the appellant was not estopped from bringing the claim.

The appellant, being dissatisfied with the master's decision, appealed. The respondent counter-appealed on the basis that the appellant was not estopped from bringing the claim. The issues on appeal are: whether the master erred in considering the decision of the High Court in *Hickox v Leeward Isles Resorts Limited* ("the Hickox Action") in coming to his decision; whether the master erred in finding that the High Court had concluded in the Hickox Action that the Settlement Agreement was "spent", having come to an end on 16th September 1997; and whether the master should have found that the Amplification Award enjoined the respondent from relying on the prior registration of the Hickox Charges for any purpose.

Held: dismissing the appeal; confirming the order of the learned master with costs to the respondent of two-thirds of the amount awarded in the lower court; and dismissing the counter-appeal with costs to the appellant to be assessed if not agreed within 28 days of the date of this order, that:

1. The learned master was entitled to consider the findings in the Hickox Action as it also dealt with the issues of the respondent's breach of the Settlement Agreement and the validity of the registration of the Hickox Charges which were among the matters being considered by the master. He was free to

consider all the circumstances of the claim that was before him which included the findings made by the High Court in the Hickox Action, and come to his own decision whether or not they coincided with the findings made by the High Court.

2. The learned master erred in interpreting the judgment in the Hickox Action as deciding that the Settlement Agreement became spent. As a result, his conclusion that the respondent did not breach the Settlement Agreement was based on a wrong premise. The learned judge in the Hickox Action stated that the agreement became spent “to some extent” which is not the same as becoming actually spent. It is clear that the judge did not treat the Settlement Agreement as actually spent as she proceeded to grant relief pursuant to the terms of the Agreement. Further, there are obligations under the Agreement that will continue until the debt due to the Friedland Group from HBLS is settled. However, this is not fatal to the overall conclusion of the first preliminary issue.
3. Clause 19 of the Settlement Agreement effectively enjoined the Resort Entities, which then included the respondent and HBLS, from taking any step that would adversely affect or diminish the interests of the Friedland Group, and vice versa. The respondent, as a Resort Entity, was restricted by clause 19 and by the mediator’s final award from exercising his powers as a chargee pursuant to the charges. However, the respondent ceased to be a Resort Entity as of 16th September 1997 and the restrictions were lifted by the mediator in July 1998 by his finding in the Amplification Award. After that date, the respondent was free to register the charges subject only to the requirements of Anguillan law. As a matter of Anguillan law, the respondent was not required to re-register the charges in order to exercise his powers of sale as a chargee.

4. Merely giving CJPL and/or LIR authority to negotiate a settlement is insufficient to bind the appellant to an agreement subsequently made between CJPL, LIR and other persons to which the appellant was not a party. Further, there is no evidence of reliance on any representation by the appellant or detriment suffered by the respondent, which are essential elements of estoppel. Accordingly, the appellant was not estopped from bringing the claim against the respondent.

Case Name:

**Delco Participation BV
v
Green Elite Limited**

**[BVIHCMAP2017/0018]
*Territory of the Virgin Islands***

Date:

Friday, 15th June 2018

Coram:

**The Hon. Mr. Davidson Baptiste, Chief Justice [Ag.]
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Tyrone Chong, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. George Looby holding papers for Mr. Matthew Hardwick, QC

Respondent:

Mr. Kwame Simon holding papers for Mr. Phillip Jones, QC

Ms. Krishna Kay Lawrence holding papers for Mr. Richard Millet, QC, for the interested party, HWH Holdings, Ltd.

Issues:

Commercial appeal – Insolvency Act, 2003 – BVI Business Companies Act, 2004 – Whether learned judge erred in refusing to wind up company – Whether the learned judge erred in concluding that there was no loss of substratum – Main object or

dominant purpose of company – Test for whether a company has lost its substratum

Result and Reason:

Allowing the appeal; dismissing the cross appeal; setting aside the costs order; ordering that Green Elite be wound up; and awarding costs to Delco on the appeal and the cross appeal, such costs to be assessed, if not agreed within 21 days, that:

1. It is just and equitable for a court to order the winding up of a company if that which the company was formed to do can no longer be done or if the company has ceased to carry on its business and the carrying on of the business has become, in a practical sense, impossible. In such a case, the company's substratum has disappeared.

Re Bristol Joint Stock Bank (1890) 44 Ch D 703 applied.

2. In considering whether it has become impossible for the company to achieve the purpose for which it was formed, it is necessary to ascertain the main objects or paramount object or dominant object of the company as expressed in the company's memorandum and articles and to determine whether it has become impossible for the company to attain those objects. Where the company has no objects clause, the nature of its business must be ascertained from other materials.

Re German Date Coffee Co (1882) 20 Ch D 169 applied; Citco Global Custody NV v Y2K Finance Inc, BVIHCV2009/0020A (delivered 25th November 2009, unreported) approved.

3. Applying this test, as Green Elite's Memorandum of Association does not identify the main or any objects of the company, the

nature of its business must be ascertained from available materials. Based on the documentation, it is clear that the main object or dominant purpose of Green Elite was to hold the shares. Upon the sale of the shares in 2014, the main object could have no longer have been obtained; Green Elite's CT shares now sold, it serves no further purpose. As a result, Green Elite's substratum had totally failed.

Re Bristol Joint Stock Bank (1890) 44 Ch D 703 applied; Re German Date Coffee Co (1882) 20 Ch D 169 applied; Citco Global Custody NV v Y2K Finance Inc, BVIHCV2009/0020A (delivered 25th November 2009, unreported) approved.

The learned judge was involved in a trial and the corollary of this is that he was entitled and bound to make findings based on the evidence and/or documentation that was before him. The trust matter, having been raised by HWH and the learned judge having reviewed the evidence and the submissions in relation thereto, it was clearly open to him to determine whether or not a trust existed. The learned judge correctly found that Green Elite was not a trust company. In that connection, the appellate court would not interfere with the judge's finding

Case Name:

Half Moon Bay Home Owners

V

Platinum Properties Inc.

[SKBHCVAP2014/0003]

Saint Kitts & Nevis

Date:

Friday, 15th June 2018

Coram:

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

Appearances:

Appellant: Mr. Kwame Simon holding papers for Ms. Keisha Spence

Respondent: Mr. Sherfield Bowen holding paper for Mr. Fitzroy Eddy

Issues:

Civil appeal – Easement – Enforcement – Covenant – Covenants affecting land – Positive covenant – Covenant to maintain – Covenant to contribute to maintenance – Whether covenant runs with the land – Building development – Benefit and burden principle – Whether purchaser successor's in title bound by covenant – Title by Registration Act of the St Kitts and Nevis – Declaratory relief

Result and Reason:

Allowing the appeal, setting aside the judgment of the learned judge; ordering Platinum to pay the maintenance fees to Half Moon Bay from 6th August 2010; declaring that Half Moon Bay is entitled to disconnect Platinum's property from the sewage system of the Development unless and until all outstanding maintenance fees and the cost of reconnection are paid and ordering that Platinum pay the costs of the proceedings in the court below, such costs being prescribed costs and the costs of the appeal being two thirds of the costs below, that:

1. The general principle which has existed for centuries is that a positive covenant is a matter of contract between the covenantor and the covenantee and therefore it does not run with the land. However, with the passage of time, exceptions have developed to this general rule. One such the exception is that a person who takes the benefit of a positive covenant must also subscribe to the burden attached to the covenant, but only where the benefit is related to and conditional upon the burden.

Austerbery v Corporation of Oldham (1885) 29

Ch. D. 750 applied; Halsall and others v Brizell and another [1957] 1 All ER 371 applied; Rhone v another v Stephens (Executrix of May Ellen Barnard, decd.) [1994] 2 AC 310 applied; Westerhall Point Residents Association Limited v Anthony Batihk GDAMCVAP2015/0004 (delivered 3rd May 2016, unreported) followed.

2. There are two requirements for the enforcement of a positive covenant against a successor in title to the covenantor. Firstly, the condition of discharging the burden must be relevant to the exercise of the rights that enable the benefit to be obtained. Conditionality may be express or implied. Secondly, the successor in title must have the opportunity to choose whether to take the benefit or having taken it to renounce it, even if only in theory and thereby to escape the burden.

Halsall and others v Brizell and another [1957] 1 All ER 371 applied; Rhone v another v Stephens (Executrix of May Ellen Barnard, decd.) [1994] 2 AC 310 applied.

3. In the present case, the benefit of using the sewage system and the burden of paying for the maintenance of the sewage system are reciprocal. The endorsement on Platinum's certificate of title expressly stated the exercise of the rights were conditional on the payment of maintenance fees to Half Moon Bay. Platinum had a choice whether to exercise the rights granted in the deed and pay the maintenance fees or opt to use an alternative method such as a private sewage system. Platinum, having opted to exercise the right to use the sewage system, is obliged to pay maintenance fees.

Halsall and others v Brizell and another [1957] 1 All ER 371 applied; Rhone and another v Stephens (Executrix of May Ellen Barnard,

dec'd.) [1994] 2 AC 310 applied.

4. Where, having regard to the manner of computation of the maintenance fees, it is not possible to apportion the fees based on the number of benefits utilised, the entire fee is payable provided that the fee is related to the benefit utilised and the owner had the option (at least in theory) to decide not to take the benefit. While Platinum did not utilise all of the benefits pursuant to the endorsement on its certificate of title, Platinum made use of the benefit of the sewage system on the Development. The maintenance fee was related to the maintenance of, among other things, the sewage system, and the manner of computation of the maintenance fee as outlined in the maintenance agreement having been fixed on the number of bedrooms in a villa, it was not possible to apportion the maintenance fees. Platinum is therefore liable to pay the entire maintenance fee.

Wilkinson & Others v Kerdene Limited [2013] EWCA Civ 44 applied.

5. The general principle is that the power to grant declaratory relief is discretionary. The discretion must be exercised judicially with due care and caution having regard to all of the circumstances of the case. The party seeking a declaration must satisfy the court that he either has a right which is established or he is entitled to a right which the court is empowered to grant.

STATUS HEARING

Case Name:

**Geddis Meyer
v
Kehvin Dickson**

[ANUHCVP2014/0005]

Date:

Monday, 11th June 2018

Coram:

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

Appearances:

Appellant:

No appearance

Respondent:

Mr. Jarid Hewlett holding papers for Ms. Kamilah Roberts

Issue:

Status of the matter

**Type of Oral
Result / Order
Delivered:**

N/A

Result / Order:

Matter taken off the list of 11th June 2018 and adjourned to next status hearing in Antigua and Barbuda during the week commencing 26th November 2018.

Case Name: **Treetops Garden Centre Limited**
v
St. John's Development Corporation

[ANUHCVAP2014/033]

Date: **Monday, 11th June 2018**

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

Appearances:
Appellant: **No appearance**
Respondent: **No appearance**

Issue: **Status of the matter**

**Type of Oral
Result / Order
Delivered:** **Directions**

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

The order of the court:

1. The matter is adjourned to the next status hearing during the sitting of the court of appeal in Antigua and Barbuda during the week commencing 26th November 2018.
2. Notice of the hearing to be served on the appellant and the respondent personally.

Case Name: **[1] Violet Francis**
[2] Pauline Gomes
v
[1] The Attorney General
[2] The Commissioner of Police

[ANUHCVP2014/0012]

Date: Monday, 11th June 2018

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

Appearances:

Appellant: Mr. Jarid Hewlett holding papers for Dr. David Dorset

Respondent: Ms. Alicia Aska, Crown Counsel I

Issue: Status of the matter

Type of Oral Result / Order Delivered: Directions

Result / Order: [Oral Delivery]

1. The Solicitors for the Appellants to provide a report to the Court on the status of the application for the probate of the Estate of Pauline Gomes, Deceased by 31st October 2018.
2. The matter is adjourned to the next status hearing during the sitting of the court of appeal in Antigua and Barbuda during the week commencing 26th November 2018.

Case Name:

**Eurel Hodge
v
Peach Hallpike-Hodge
[ANUHCVP2017/0010]**

Date:

Monday, 11th June 2018

Coram:

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

Appearances:

Appellant:

Ms. Saskia Diamond

Respondent:

Mr. R. Leonard Moore

Issue:

Status of the matter

**Type of Oral
Result / Order
Delivered:**

Order

Result / Order:

[Oral Delivery]

- 1. The Registrar of the High Court is directed to take all necessary steps to secure the judge's notes of evidence of the proceedings in the High Court.**
- 2. The matter is adjourned to the next status hearing during the sitting of the Court of Appeal in Antigua and Barbuda during the week commencing 26th November 2018.**

Case Name: [1] Antigua Flight Training Center Inc.
[2] Grace Norman
v
Eastern Caribbean Civil Aviation Authority
[ANUHCVP2017/0015]

Date: Monday, 11th June 2018

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

Appearances:

Appellant: Mr. Warren Cassell

Respondent: Mr. Jarid Hewlett, holding papers for Dr. David Dorset

Issue: Status of the matter

Type of Oral Result / Order Delivered: Oral Judgment or Decision

Result / Order: [Oral Delivery]
1. At the request of the Appellant, the appeal is withdrawn.
2. No order as to costs.

Case name: Devon Byam
v
The Queen
[ANUHCRA2014/0009]

Date: Monday, 11th June 2018

Coram:	The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
Appearances:	
Appellant:	In person
Respondent:	Mrs. Shannon Jones-Gittens, holding papers for the Director of Public Prosecutions
Issue:	Status of the matter
Type of Oral Result / Order Delivered:	Adjournment
Result / Order:	1. The matter is adjourned to the next status hearing in Antigua and Barbuda during the week commencing 26th November 2018
Reason:	Transcript in process
Case name:	Darnell Azille v The Queen [ANUHCRA2015/0003]
Date:	Monday, 11th June 2018
Coram:	The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
Appearances:	
Appellant:	In person
Respondent:	Mrs. Shannon Jones-Gittens, holding papers for the Director of Public Prosecutions
Issue:	Status of the matter
Type of Oral Result / Order	Adjournment

Delivered:

Result / Order:

1. The appeal is adjourned to the next status hearing of during the sitting of the Court of Appeal in Antigua and Barbuda commencing the week of 26th November 2018.

Reason:

Transcript in process

Case name:

Keyon Bronille Hamilton

v

The Queen

[ANUHCRA2015/0002]

Date:

Monday, 11th June 2018

Coram:

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

Appearances:

Appellant:

No appearance

Respondent:

Mrs. Shannon Jones-Gittens holding for the Director of Public Prosecutions

Issue:

Status of the matter

**Type of Oral
Result / Order
Delivered:**

N/A

Result / Order:

1. Matter to be taken off the list.

Reason:

**Matter was completed at the last sitting of the court.
Sentenced to time served.**

Case Name: **Jemal Benjamin**
V
Commissioner of Police
[ANUMCRAP2015/0004]

Date: **Monday, 11th June 2018**

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

Appearances:

Appellant:	No appearance
Respondent:	No appearance

Issue: **Status of the matter**

Type of Oral Result / Order Delivered: **N/A**

Result / Order: **1. Matter taken off the list.**

Reason: **High court criminal appeal already heard. The matter was incorrectly listed as a magisterial criminal appeal.**

Case Name **Glenworth Prince**
V
Laudanski Joseph (Agent for Christina Richardson)
[ANUMCVAP2012/0002]

Date: **Monday 11th June, 2018**

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

Appearances:	Mr. Jarid Hewlett holding papers for Dr. David Dorsett
Respondent:	Mr. John Fuller
Type of Oral Result/Order Delivered:	N/A
Result/Order	1. Matter to be referred to the full court for status hearing

Case Name:	Gervon Archibald v Claudette Barnes et al [ANUMCVAP2013/0004]
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Date:	Monday, 11th June 2018
Coram:	The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:	
Appellant:	No appearance
Respondent:	No appearance

Issue:	Status of the matter
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Type of Oral Result / Order Delivered:	Adjournment
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Result / Order:	[Oral Delivery] Upon the parties not being present and the Court noting that there is no evidence of service on the parties of today's hearing, it is ordered that: 1. The appeal is adjourned to the next status
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hearing during sitting of the Court of Appeal in Antigua and Barbuda during the week commencing 26th November 2018.

2. The notice of the hearing to be served personally on the Appellant and Respondents.

Case Name:

Neil Jerrick

v

Chief Immigration officer

[ANUMCVAP2014/0001]

Date:

Monday, 11th June 2018

Coram:

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

Appearances:

Appellant:

Mr. Jarid Hewlett holding papers for Dr. David Dorset

Respondent:

Ms. Alicia Aska, Crown Counsel I

Issue:

Status of the matter

**Type of Oral
Result / Order
Delivered:**

Directions

Result / Order:

[Oral delivery]

1. The Chief Magistrate shall cause the record of appeal including the reasons for the decision to be prepared and submitted to Registrar of the High Court on or before the 30th September 2018.
2. The appeal is adjourned for further status hearing at the next sitting of the Court of Appeal in the state of Antigua and Barbuda during the week commencing the 26th November 2018.

Case Name:

**Glenworth Prince
v
Laudanskie Joseph (Agent for Christina
Richardson)**

[ANUMCVAP2012/0002]

Date:

Friday 15th June 2018

Coram:

**The Hon. Mr. Davidson Baptiste, Chief Justice [Ag.]
The Hon. Mde Gertel Thom, Justice of Appeal
The Hon. Mr. Tyrone Chong, Justice of Appeal [Ag.]**

Appearances:

Appellant:

**Mr. Jarid Hewlett, holding papers for Dr. David
Dorset**

Respondent:

Mr. John Fuller

Issue:

Status of the Matter

**Type of Oral
Result / Order
Delivered:**

Order

Result / Order:

[Oral delivery]

Upon the court noting that this appeal has been pending since 2012, and there is no indication that record of the proceedings in the Magistrate's Court will be made available and having heard counsel on both sides, this Court orders that:

- 1. By consent, the matter is remitted to the Magistrate's Court for a re-hearing before a different Magistrate.**
- 2. There is no order as to costs.**
- 3. The order of the learned Magistrate made on 20th March 2012 is hereby set aside.**

APPLICATIONS AND APPEALS

Case Name:

Melvin David Anderson

V

[1] The Attorney General of Antigua and Barbuda

[2] Commissioner of Police

[3] Glennis Simon

[4] Moncy Duncan

[ANUHCVP2013/0018]

Date:

Monday, 11th June 2018

Coram:

The Hon. Mr. Davidson Baptiste, Chief Justice [Ag.]

The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant:

Dr. David Dorsett

Respondent:

Mrs. Carla Brookes-Harris, Deputy Solicitor General

Issues:

Leave to appeal to Her Majesty in Council – Whether the Applicant is entitled to leave to Her Majesty in Council as of right pursuant to Section 122 (1) (a) of the Antigua and Barbuda Constitution – Whether or not the learned judge erred in holding that the Appellant did not continue in the employment of the Government from August 2005 (and hence was in breach of the two bonds executed on 13th August 1999 and 1st August 2003) when as a matter of law the Appellant continued in the service of the Government as a police officer because none of the conditions prescribed under Section 16 of the Police Act by which a police officer ceases to continue in the service of the Government as a police officer had materialized – Section 16 (3) of the Police Act

Type of Oral

Oral Judgment or Decision

**Result / Order
Delivered:**

Result / Order:

[Oral Delivery]

1. Leave to appeal to Her Majesty in Council is granted to the Applicant pursuant to Section 122 (1) (a) of the Antigua and Barbuda Constitution against the judgment of the Court of Appeal issued herein on 14th February 2018 upon the following conditions.
2. The Applicant do within 90 days of the hearing of this application for leave to appeal enter into good and sufficient security in the sum of £500 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 into the Court.
3. The record shall be prepared in accordance with Rule 18 to 20 of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009, and its Practice Direction 4.2.1 to 4.3.2 and Practice Direction 5 of the Judicial Committee Appellate Jurisdiction Rules Order 2009. The same to be transmitted to the Registrar of the Judicial Committee of the Privy Council without delay when final permission to appeal has been granted.
4. The Applicant do take such steps for the purpose of procuring the preparation of the record and settling such record with the Solicitors for the Respondents, and transmitting such record to the Registrar of the Privy Council within 90 days of the date of the hearing of this application for leave to appeal.
5. The record shall be comprised of the record used at the hearing of the appeal excluding documents of formal nature and those omitted by consent and shall include the judgments

and orders of the Court of Appeal and the Order granting conditional leave to appeal.

6. The Appellant shall make an 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.
7. The costs of this application shall be the costs in the appeal to Her Majesty in Council.

Case Name:

Charles Khoury

v

Agnes Khoury

[ANUHCVP2017/0019]

Date:

Monday, 11th June 2018

Coram:

**The Hon. Mr. Davidson Baptiste, Chief Justice [Ag.]
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

Appellant:

Mr. Anthony Astaphan, SC with him Mr. Kwame L. Simon

Respondent:

Mr. John Carrington, QC with him Ms. Kalisia Marks

Issues:

Leave to appeal to Her Majesty in Council – Whether the Appellant is entitled to appeal to Her Majesty as of right pursuant to Section 122 (1) (a) of Antigua and Barbuda Constitution – Whether there is an issue of great public importance – Whether under CPR Rule 13, the Court was required to consider the conduct of an Applicant based on the advice received, and not separately or in isolation from advice received, or not received – Whether or not the Applicant had a good explanation, and whether he intended or acted

with indifference to the consequences – Whether the reliance on advice, whether right or wrong, the existence of an unanswerable defence of limitation, sought stays and the windfall to a Respondent who will derive significant benefit notwithstanding the claim was filed out of time, constituted exceptional circumstances – interpretation of Civil Procedure Rule 13.3.

Type of Oral
Result / Order
Delivered

Oral Judgment or Decision

Result / Order:

[Oral delivery]

1. The application is dismissed.
2. Costs agreed in the sum of \$7,500 to the Respondent.

Reason:

This is an application by Mr. Charles Khoury for leave to appeal to Her Majesty in Council. The application made under section 122 (1) (a) and 122 (2) (a) of the Constitution of Antigua and Barbuda. Section 122 (1) (a) deals with appeals as of right from final decisions from the Court of Appeal, while Section 122 (2) (a) deals with appeals with the leave of the Court of Appeal from decisions where question involves matters of great general and public importance. The application is opposed by the Respondent. Both sides filed written submissions. The applicant relied on his written submissions in relation to Section 122 (1) (a). We have considered the submissions and the submissions of the Respondent, and we are of the view that the Applicant does not meet the requirements pursuant to Section 122 (1) (a) in that the decision sought to be appealed is not a final decision. The decision which is sought to be appealed is an order of the Court of Appeal affirming the Master's decision refusing to set aside the default judgment. On the application test, such an order is an interlocutory order and not a final decision. In relation to section 122 (2) (a), learned

Queen Counsel submitted that the application raised the matter of great general. The appeal raised the matter of great general public importance being the interpretation an application of CPR 13.3 in particular whether the words “in any event” in CPR 13.3 (2) can include matters referred in 13.3 (1). Learned counsel relied on the decision of this court in Pacific Wire and Cable Company Limited v. Texan Management et al, that leave should be granted where if the court considers that guidance of Privy Council would be appropriate in relation to the interpretation or application of a procedural rule, the local interpretation or application of which has a draconian effect or where there is substantial circumstances that would render such guidance useful to the court. While we agree with the principle stated by this court in Pacific Wire and Cable Company Limited, we are not of the view that this case meets the threshold. We would therefore dismiss the application and we will hear the parties on the issue of the cost. Cost agreed in the sum of \$7,500 to the Respondent

Case Name:

**Marcus A. Wide and Hugh Dickson
As Joint Liquidators of Stanford International
Bank Limited (In Liquidation)**

v

**[1] Amicus Curiae
[2] Timour Gainouline**

[ANUHCVP2015/0039]

Date:

Monday, 11th June 2018

Coram:

**The Hon. Mr. Davidson Baptiste, Chief Justice [Ag.]
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

Appellant:

Mr. Kwame L. Simon

Respondent:

**Mr. Lenworth Johnson for the 1st Respondent
Mr. Lawrence Daniel for the 2nd Respondent**

Issues: Extension of Time to finalise and transmit the Record to the Registrar of the Privy Council – Final Leave to appeal to Her Majesty in Council

Type of Oral Result / Order Delivered: Oral Judgment or Decision

Result / Order: [Oral Delivery]

On the Application for extension of time, it is ordered that:

1. The time for the Appellant to prepare and transmit the record of appeal to the Registrar of the Privy Council is extended to 60 days from the date that the Court of Appeal grants final leave to appeal for the judgment issued on 22nd September 2017.
2. There be no order as to costs in relation to this application.

On the Application for final leave to appeal to Privy Council, it ordered that:

1. The Appellants are granted final leave to appeal to Her Majesty in Council in respect to the Order made by the Court of Appeal on 22nd day of September 2017.
2. The costs occasioned by the Application shall be costs in the appeal to Her Majesty in Council.

Case Name:

Jevorny Richards

v

The Queen

[ANUHCRA2013/0006]

Consolidated with

Lasana Riley

v

The Queen

[ANUHCRA2013/0007]

Date:

Monday, 11th June 2018

Coram:

**The Hon. Mr. Davidson Baptiste, Chief Justice [Ag.]
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

Appellant:

Mr. Cosbert Cumberbatch for Mr. Jervony Richards

Respondent:

Mr. Anthony Armstrong, Director of Public Prosecutions

Issues:

**Criminal appeal against sentence — murder—
Additional grounds of appeal —Whether the
sentence imposed by the learned trial judge was
unduly severe.**

**Type of Oral
Result / Order
Delivered:**

Oral Judgment or Decision

Result / Order:

**[Oral Delivery]
The Court having heard Counsel Mr. Cumberbatch
and learned Director of Public Prosecution ordered
that:
1. Mr. Sherfield Bowen is assigned as Counsel**

- for the Appellant, Lasana Riley.
2. The Appellant, Jervony Richards has leave to file a new ground of appeal, being the sentence imposed by the learned trial judge was unduly severe.
 3. The grounds of appeal filed on 26th July 2013 are hereby deemed to have been abandoned by the Appellant, Jervony Richards and are accordingly dismissed.
 4. The Appellant, Jervony Richards has leave to file submissions in relation to the new ground of appeal on or before 26th July 2018.
 5. The Appellant, Lasana Riley has leave to file and serve written submissions with authorities on or before the 15th September 2018.
 6. The Respondent has leave to file and serve submissions with authorities in response on or before 16th October 2018.
 7. Hearing of the appeal is set down for the next sitting of the Court of Appeal in the state of Antigua and Barbuda during the week commencing the 26th of November 2018.

Case Name: **Cable and Wireless (Antigua and Barbuda)
Limited
v
Antigua and Barbuda Workers' Union**

[ANULTAP2016/0003]

Date: **Monday, 11th June 2018**

Coram: **The Hon. Mr. Davidson Baptiste, Chief Justice [Ag.]
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

Appellant: **Mrs. Ruth-Ann Richards-Simpson, holding papers on
behalf of Mr. Roger Forde QC,**

Respondent: Mr. L. Justin Simon, QC

Issues: Request for an adjournment

**Type of Oral
Result / Order
Delivered:** Directions

Result / Order: [Oral Delivery]

It is ordered that:

1. The Respondent is to file skeleton submissions and authorities on or before the 18th June 2018.
2. The Appellant is granted leave to file a reply, if necessary, on or before 5th July 2018.
3. The application for the adjournment of the hearing of the appeal is granted.
4. The hearing of the appeal is scheduled to a date to be fixed by the Chief Registrar.

Case Name: Saffron Limited
v
Angel Estates Limited
[ANUHCVP2012/0045]

Date: Monday, 11th June 2018

Coram: The Hon. Mr. Davidson Baptiste, Chief Justice [Ag.]
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:
Appellant: Dr. David Dorsett
Respondent: Mr. John E. Fuller

Issues:

- 1. Whether the learned trial judge erred when she held that the Appellant failed to mitigate its losses by failing to seek an alternative venue when no such allegation or factual argument had been set out in the Respondent's defence and thus the Respondent was estopped by CPR 10.7 and as a matter of substantive law from relying on an allegation or factual argument not set out in its defence –**
- 2. Whether the learned trial judge erred in holding that the renting or purchasing of a generator to provide electricity was an alternative available to the Claimant by failing to have regard and/or proper regard to section 5 of the Public Utilities Act and the interest of the Public Utilities Authority–**
- 3. Whether the learned trial judge erred in holding that the question of whether spending \$200,000.00 would have exposed the Claimant to financial risk did not arise –**
- 4. Whether or not the Claimant was under a duty to undertake financial risk in order to connect to CDAL was a live issue for determination, particularly in light of the evidence of the engineers –**
- 5. Whether the learned trial judge erred in disallowing the Claimant's claim for special damages with respect to personnel costs when such costs were clearly quantifiable and the facts upon which such quantification was based were evidence before the court**
- 6. Whether the learned trial judge erred in disallowing the Claimant's claim for special damages with respect to loss of profits, the learned trial judge mistakenly adopting the view that "the report of Dr. Richards is not loss of net profit" when the report of Dr. Richards was a report relating to net profit –**
- 7. Whether the learned trial judge erred in disallowing the Appellant's claim for loss of profits when the loss of profits over a number of years was not too remote and would have been in the contemplation of the parties –**
- 8. Whether the learned trial judge erred in holding that the real reason for the Claimant's closure was not due to default of the Claimant,**

it being the case that the issue of liability was settled and liability had been affixed to the Defendant –

9. Whether the learned trial judge erred in awarding only the sum of \$54,000.00 for breach of contract based on the evidence of Mr. Watson and Mr. Owen as being the cost of getting electricity from CDAL when in fact the evidence disclosed that the cost of getting electricity from CDAL would be in the region of \$200,000.00.

Type of Oral
Result / Order
Delivered:

N/A

Result / Order:

Judgment is reserved.

Case Name:

Owen Adriani Roach

v

[1] The Attorney General

[2] The Registrar of the High Court

[ANUHCVP2016/0023]

Date:

Tuesday, 12th June 2018

Coram:

The Hon. Mr. Davidson Baptiste, Chief Justice [Ag.]

The Hon. Mr. Tyrone Chong, Justice of Appeal [Ag.]

The Hon. Mr. Humphrey Stollmeyer, Justice of
Appeal [Ag.]

Appearances:

Appellant:

Dr. David Dorsett and with him, Mr. Jarid Hewlett

Respondent:

Ms. Alicia Aska, Crown Counsel I

Issues:	Application for Adjournment
Type of Oral Result / Order Delivered:	Oral Judgment or Decision
Result / Order:	[Oral delivery] 1. The Respondent is granted leave to file and serve skeleton submissions with authorities on or before 14th of July 2018. 2. The Appellant is granted leave to file and serve reply if necessary on or before 30th of July 2018. 3. The hearing of this appeal is adjourned to the next sitting of the Court of Appeal in the state of Antigua and Barbuda during the week commencing the 26th of November, 2018.
Reason:	Counsel for the respondent having been hospitalized on the 5 th February, 2018 was unable to attend court to conduct the matter during the last sitting of the Court of Appeal. Counsel for the appellant does not object to an application for an adjournment.
Case Name:	Simon Davis v The Queen [ANUHCRA2012/0007]
Date:	Tuesday, 12th June 2018
Coram:	The Hon. Mr. Davidson Baptiste, Chief Justice [Ag.] The Hon. Mr. Tyrone Chong, Justice of Appeal [Ag.] The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Mr. Sherfield Bowen

Respondent: Mr. Anthony Armstrong DPP and with him, Ms. Shannon Jones-Gittens

Issues: Criminal appeal against conviction and sentence – Sexual intercourse with a minor under 16 years/buggery –Whether there were material irregularities which occurred during the trial and whether the entire process was tainted so as to render the verdict unsafe and unsatisfactory – Whether the sentence was excessive – Whether the learned judge ought not to have imposed a further sentence of 12 years to run consecutively to the sentence imposed for buggery of 8 years – Whether the summation of the learned judge was unfair – Whether the learned judge erred when he instructed the jury to return to deliberate thereby creating undue pressure on the jury – whether the learned judge erred by properly directing the jury.

**Type of Oral
Result / Order
Delivered:**

Directions

Result / Order:

1. The Respondent is to file and serve skeleton submissions and authorities on or before 31st July 2018.
2. The hearing of the appeal is traversed to the next sitting of the Court of Appeal in the state of Antigua and Barbuda during the week commencing 26th November 2018.

Case Name:

Glenis Messiah

v

The Queen

[ANUHCRA2018/0002]

Consolidated with

Corian Thomas

v

The Queen.

[ANUHCRA2016/0004]

Date: Tuesday, 12th June 2018

Coram: The Hon. Mr. Davidson Baptiste, Chief Justice [Ag.]
The Hon. Mr. Tyrone Chong, Justice of Appeal [Ag.]
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Lawrence Daniels for 1st Appellant Glennis Messiah and Mr. Ralph Francis for 2nd Appellant Corian Thomas

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

Issues: Criminal appeal against conviction and sentence – Armed Robbery – Whether the verdict was unsafe and unsatisfactory– whether the sentence was excessive in all the circumstances –Whether the learned trial judge erred in failing to address the jury adequately on the issue of identification –DNA identification – Identification parades – Whether the evidence is unsafe and whether it supports the conviction – Whether the learned trial judge erred in ordering that the First Appellant be sentenced to a term of 20 years imprisonment when the First Appellant was a first time offender –

Type of Oral Result / Order Delivered: Oral Judgment or Decision

Result / Order: [Oral Delivery]
1. The appeal against conviction by the 1st Appellant Glenis Messiah is dismissed.

2. The appeal against sentence in respect of the 1st Appellant, Glenis Messiah is allowed to the extent that the sentence imposed of twenty (20) years is varied to sixteen (16) years.
3. The appeal against conviction by the 2nd Appellant Corian Thomas is dismissed.
4. The appeal against sentence in respect of the 2nd Appellant Corian Thomas is allowed to the extent that the sentence of twenty (20) years is varied to eighteen (18) years.

Reason:

The Appellants Glenis Messiah and Corian Thomas were jointly charged and they were both convicted of the crime on 12th February 2016 and each sentenced to 20 years imprisonment with time and remand taken into account. Both appellants have filed an appeal against conviction and the sentence. The appellant, Glenis Messiah had filed several appeal grounds in respect of his conviction. During the course of the oral submissions, his counsel effectively abandoned the various grounds which concerned the appeal against conviction and proceeded with his appeal against sentence. In the circumstances, the appeal against conviction by Glenis Messiah is dismissed.

This leaves his appeal against sentence. Counsel submitted that the sentence imposed of 20 years is manifestly excessive. He advanced as matters in mitigation, the age of the defendant, 35 years old and the fact that this was his first conviction of the appellant, Glenis Messiah. Counsel's submission in respect of the sentence imposed, finds favor with the Director of Public Prosecutions whilst giving the decision the court opined that the sentence imposed was on the higher side. We have listened to submissions of both sides and also read the cases relied on by Counsel for the appellant, Mr. Lawrence Daniel in respect of offenses of similar nature and various sentences which have been imposed by the courts. We note that in this particular case the appellant Glenis Messiah was not the carrier of the gun. We are not of the view that his age at the time would be a factor which engages seriously the

aspect of age as a factor in mitigation. We recognize the fact that offenses of such a nature are on the rise and the seriousness of such offenses. We note that the offense took place at an occasion – place which the public frequents. We were invited by Counsel to use the benchmark of 15 years in the robbery case. We looked at it and used the benchmark of 15 years. We will accept this and use that benchmark of 15 years.

Factors in mitigation. The relevant one to my mind concerns the age – not the age, the fact that this was the first offense of the appellant also that he did not carry the gun which was use in this robbery. So, we are inclined to give a deduction of 2 years to incorporate these factors in mitigation. It is clear, however, that the factors in aggravation do outweigh the factors in mitigation. We are of the view that the sentence must incorporate such factors of aggravation which will result in the penalty being increased from 13 years to 16 years. We added on 3 years for factors in aggravation. Consequently, the appeal against sentence in respect the Appellant, Glenis Messiah is allowed to the extent that the sentence imposed of 20 years is varied to 16 years.

With respect to the Appellant Corian Thomas, also appealed his conviction and sentence. Several appeal grounds against conviction were advanced by his Counsel, Mr. Francis. Counsel submitted that the verdict reached by the court was unsafe and unsatisfactory. In support there of Counsel stated that the judge misdirected himself on the basic principles relevant to the admissibility of evidence of witnesses given in a witness statement prior to trial which evidence sought to be admitted as evidence of the truth of its intent where the witness is not available for cross- examination. Counsel also complained that the that the judge erred in law in admitting into evidence photographs taken of the garbage bag and its contents including latex gloves, the small piece of latex gloves alleged to have been found in the car in which the co-accused was driving. Counsel also complained that the judge also erred in law when he failed to properly direct the jury on the issue of circumstantial evidence. The

question of the admissibility of the deposition or statement of an absent witness is on which exercises the discretion of the court. Counsel referred to Section 37 of the Evidence Special Provisions Act, 37 (c). It says: *“Admissibility of firsthand hearsay statements in criminal proceedings (c) when the person is living outside of Antigua and Barbuda and is not reasonably practicable to secure his attendance.”*

Counsel complained that the requisite situation for invoking of that sub-section was not satisfied and in that the Crown has failed to satisfy the conjunctive *“and” that is not reasonably absolute to secure his attendance.* The learned Director of Public Prosecutions contends that the learned judge in exercising his discretion to admit into evidence the statement of the witness, would have considered the relevant evidence and would have arrived at a conclusion or inferred that it was not reasonably practicable to secure the attendance of the witness. We are satisfied that it has not been demonstrated that in admitting into evidence of statement of witness, the learned trial judge wrongly exercised his discretion which was vested in him, neither can we see that any unfairness ensued to the appellant consequent upon the admissibility into evidence of the witness statement. Again, Counsel for the appellant complained with respect to the admission into evidence of the photographs which were taken. Again, in so admitting into evidence the photographs taken, the trial judge was undoubtedly exercising his discretion. The learned Director of Public Prosecutions cited the section and submitted that it relates to chattel and moveable objects. Counsel also stated that there was no objection to the photographs being tendered and a judge has discretion to exclude evidence where it would rate unfairly in respect of the accused. Counsel also submitted that even if one were to exclude the photographs the court had in evidence the relevant items. We agree with submissions of learned Director of Public Prosecutions and find no further basis in this appeal ground. Counsel also addressed the issue of circumstantial evidence and criticized the learned trial judge’s statement of the issue of circumstantial evidence. It is noted that to a large

extent the case for the Prosecution against the appellants relied substantially on circumstantial evidence, the Learned Director of Prosecution submitted that the evidence was compelling as well as cogent. There is no doubt in our minds that the Crown's case which was based substantially was both compelling and cogent. The criticism which was made by Counsel for the appellant, Corian Thomas, in respect of the directions given by the judge to the jury on circumstantial evidence to our minds are not such to undermine the safety of the convictions or the fairness of the trial. The learned Director of Public Prosecutions did direct court's attention to the various instances in which the learned trial judge addressed the issue of circumstantial evidence. Although some criticism could be made, when we look on the directions of both we find no unfairness in the directions given by the judge to the jury on the question of circumstantial evidence. In his submissions Counsel in addressing the court on the question of the admissibility of the statement of an absent witness where the witness said, *"I saw a man in the doorway brandishing the handgun at me."* Counsel submitted that in the absence of that evidence, there was no evidence that spoke to the gun. Counsel in fact was suggesting that in the absence of that evidence, a critical element in the defence would not have been proven. The matter by itself is not a relevant decisive factor in deciding whether or not the court should exercise its discretion against admitting the evidence. Once the relevant directions are given to the jury by the judge and the court finds that the judge did in fact exercise his discretion correctly, there is no basis for this court to upset the direction of the trial judge in admitting into evidence the statement which Counsel seeks to impugn. For all of these reasons we are of the view that the appeal against conviction is dismissed.

With respect to the appeal against sentence, the appellant like his co-appellant was sentenced to 20 years with remand time being considered. Counsel submitted that his sentence of 20 years was excessive. Counsel did point to the age of the appellant of 24 years at the time and that this was his

first conviction. With respect to the factors of aggravation, a gun was used and the offence taken in a place which the public frequents. There is no doubt that the frequency and prevalence of such offences are on the increase. We have considered the factors in mitigation and aggravations. We apply similar benchmark of 15 years. We also factored in the factors in mitigation. So from 15 years we go down to 13 years. We, however, looked at the factors in aggravation which would result in a term of 5 years being imposed on the 13 years. We note that the gun used was in the possession of this appellant and we do not believe he ought to be given the term of imprisonment as his co-accused and the sentence imposed must reflect that part. In the premises, the sentence imposed on the appellant, Corian Thomas is reduced from 20 years to 18 years. The appeal against conviction by the Appellant Corian Thomas is dismissed and the appeal against sentence is allowed to the extent that the sentence of 20 years is varied to 18 years.

Case Name:

Claudy Kelvin Brown

v

[1] The Attorney General of Antigua Barbuda

[2] The Chief Immigration Officer

[3] The Chief Magistrate

[ANUHCVP2012/0017]

Date:

Tuesday, 12th June 2018

Coram:

The Hon. Mr. Davidson Baptiste, Chief Justice [Ag.]

The Hon. Mr. Tyrone Chong, Justice of Appeal [Ag.]

The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal [Ag.]

Appearances:

Appellant:

Dr. David Dorsett with him, Mr. Jarid Hewlett

Respondent:

Ms. Alicia Aska, Crown Counsel I and with her Ms. Rose-Ann Kim

Issues:	Whether the right to protection of one's family life is a fundamental right afforded to every person (not just citizens) in Antigua and Barbuda by virtue of Section 3 (c) of Antigua and Barbuda Constitution – Whether the learned judge was right to dismiss the Appellant's action on the ground of lack of locus standi.
Type of Oral Result / Order Delivered:	Oral Judgment or Decision
Result / Order:	1. The appeal is dismissed. 2. No Order as to costs.
Reason:	[Oral Delivery] This appeal is centered on Claudy Kelvin Brown's claim to an infringement of his constitutional right to family life which he says was infringed by the deportation from Antigua of Rita Carmichael. Mrs. Carmichael, a citizen of Guyana, was deported in April of 2010 to Guyana. Kia Sofia Brown, daughter of Claudy Kelvin Brown and Rita Carmichael, went with her mother. There are two issues for determination. The first is whether these three people enjoyed a family life. The second is whether Claudy Kelvin Brown has the necessary locus standi to successfully maintain his claim. As to the family life, Dr. Dorsett for Mr. Brown remains firm in his view that the trial judge's finding of fact at paragraph 34 of his judgment has sufficiently proved that a family unit and a family life existed. These facts which emerged during cross-examination are that Mr. Brown is saying, <i>"I try to keep everybody all right. Everybody dependent on me. That's my family. Not that everybody lives together that I look after."</i> Also he said in his affidavit of 12th May 2010, that he took his daughter to school every day up to the time essential when she left Antigua with her mother. This in essence was the relationship that existed at the time of deportation. The trial judge concluded that the evidence did not satisfy sufficiently the existence of a family life. Dr. Dorsett

urges us to have regard to amongst other things, the love trust confidence, mutual dependence and unconstrained social intercourse as was set out in M v. the Secretary of State for Work and Pension cited in EM (Lebanon) v Secretary of State for the Home Department and demonstrates the evolution of the law in this area. We've come to the conclusion that the trial judge was not clearly wrong in his interpretation of the law and his findings of facts so as to allow this court to interfere with his conclusions. In our view, there was sufficient evidence before the trial judge to allow him to come to his findings and to conclude that the required family unit and family life did not exist. Having so found, it flows that Claudy Kelvin Brown did not have sufficient interest to vest him with the necessary locus standi to bring to his claim. For these reasons the appeal is dismissed. No orders as to cost. This is the unanimous decision of the court.

Case Name:

Marilyn Jeffers Nee Weste

v

**[1] The Personal Representative of the Estate
of Wyndham Weste, deceased**

**[2] Rupert Alexander Joseph aka Benjamin
Joseph**

**[3] Maudlyn Joseph (also known as Modlyn
B. Joseph) now Deceased**

**and replaced by Rupert Alexander Joseph
as Personal Representative of the Estate of
Maudlyn Joseph (for purposes of these
proceedings only)**

[ANUHCVP2017/0029]

Date:

Wednesday, 13th June 2018

Coram:

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

Appearances:

Appellant:	Dr. David Dorset with him, Mr. Jarid Hewlett
Respondent:	Mrs. Stacy Richards-Roach

Issues:

Extension of time for filing of skeleton arguments of the Respondents/ deeming the skeleton arguments filed in time –

Type of Oral Result / Order Delivered:

Oral Judgment or Decision

Result / Order:

[Oral Delivery]

- 1. The Application for an extension of time for the Respondent to file skeleton arguments in the appeal, not being opposed by the Appellant, is hereby granted.**
- 2. The submissions filed by the Respondents on 9th May 2018 are hereby deemed to have been properly filed.**

Case Name:

Medical Associates Ltd.
v
Royal Caribbean Cruises Ltd.

[SLUHCVAP2017/0041]

Date:

Wednesday, 13th June 2018

Coram:

The Hon Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal [Ag.]

Appearances:

Appellant:	Mr. Anthony Astaphan, SC
Respondent:	Mr. Dexter Theodore QC

Issues:	Interlocutory appeal— Consolidation
Type of Oral Result / Order Delivered:	Oral Judgment or Decision
Result / Order:	1. The appeal is dismissed. 2. Costs in the cause.
Reason:	We've considered carefully the submissions and the authorities put before us. Counsels have been very helpful. We've come to the conclusion that we are not persuaded that the Master erred in the exercise of her discretion sufficiently so as to allow this court to set aside her orders and substitute our own. The expressed reservation included as part of her orders preserved the appellant's right to raise the issue of prescription. The basis on which the court would set aside the orders of the lower court or the court of appeal setting aside the orders of the lower court are well known and can be dispelled for example the long line of cases including that of <u>Dufour v Helenair Corporation</u>. In the circumstances the appeal is dismissed. Cost in the cause.
Case Name:	Maverick Development Antigua Limited v [1] Mr. Gregory Walter [2] Dr. Jinks Walter [3] Trustees of the Estate of Marietta Walter [ANUHCVP2017/0028]
Date:	Wednesday, 13th June 2018
Coram:	The Hon. Mr. Mario Michel, Justice of Appeal The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Sylvester Carrot with him, Ms. Nelisa Spencer

Respondent: Mrs. Laurie Freeland- Roberts

Issues:

Whether the learned Master failed to provide any or any proper reasons for her decision that the Appellant should pay US\$600,000.00 into the court – Whether the learned Master erred in law in holding that the Appellant was required to pay costs into Court under CPR 24 or Section 548 of the Companies Act 1995, No 18 of 1995 – Whether the learned Master ought to have held that the Respondents had not discharged the onus upon them under section 548 of the Companies Act and that the conditions under CPR 24.2 had not been fulfilled – Whether the Learned Master erred in law by failing to properly or at all, take into account the relevant factors, including the merits of the case and the 11.5 acres of land to which the Claimant is entitled and which additionally represents immovable assets in the jurisdiction – Whether the learned Master erred in law by placing undue weight on the ability of one of the Directors of the Claimant to pay the sum of US\$600,000.00 given his wealth – Whether the learned Master erred in law and in fact by failing to give any or any proper consideration to the wealth of the same Director of the Claimant company, in determining whether security for costs should be awarded at all– Whether the Learned Master erred in law by ordering that the sum of US\$600,000.00 should be paid as security of costs, which sum was excessive and unjust – Whether the learned master erred in law by failing to exercise her discretion properly or indeed at all.

**Type of Oral
Result / Order
Delivered:**

Oral Judgment or Decision

Result / Order:

[Oral Delivery]

1. The appeal is allowed.
2. The order of the learned Master is set aside.
3. Costs to the appellant in the sum of \$1,333.33.

Reason:

This is an appeal against the decision of the learned master in which the learned master ordered the appellant to provide security or costs in the amount of US\$600,000.00. The order was made as a result of an application by the Respondent /Defendant in the proceedings pursuant to Section 548 of the Companies Act and CPR 24. The Respondents contended in their application that the Appellant would be unable to pay any costs that may be awarded against it in the proceedings below. The learned Master did not provide any reasons for her decision. The appellant being dissatisfied with the order of the court filed several grounds of appeal. At the hearing of the appeal, the appellant pursued one ground being ground number three (3) that the Learned Master erred in law by failing to properly or at all take into account relevant factors including 11.5 acres of land to which the Claimant is entitled and which additionally represents irremovable assets in the jurisdiction. We have heard the arguments of both the learned Counsel for the Appellant and the Respondents and we have noted the various affidavits which were before the learned Master. It was not disputed that loans were made by the Appellant to a company which the Respondents are shareholders and the Respondents pledged certain acres of land to secure the loan. What learned Counsel for Respondents emphasized, was that the Respondents neither admitted nor denied that the loan was advanced. We have taken into account that there is no dispute that the property belonging to the Respondents was pledged to the Appellant and we are of the view that if a cost order is made in the proceedings against the Appellant, the Respondents would be able, having regard to the pledge, to be able to recover those costs which have been granted to them. We are of the view that this was a relevant factor which the learned Master ought to have taken into account in discretion pursuant to Section 548 of the Companies Act and CPR 24. In our view, if the learned Master had taken that factor into

account with the other factors, the learned Master would not have made an order for security for costs. And for that reason, we find that the learned Master erred in that she failed to take into account a relevant factor and therefore erred in the exercise of her discretion. We will therefore allow the appeal and set aside the order of the learned Master. On the issue of costs, costs to the Appellant in the sum of EC\$1,333.33.

Case Name:

Marilyn Jeffers Nee Weste

V

**[1] The Personal Representative of the Estate
of Wyndham Weste, deceased**

**[2] Rupert Alexander Joseph aka Benjamin
Joseph**

**[3] Maudlyn Joseph (also known as Modlyn
B. Joseph) now Deceased**

**and replaced by Rupert Alexander Joseph
as Personal Representative of the Estate of
Maudlyn Joseph**

(for purposes of these proceedings only)

[ANUHCVP2017/0029]

Date:

Wednesday, 13th June 2018

Coram:

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

Appearances:

Appellant: Dr. David Dorset and with him Mr. Jarid Hewlett

Respondent: Mrs. Stacy Richards-Roach

Issues:

**Interlocutory Appeal – Jurisdiction to set aside the
order of July 2009 – Natural Justice – Whether the
learned trial judge erred in failing to set aside the
order made on 5 July 2009 when the order was made**

without leave and was accordingly a nullity – Whether the learned trial judge erred in dismissing the application of 31 July 2009 on the criteria pursuant to CPR 11.18 since the order of 9 July 2009 was never served on the Appellant – Whether the learned trial judge erred in failing to adjudicate on application filed on 5 July 2016.

Type of Oral
Result / Order
Delivered:

N/A

Result / Order:

Judgment is reserved.

Case Name:

George Rick James
(In person and as Secretary of the Free and
Fair Election League Inc.)

v

[1] Nathaniel James
(Chairman of the Electoral Commission)

John Jarvis

Anthonyson King

Paula Lee

Suzette Charles

Generis Robinson

Jeanette Charles

(Electoral Commissioners)

and

[2] Lorna Simon

(In her capacity as Chief Registration Officer
and Supervisor of Elections)

[ANUHCVP2018/0010]

Date:

Thursday, 14th June 2018

Coram:

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

The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Ralph Francis

Respondent: Mrs. Emily Simon-Forde

Issues:

Leave to Appeal– Extension of time to file Notice of Appeal

**Type of Oral
Result / Order
Delivered:**

Oral Judgment or Decision

Result / Order:

[Oral Delivery]

On the application of George Rick James to extend the time to file an appeal:

- 1. The time is extended to 21 days from today's date.**
- 2. Costs be costs in the Appeal**

Case Name:

Flat Point Development Limited

v

Mary Dooley

[ANUHCVP2015/0029]

Date:

Thursday, 14th June 2018

Coram:

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

Appearances:

Appellant: Ms. Jacqueline Walwyn with her, Ms. Leonora Walwyn

Respondent: Ms. Amina Byron with her, Ms. Rika Bird

Issues: Application for leave to adduce fresh evidence – Application for stay of the proceedings following judgment of the Hon. Justice Brian Cottle dated 17 June 2015 pending the outcome of the Appellant Appeal– Application for extension of time to file record of appeal-- Application to adjourn the hearing of the substantive appeal

Type of Oral Result / Order Delivered: Oral Judgment or Decision

Result / Order: [Oral Delivery]

On the Application to withdraw interlocutory appeal, it is ordered that:

1. Leave is granted to the Applicant to withdraw the interlocutory appeal against the Order of Lanns, J filed on 20th June 2017.

On the Application to adduce fresh evidence filed on 17th May 2018, it is ordered that:

1. The application to adduce fresh evidence is dismissed in its entirety.
2. Costs to the Respondent in the sum of EC\$500.00.

On the application on 5th June 2018 to stay the judgment of Cottle, J, it is ordered that:

1. The Application to stay the proceedings is refused.
2. Costs to the Respondent in the sum of EC\$500.00

On the application filed on 12th June 2018 for an extension of time to file and serve of the record of appeal, core bundle, the skeleton arguments and chronology of events, we order that:

1. An extension of time is granted to the

appellant to file and serve the record of appeal and skeleton arguments in support of the appeal.

2. The appellant shall file and serve the record of appeal on or before the 9th July, 2018.
3. The appellant shall file and serve skeleton arguments in support of the appeal on or before 1st of August, 2018.
4. The Respondent shall file and serve skeleton arguments in response within 28 days of being served with the Appellant's skeleton arguments.
5. Leave is granted to the Appellant to reply if necessary to the Respondent's skeleton arguments within 21 days of being served with the Respondent's skeleton arguments.
6. Hearing of the appeal is adjourned to the next sitting of the Court of Appeal in Antigua and Barbuda during the week commencing 26th of November, 2018.
7. No order as to Costs.

Reason:

On an application of May 17, 2018, the Appellant has applied for leave to adduce fresh evidence namely the following documents:

1. A purchase and sales agreement entered into between Mary Dooley and John Hughes purportedly for a condominium unit situated at Flat Point Development Limited property and receipts of payments made under that agreement.
2. Second, that Flat Point Development Limited be granted leave to adduce a caution application of John Hughes dated July 8, 2015, together with the exhibits in support.
3. Third, that Flat Point Development Limited be granted leave to adduce the caution application of Tommy Hopkins dated February 5, 2015, together with the exhibits in support.

Now for these documents to be admitted, Flat Point Development Limited must satisfy the three tests set out in the celebrated case of Ladd v. Marshall.

Those three tests are:

1. First, that the evidence could not have been

obtained with reasonable diligence for use at the trial.

2. Second, that the evidence must have an important influence on the outcome of the case although it need not be decisive.
3. And, thirdly, the evidence must be apparently credible although it need not be incontrovertible.

Now, let us deal with the application in relation to the purchase agreement supposedly entered into between Mary Dooley and John Hughes. Attorneys for Mary Dooley remained adamant that this document does not exist. In the absence of any credible evidence that it does, this court remains unpersuaded that it be adduced in evidence. In relation to the receipts for payment made under that agreement, we see no evidence to support the existence of those receipts nor have we seen the receipts. Consequently, leave to adduce those documents is refused.

In relation to the second document which is the said caution of John Hughes. That document was filed on the 15th of July 2015, after the trial in this matter. It turned out, however, that what Flat Point Development was really seeking to have adduced in evidence was a document dated the 20th of January, 2010. This document on its face is entered into an agreement, if one may use the expression, entered into between Flat Point Development Limited and John Hughes. In those circumstances, it would seem that the document was well within the possession and within the knowledge of Flat Point Development Limited. It has been submitted that Flat Point Development Limited was unaware of its existence that, however, we find to lack credibility in the extreme. A further submission was that the contents of that document should not be regarded as credible. In the circumstance, if this particular document were to cross the first or meet the first test in Ladd v. Marshall which we do not conclude that it did, then it would certainly fail the third one. It goes without saying that the remainder of that caution is obviously not admissible or adductive.

Last, there is caution of Tommy Hopkins. While it is

certainly arguable that this passes the first test in *Ladd against Marshall*, we are not persuaded that it would have an unfortunate influence on the outcome of the case. Consequently, it fails the second test in Ladd v. Marshall. Need to adduce it is therefore also refused, and the application for leave to adduce fresh evidence is consequently dismissed in its entirety.

In July 2015, Justice Cottle heard a claim brought by the Claimant, Mary Dooley, and delivered a judgment. The essential orders that he made are as follows:

1. That the defendants are ordered to transfer and convey the unit to Claimant forthwith.
2. The Defendants will pay damages to the Claimant for failing to transfer the unit over the last five years. He ordered that the damage were to be fixed as fear of letting value of the unit over the five year period less as any portion of time that Claimant was unable to occupy the unit.
3. And he also ordered that certain repairs be carried out on the unit.

The Respondent, Flat Point, has filed an appeal against the judgment of Justice Cottle. They have also applied for a stay of the judge's order. That was the first application that they filed. That application was heard by Justice Lanns and she dismissed the application and set out in a reasoned judgement the reasons for dismissing the application of a stay. Flat Point appealed against the decision of Justice Lanns by way of an interlocutory appeal which Flat Point withdrew during the course of the proceedings today.

In the meantime, Flat Point had applied directly to this court by way of a second application for a stay of Justice Cottle's order—a Stay of the proceedings. Since the judgement was delivered, Ms. Dooley, the Respondent to the appeal, has applied in the High Court for assessment of the damages ordered by Justice Cottle. So the stay which is before the court is firstly in respect of the transfer of the unit to the Respondent as well as the stay of the proceedings

which are now appearing before the High Court of the assessment of damages ordered by Justice Cottle. There is evidence before the court that unit in question has deteriorated in its condition and we note that the judgment of Justice Cottle is now approximately three years old and the terms of the judgment have not been carried into effect by Flat Point. We know the law which is very clear on applications for a stay, that firstly, an appeal of a judgment does not operate as a stay and the successful party is entitled to the benefits of the victory in the lower court. In order to secure a stay, the applicant must provide cogent evidence to this court that if the judgment is carried into effect, it would suffer financial ruin, or that the appeal will be stifled. The applicant must also show that the balance of harm favors the granting of a stay.

We have reviewed the evidence in this matter and we have heard the submissions of counsel on both sides.

On the issue of financial ruin, we are satisfied that there is no sufficient evidence to satisfy this court that Flat Point would suffer financial ruin if the judgment is carried into effect nor will this appeal be stifled. As I said before, this is a judgment which is now three years old. It calls for the transfer of the unit, firstly for the transfer of the unit to the Respondent. The applicant, Flat Point claims that if the unit is transferred, it will affect their business and will cause reputational risk and we find that even if there is some evidence of that, and we cannot see it, it certainly does not meet the threshold of the cogent evidence sufficient to deprive the Respondent of the benefits of the judgment ordered by the High Court judge.

There is the question of ongoing proceedings in the high court of assessment of damages. Again, we are not satisfied that after all this time those proceedings should be held back any further so that the application for a stay in respect of the ongoing proceedings in the lower court, the test has not been

satisfied.

As to the balance of harm, the balance we think favors the transfer of the unit to the Respondent without further delay. And as to the ongoing assessment of the damages, again we think that the balance is in favor of the Respondent who has been waiting for over three years for the judgment to be carried into effect. So that on total consideration of the evidence in this case and the submissions, we find that the justice of the case is that the application for a stay of the judgment of Justice Cottle is refused.

The third application is an application which was filed by the appellant on the 12th of June 2018, which application sought the following orders:

1. That this application be deemed appropriate to be determined by a single judge of appeal without hearing the parties;
2. That the appellant be granted an extension of time to file and serve the record of appeal and core bundle;
3. That the Appellant be grant an extension of time to file and serve skeleton arguments and chronology of events;
4. That the Appellant be granted relief from sanction;
5. That there be no order as to costs.

The application was supported by an affidavit in support filed on the same date and was accompanied by a draft order.

In terms of the order sought in paragraph 1 of the application that of course, is unnecessary now to address because it was an application for this matter to be determined by a single judge. The matter is now being determine by the full court so that the first of the order sought is unnecessary.

The fourth order sought that the Appellant be

granted relief from sanctions is also unnecessary. The Court will deal directly with the application for extension of time and there is no need for any application or order in respect of relief from sanctions.

In terms of the application therefore to extend time for the filing of the record, the core bundle, skeleton argument and chronology of events, we are satisfied that the appellant has met the requirement for the grant of an extension of time and we accordingly order that:

1. An extension of time is granted to the appellant to file and serve the record of appeal and skeleton arguments in support of the appeal. One can mention along the way that a core bundle, the requirements of filing of a core bundle are contained in CPR Part 62. It is not something that is required to be filed every time but CPR Part 62 sets out when and how it is to be filed and we need not specifically refer to it in the order.
2. The Appellant shall file and serve the record of appeal on or before the 9th July, 2018.
3. The Appellant shall file and serve skeleton arguments in support of the appeal on or before 1st of August, 2018.
4. The Respondent shall file and serve skeleton arguments in response within 28 days of being served with the Appellant's skeleton arguments.
5. Leave is granted to the Appellant to reply if necessary to the Respondent's skeleton arguments within 21 days of being served with the Respondent's skeleton arguments.
6. Hearing of the appeal is adjourned to the next sitting of the Court of Appeal in Antigua and Barbuda during the week commencing 26th of November, 2018.

In respect of the first application to adduce fresh evidence, cost to the Respondent in the sum of

\$500. In respect of the second application for a stay of proceedings, cost to the Respondent in the sum of \$500. In respect of the third application for an extension of time, no order as to cost.

Case Name: **Star Properties Corp.**
V
Jose Gillis Lawful Attorney of Pierre
Vandenbouce

[ANUHCVP2017/0021]

Date: **Thursday, 14th June 2018**

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

Appearances:

Appellant: **Mr. Kendrickson Kentish with him, Ms. Cherise Archibald**

Respondent: **Mr. Lenworth Johnson**

Issues: **Leave to appeal to Her Majesty in Council– stay of execution –**

Type of Oral
Result / Order
Delivered: **Order**

Result / Order: **Upon Counsel for both parties agreeing that Conditional Leave to appeal to Her Majesty in Council should be granted upon agreed terms and conditions. It is hereby ordered that:**

(1) Leave to appeal to Her Majesty in Council is granted to the Applicant pursuant to section Sections 122(1)(a) and (2) (a) of the

Constitution of Antigua and Barbuda of the Revised Laws of Antigua and Barbuda against the judgment of the Court of Appeal issued herein on 23rd day of May 2018 upon the condition that:

- i) 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 equivalent of Five Hundred Pounds Sterling (£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.**
- ii) 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.**
- iii) 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.**
- iv) The Appellant 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.**
- v) The Respondent UNDERTAKES that he will not 1) distribute any dividends to any shareholder of Star Properties Corp 2) dispose of or transfer the ownership or use**

of the Hotel Ipanema in Rio De Janeiro, Brazil 3) discontinue these appellate proceedings pending the hearing and determination of the intended appeal to Her Majesty in Council.

vi) The costs of this Application be costs in the Appeal.

Case Name:

Kaniel Martin

v

The Queen

[ANUHCRA2012/0001]

Date:

Friday, 15th June 2018

Coram:

**The Hon. Mr. Davidson Baptiste, Chief Justice [Ag.]
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Tyrone Chong, Justice of Appeal [Ag.]**

Appearances:

Appellant:

No appearance (Mr. Marcus Foster)

Respondent:

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

Issues:

Criminal appeal against conviction– Murder – Whether the conviction was unsafe and unsatisfactory – Whether the Appellant is not guilty of the offence – Whether the trial of the indictment was conducted in a manner that was unfair to the Appellant – Whether the verdict was against the weight of the evidence.

**Type of Oral
Result / Order**

Adjournment

Delivered:

Result / Order:

[Oral delivery]

On the application of the Appellant, his Counsel Mr. Marcus Foster being absent, the hearing of this appeal is adjourned to the next sitting of the Court of Appeal in Antigua and Barbuda during the week commencing n 26th November 2018.

Case Name:

Deless Phillip

v

The Queen

[ANUHCRA2015/0020]

Date:

Friday, 15th June 2018

Coram:

**The Hon. Mr. Davidson Baptiste, Chief Justice [Ag.]
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Tyrone Chong, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. Sherfield Bowen

Respondent:

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

Issues:

**Criminal appeal against conviction – Shooting with
Intent – Aggravated Robbery –Identification**

**Type of Oral
Result / Order
Delivered:**

Oral Judgment or Decision

Result / Order:

**1. The appeal against conviction is allowed and the
conviction and sentence quashed.
2. The appellant is to be retried.**

Reason:

The question on whether a re-trial should be ordered requires an exercise of judgment and involves matter of the public interest as well as the interest of the appellant. The public interest is generally served by the Prosecution of those reasonably suspected on the evidence of serious crime if the prosecution can be conducted without unfairness or oppression of the defendant. The interest of the defendant will often call into play the time which has passed since the offence and any penalty the defendant may already have paid before the quash of the conviction. In this case, there are two good reasons why the re-trial should be ordered: (1) the offence is of a very serious nature and it is generally in the public interest that those reasonably suspected of having committed serious crimes should be brought to trial. Whilst the court recognizes that the appellant has spent some time in prison, the public interest and the seriousness of the offence would combine to influence the court in the exercise of its discretion and judgment to order a re-trial of the appellant. So for the reasoning earlier indicated, the appeal against conviction is allowed and the conviction and sentence quashed and it is also ordered that the appellant be re-tried.

Case Name:

**Donald Sylvester Lumsden
v
The Commissioner of Police
[ANUMCRAP2013/0002]**

Date:

Friday, 15th June 2018

Coram:

**The Hon. Mr. Davidson Baptiste, Chief Justice [Ag.]
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Tyrone Chong, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. John E. Fuller

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

Issues: Status of the matter– Magisterial criminal appeal against sentence– Whether there was any evidence tendered to the court proving the substance for which the appellant was convicted was cannabis – whether the decision is unreasonable or cannot be supported having regard to the evidence – Whether the sentence [6 months imprisonment for 2 grams] was unduly severe– Whether the Appellant is not guilty.

Type of Oral Result / Order Delivered: Oral Judgment or Decision

Result / Order: [Oral delivery]

1. The appeal is allowed.
2. The conviction is quashed and the sentence is set aside.

Reason: The matter having been outstanding since 2013, there is no evidence that the parties will be provided with the record.

Case Name:

**Kareem Gardiner
V
The Commissioner of Police**

[ANUMCRAP2013/0004]

Date:

Friday, 15th June 2018

Coram:

**The Hon. Mr. Davidson Baptiste, Chief Justice [Ag.]
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Tyrone Chong, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. Sherfield Bowen, appearing amicus

Respondent:

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

Issues:

**Magisterial criminal appeal against sentence —
unlawful possession of a firearm—unlawful
possession of ammunition—whether the sentence
imposed was unduly severe—whether the learned
magistrate failed to take into consideration (a) the
guilty plea entered by the appellant and (b) the
antecedents of the appellant and the fact that he was
a first time offender, his age, and previous good
character—whether the learned magistrate
contravened Section 115 of the Magistrate’s Code of
Procedure Act, Chapter 255 of the 1992 Revised
Laws of Antigua and Barbuda by failing to ascertain
the means of the appellant to pay the fines imposed
forthwith.**

**Type of Oral
Result / Order
Delivered:**

Oral Judgment or Decision

Result / Order:

[Oral delivery]

- 1. The court will allow the appeal against the sentence.**

2. This court will impose a sentence of EC\$5,000.00 to be paid within nine (9) months, in default six (6) months imprisonment.
3. In relation to the second offence, the sentence imposed is a fine of EC\$2,500.00 to be paid within none (9) months, in default six (6) months imprisonment.
4. The six (6) months will run concurrently if there is a default.

Reason:

The court will allow the appeal against the sentence for the reason that — having heard the learned DPP and Mr. Bowen appearing amicus for the appellant, in our view, the sentence imposed by the learned Magistrate was excessive.

The learned Magistrate also erred in law when she ordered the fines be paid forthwith without first conducting a means test to determine whether the appellant was capable of paying a fine in the first place and a fine to the magnitude that the Magistrate sought to impose. We will exercise our discretion and substitute a sentence in relation to the offence of unlawful possession of a firearm.

This court will impose a sentence of EC\$5,000.00 to be paid within nine (9) months, in default, six (6) months imprisonment. In relation to the second offence of unlawful possession of ammunition, the sentence imposed is a fine of EC\$2,500.00 to be paid within none (9) months, in default six (6) months imprisonment. The six (6) months will run concurrently if there is a default.

Case Name:

Keimiah George
v
The Commissioner of Police
[ANUMCRAP2013/0006]

Date: Friday, 15th June 2018

Coram: The Hon. Mr. Davidson Baptiste, Chief Justice Ag
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Tyrone Chong, Justice of Appeal Ag.

Appearances:

Appellant: No appearance

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

Issues: Magisterial criminal appeal against sentence – Status
of the matter –

**Type of Oral
Result / Order
Delivered:** Oral Judgment or Decision

Result / Order: [Oral delivery]

The order of the court is that:

1. The appeal is dismissed for want of
prosecution.