

COURT OF APPEAL SITTING

GRENADA

Monday, 29th January 2018 to Friday, 2nd February 2018

JUDGMENTS

Case Name: **Allen Baptiste v The Queen**
[BVIHCVAP2013/0003]

Consolidated with

Yan Edwards v The Queen
[BVIHCVAP2013/0004]

(British Virgin Islands)

Date: **Tuesday, 30th January 2018**

Coram: **The Hon. Mr. Davidson Baptiste, Justice of Appeal**
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellants:	Mr. Ruggles Ferguson, holding papers for Mr. Patrick Thompson for Allen Baptiste Ms. Ruthilia Maximea for Yan Edwards
Respondent:	Mr. Howard Pinnock, Senior Crown Counsel

Issues: **Civil Appeal – Voice identification evidence – Direction to jury – Judge’s failure to give direction pursuant to section 112 of Evidence Act of the Virgin Islands and in keeping with Turnbull guidelines – Whether judge’s failure rendered conviction unsafe – Whether retrial should be ordered – Factors to be considered in ordering retrial**

**Result and
Reason:**

Held: allowing the appeal, quashing the conviction, setting aside the sentence and ordering a retrial of the case:

- 1. Section 112 of the Evidence Act of the Virgin Islands is in the same terms as the Turnbull guidelines and is applicable to both visual and voice identification. The definition of identification evidence in section 2 of the Act includes evidence of voice identification. Thus, when voice identification evidence is admitted, the judge is required to direct the jury on voice identification and in so doing the judge must address the factors outlined in the section. In directing the jury, the judge is not required to follow a specific formula. There may be instances where the evidence is such that some of the factors outlined in the section may be irrelevant. The judge's summation must be tailored based on the evidence adduced at the trial.**

Gerald Joseph v the Queen SLUHCRA2006/0002 (delivered on 15th January 2007, unreported) followed.

- 2. In this case, the prejudicial effect of the voice recognition evidence was no doubt considerable. Having regard to the visual identification evidence which cannot be classified as of an exceptionally good quality as was found in *Freemantle v R* and *Karl Shand v R*, and the nature and difficulties associated with voice identification evidence as pointed out in the case of *R v Flynn and St. John*, the omission of the learned judge to give the identification direction pursuant to section 112 invalidated the convictions.**

***Freemantle v R* [1994] 3 All ER 225 applied; *Shand v R* [1996] 1 WLR 67 applied; *R v Flynn and St. John* [2008] EWCA Crim 970 applied.**

- 3. In determining whether a retrial should be ordered, the Court is required to make an assessment of how the interest of justice would be best served. In making that determination, the Court must consider both the defendant's interest**

and the public interest in convicting the guilty and maintaining confidence in the effectiveness of the criminal justice system. In so doing, the Court is required to consider several factors including whether the defendants could get a fair trial, the time that has elapsed since the commission of the offence and the likely time of the retrial, whether key witnesses for the defendants are no longer available, that persons guilty of an offence should not escape because of an error in the summation of a judge, the serious nature of the offence, the prevalence of the offence in the society, and the strength of the prosecution's case. While the offence here was committed six years ago, there was no indication that the appellants would be unable to get a fair trial or that the defence witnesses are no longer available. It is also notable that the offence is of a very serious nature. The evidence against the appellants although not exceptionally good was not tenuous. Thus, the Court finds that the interest of justice would be best served if a retrial is ordered.

Sherfield Bowen v The Queen
ANUHCRA2005/0004 (delivered 20th June 2007,
unreported) followed; Reid v The Queen (1978) 27
WIR 254 applied; Bowe v The Queen [1979] 2 All
ER 904 applied.

Case Name:

**Pickle Properties Limited
v
Stephen Leslie Plant

BVIHCP2016/0032
(British Virgin Islands)**

Date:

Tuesday, 30th January 2018

Coram:

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

Appearances:

Appellant: Ms. Aloytha Thomas holding for Appleby

Respondent: Ms. Melissa Garraway holding for Maples and Calder

Issues:

Commercial appeal – Claim of contribution – Contribution of co-guarantor to settlement of claim – Whether the respondent is entitled to reimbursement of one-half the amount of contribution from the co-guarantor of the guarantee after settlement of a claim with mortgagee – Whether the right to a contribution from the appellant was lost due to the questioned conduct of the respondent – Whether the properties sold at an undervalue is reasonable grounds to deny re-imbursement of guarantee – The relevance of the delay of the delivery of the judgment and the implications on the fair trial principle – Rule 8.6(4) of the Civil Procedure Rules 2000 – Does failure to fully comply with the CPR 8.6(4) amount to automatic failure to be awarded interest in a claim

Result and Reason:

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

1. Based on the principles of contract and equity, Mr. Plant was free to seek to enforce the reimbursement based on the Guarantees. Parties to an agreement are obligated in both contract and equity to fulfil the requirements of said agreement. Mr. Plant and Pickle jointly and severally guaranteed Newmarket Limited's indebtedness to the Bank, with the Guarantee being capped at £500,000.00 plus interest. A right, including the percentage of contribution arises between co-sureties (or co-guarantors) where: (1) the surety and the co-surety have guaranteed a common liability, (2) the co-surety had paid more, or is about to pay more, than his rateable proportion of the total guaranteed debt and (3) the right to contribution has not been contractually excluded or lost. Once the debt to the Bank has been ascertained each is only bound to pay a half. To relieve itself from contributing its one-half share, the disputing

party has to prove that this was an improvident bargain. In the case at bar, Mr. Plant paid more than his rateable share of the total guaranteed surety, with the inclusion of the solicitor's costs, the one-half contribution was reasonable and prudent in the circumstances. Ergo, the learned judge was correct to rule Pickle to be liable on this basis of non-conformity with the Guarantee.

Re Snowden (1881) LR 17 Ch D 44 applied; Gillett v Rippon (1835) 3 B & Ad 409 applied.

2. The equitable maxim 'he who comes into equity must come with clean hands' or alternately, 'equity will not permit a party to profit by his own wrong' has been agreed by the courts that a party's alleged conduct must have reference to the very matters in controversy. With classifications such as: (1) cases where the plaintiff is engaged in a continuing course of fraudulent or illegal conduct and (2) cases where a party's misconduct is at an end, and he seeks restoration of the status quo, or other affirmative relief. Mr. Sharp was aware of Mr. Plant's interests in purchasing the properties and encouraged to partake in the purchase. The trial judge was correct to adjudicate that the submissions of Pickle that Mr. Plant acted improperly or disadvantageously were without merit as steps were taken to protect the Bank's interests during the sale of the properties. These complaints were only raised in objection to Mr. Plant's claim for contribution after the settlement of the debt to the Bank. The Properties were acquired by Uddington Holdings Limited and Lethia Holdings Limited, the Gibraltar companies, and not by Mr. Plant. Strictly speaking, if a secret profit was had, it was had by the Gibraltar properties and not Mr. Plant. There is, in this case, no basis for piercing the corporate veil, and no such argument was advanced by Pickle.

Benmax v Austin Mоторо Co. Ltd. [1955] AC 370 applied; Assicurazioni Generali SpA v Arab Insurance Group [2002] EWCA Civ 1642 applied.

3. To determine whether a property has been sold at an undervalue the Court has to consider an admixture of questions of credibility, findings of primary facts and judge's evaluation of those facts. For the Court to interfere with the trial judge's conclusions on these issues it would have to be concluded that the learned judge was plainly wrong. In the case at bar, the trial judge was correct to rule that the properties were not sold at an undervalue, the Bank in its own self-interest insisted on moving quickly and accepted market price, with no secret profit being made and was deemed commercially sound. It was the Bank's duty to the owners of the properties to obtain the best purchase price. Mr. Plant's involvement in the transaction had no effect on this purchase price. Further, Mr. Plant has not lost his equitable right to contribution against the appellant because Mr. Plant's involvement in advertising and bidding of the properties does not give rise to serious concerns.

Piglowska v Piglowski [1999] UKHL 27 applied; Skipton Building Society v Scott [2001] QB 261 applied.

4. In deciding whether delay in the delivery of a judgment in lower court is sufficient to set aside the judgment it is necessary to show that the length of the delay and its possible impact on the ability of the trial judge to properly deliberate on the issues and that as a result the trial was unfair. In deliberating this fair trial point the appellate court is required to assess whether the trial judge properly considered and resolved the issues based on the evidence and applicable law. Further, in conducting this exercise, the appellate court should not substitute its views or conclusions for those of the trial judge. A delay, however long, may not by itself be sufficient to allow an appeal against a decision of a trial judge. This Court is not to conduct a re-trial. The appellate court must be

satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant.

Harb v Abdul Aziz [2016] EXCA Civ 566 applied; Cobham v Frett [2001] 1 WLR 1775 applied.

5. Prima facie, the High Court will not award interest upon the failure to comply with Civil Procedure Rule 8.6(4). However, this is not always the case. The court below has the power to award interest pursuant to its equitable jurisdiction, both compound interest as well as simple interest.

Creque v Penn [2007] UKPC 44 applied; Andrey Adamovsky & Anor v Andriy Malitskily & Anor [2007] UKPC 44 applied; Jennifer Prescott v Aldrick Parris et al SLUHCVAP2013/0013 & 0025 (delivered 30th October 2015, unreported) followed.

STATUS HEARING

Case Name:

**Grenada Rice Mills Limited
v
Grenada Marketing and National Importing
Board**

[GDAHCVAP2015/0002]

Date:

Monday, 29th January 2018

Before:

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

Appearances:

Appellant:

Mr. Anselm A. Clouden

Respondent:

Mrs. Lisa Taylor

Issue:	Status of the matter
Type of Oral Result / Order Delivered:	Directions
Result/Order:	[Oral delivery] 1. The Registrar of the High Court will continue to make efforts to secure the preparation of the transcript. 2. The matter is adjourned to the next status hearing at the sitting of the Court of Appeal in Grenada during the week commencing 28th May 2018.
Reason:	Transcript not yet prepared.
Case Name:	Catherine Joseph (also known as Faith Regis) v Maude Campbell [GDAHCVAP2014/0029]
Date:	Monday, 29th January 2018
Before:	The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Mr. Anselm Clouden
Respondent:	Mr. Deloni Edwards
Issue:	Status of the matter
Type of Oral Result / Order	Directions

Delivered:

Result/Order:

[Oral delivery]

1. The Registrar of the High Court will continue to make efforts to secure the preparation of the transcript.
2. The matter is adjourned to the next status hearing at the sitting of the Court of Appeal in Grenada commencing the week of 28th May 2018.

Reason:

Transcript not yet prepared.

Case Name:

Nelson Louison

v

Margaret Stewart

[GDAHCVAP2015/0032]

Date:

Monday, 29th January 2018

Before:

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

Appearances:

Appellant:

Mr. Benjamin Hood

Respondent:

Ms. Deborah St. Bernard

Issue:

Status of the matter

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

Directions

Result/Order:

[Oral delivery]

1. The Registrar of the High Court will continue to make efforts to secure the preparation of the transcript.

2. The matter is adjourned to a date during the sitting of the Court of Appeal in Grenada during Term 1 of the Law Year commencing in September 2018.
3. The parties are to be notified of the date of the status hearing by the Registrar.

Reason: Transcripts not yet prepared.

Case Name: **Dickon Mitchell**
v
Rita Joseph-Olivetti
[GDAHCVAP2014/0026]

Date: Monday, 29th January 2018

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

Appearances:
Appellant: Ms. Monique Adams, holding for Mr. Alban John
Respondent: Mr. Deloni Edwards, holding papers for Mr. John Carrington, QC

Issue: Status of the matter

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

Result/Order: [Oral delivery]
The matter is adjourned to Wednesday, 31st January 2018 at 8:30 a.m.

Reason: Counsel to obtain instructions from their clients as it pertains to a way forward in having the transcripts

prepared by external sources.

Case Name: Isaac Peters
v
Caribbean Agro Industries Limited
[GDAHCVAP2015/0015]

Date: Monday, 29th January 2018

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

Appearances:
Appellant: Mr. Henry Paryag
Respondent: Ms. Sheriba Lewis

Issue: Status of the matter

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

Result/Order: [Oral delivery]
The appeal filed on the 13th May 2015 is withdrawn with no orders as to costs.

Reason: The matter has been settled between the parties.

Case Name: Hassan Brothers Limited
v
Heida Rahim
(As agent for the Estate of Ruth Rahim)

[GDAHCVAP2015/0024]

Date: Monday, 29th January 2018

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

Appearances:

Appellant: Mr. Benjamin Hood

Respondent: Mrs. Lisa Taylor

Issue: Status of the matter

Type of Oral Result / Order Delivered: Adjournment

Result/Order: [Oral delivery]
The matter is adjourned to the next status hearing at the sitting of the Court of Appeal in Grenada during the week of 28th May, 2018 for report.

Reason: Transcript not yet prepared.

Case Name: Kenthon St. Bernard
v
The Queen

[GDAHCRAP2015/0002]

Date: Monday, 29th January 2018

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

Appearances:

Appellant: Mr. Darshan Ramdhani

Respondent: Mr. Howard Pinnock, Senior Crown Counsel

Issue:	Status of the matter
Type of Oral Result/Order Delivered:	Adjournment
Result/Order:	[Oral delivery] The matter is adjourned to Wednesday, January 31st 2018 at 8:30am for hearing.
Reason:	The appellant was absent without excuse. Attempts to be made to secure his presence at the next hearing.
Case Name:	Richardson Mapp v The Queen [GDAMCRAP2015/0001A]
Date:	Monday, 29th January 2018
Before:	The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Mr. Darshan Ramdhani
Respondent:	Mr. Howard Pinnock, Senior Counsel
Issue:	Status of the matter
Type of Oral Result / Order Delivered:	Adjournment

Result/Order: [Oral delivery]
The matter is adjourned to Wednesday, 31st January 2018.

Reason: The matter was adjourned in order to secure the attendance of the appellant who was absent without excuse.

Case Name: Tevin Dominique
v
The Queen
[GDAHCRAP2015/0004]

Date: Monday, 29th January 2018

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

Appearances:
Appellant: Ms. Sabina Gibbs
Respondent: Mr. Howard Pinnock, Senior Crown Counsel

Issue: Status of the matter

Type of Oral Result / Order Delivered: Adjournment

Result/Order: [Oral delivery]
The matter is adjourned to Wednesday, 31st January 2018.

Reason: The matter was adjourned in order to secure the attendance of the appellant who was absent without excuse.

Case Name:

Shaquain Horsford

v

The Queen

[GDAHCRAP2015/0012]

Date:

Monday, 29th January 2018

Before:

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

Appearances:

Appellant:

Mr. Darshan Ramdhani

Respondent:

Mr. Howard Pinnock, Senior Crown Counsel

Issue:

Status of the matter

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

Directions

Result/Order:

[Oral delivery]

- 1. By consent this appeal is consolidated with GDAHCRAP2015/0004 Tevin Dominique v the Queen and GDAHCRAP2015/0015 Elvis Lewis v The Queen**
- 2. The consolidated appeal will be adjourned to the next sitting of the Court of Appeal in Grenada during the week commencing 28th May, 2018 before the full Court.**
- 3. Counsel for the parties to agree to a record of the facts in the Court below by 28th February, 2018.**

Reason:

The three appeals, though filed separately arose out of one trial where all three defendants were jointly charged.

The transcripts are not yet ready.

Case Name:

**Elvis Lewis
v
The Queen**

[GDAHCRAP2015/0015]

Date:

Monday, 29th January 2018

Before:

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

Appearances:

Appellant:

Mr. Darshan Ramdhani

Respondent:

Mr. Howard Pinnock, Senior Crown Counsel

Issue:

Status of the matter

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

Directions

**Result/
Order:**

[Oral delivery]

1. By consent this appeal is consolidated with GDAHCRAP2015/0004 Tevin Dominique v the Queen and GDAHCRAP2015/0012 Shaquain Horsford v the Queen.
2. The consolidated appeal is adjourned to the next sitting of the Court of Appeal in Grenada during the week commencing 28th May, 2018 before the full Court.
3. Counsel for the parties to agree to a record of the facts in the Court below by 28th February, 2018.

Reason:

The three appeals, though filed separately arose out of one trial where all three defendants were jointly charged.

The transcripts are not yet ready.

Case Name:

Tyrone Bernard

v

The Queen

[GDAHCRAP2014/0018]

Date:

Monday, 29th January 2018

Before:

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

Appearances:

Appellant:

Darshan Ramdhani

Respondent:

Mr. Howard Pinnock, Senior Crown Counsel

Issue:

Status of the matter

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

Adjournment

**Result/
Order:**

[Oral delivery]

By consent the hearing of the appeal is adjourned to the next sitting of the Court of Appeal in Grenada during the week commencing 28th May 2018.

Reason:

The transcripts are not yet ready but counsel are willing to proceed with the matter in the absence of a transcript.

Case Name: **The Director of Public Prosecutions**
v
Sheldon Payne
GDAHCRAP2014/0006

Date: **Monday, 29th January 2018**

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

Appearances:
Appellant: **Mr. Howard Pinnock, Senior Crown Counsel**
Respondent: **In person**

Issue: **Status of the matter**

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

Result/ Order & Reason: **[Oral Delivery]**
The appeal filed on the 4th July 2014 is withdrawn with no order as to costs.

Case Name: **Raymond Beggs**
v
The Queen
[GDAHCRAP2017/0014]

Date: **Monday, 29th January 2018**

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

Appearances:
Appellant: **Mr. George Prime**

Respondent:	Mr. Howard Pinnock, Senior Crown Counsel
Issue:	Status of the matter
Type of Oral Result / Order Delivered:	Directions
Result / Order & Reason:	[Oral delivery] 1. The Registrar of the High Court will continue to make efforts to secure the preparation of the transcript. 2. The matter is adjourned to the next status hearing at the sitting of the Court of Appeal in Grenada commencing the week of 28th May 2018.
Case Name:	Dwayne Nigel Charles v The Queen [GDAHCRAP2017/0013]
Date:	Monday, 29th January 2018
Coram:	The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Mr. Darshan Ramdhani
Respondent:	Mr. Howard Pinnock, Senior Crown Counsel
Issue:	Status of the matter
Type of Oral Result / Order Delivered:	Directions

**Result / Order
& Reason:**

[Oral delivery]

1. The Registrar of the High Court will continue to make efforts to secure the preparation of the transcript.
2. The matter is adjourned to the next status hearing at the sitting of the Court of Appeal in Grenada commencing the week of 28th May 2018.

Case Name:

Sheldon Bain

v

The Queen

[GDAHCRAP2016/0007]

Date:

Monday, 29th January 2018

Before:

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

Appearances:

Appellant:

In person

Respondent:

Mr. Howard Pinnock, Senior Crown Counsel

Issue:

Status of the matter

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

Directions

**Result/
Order:**

[Oral delivery]

1. The application for legal aid is granted and the Registrar is to appoint counsel to represent the appellant.
2. The appellant is granted a further extension of time to 16th March, 2018 to file skeleton arguments in support of his appeal with authorities.
3. The respondent is to file skeleton arguments in reply with authorities on or before the 30th April,

2018.

4. The appeal shall be fixed for hearing during the next sitting of the Court of Appeal in Grenada during the week commencing 28th May 2018.

Reason:

The appellant made an application in writing for the legal aid and extension of time within which to prepare for his appeal.

Case Name:

Kenthon St. Bernard

v

The Queen

[GDAHCRAP2015/0002]

Date:

Wednesday, 31st January 2018

Before:

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

Appearances:

Appellant:

Mr. Darshan Ramdhani

Respondent:

Mr. Brendon La Touche

Issue:

Status of the matter

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

Directions

Result/Order:

[Oral delivery]

1. Efforts are to be made to serve the appellant with the notice to appear at 8:30am on Friday, 2nd February 2018.
2. The matter is adjourned to Friday, 2nd February 2018 at 8:30am for hearing.

Reason: The appellant absent without excuse.

Case Name: Richardson Mapp
v
The Queen
[GDAHCRAP2015/0001]

Date: Wednesday, 31st January 2018

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

Appearances:
Appellant: Mr. Darshan Ramdhani
Respondent: Mr. Brendon La Touche

Issue: Status of the matter

Type of Oral Result/Order Delivered: Directions

Result/Order: [Oral delivery]
The matter is adjourned to Friday, 2nd February 2018 at 8:30am for hearing in order to submit the name of the Magistrate to the Registrar for the making of an order at this hearing.

Reason: It is proposed to have the matter set down before the Full Court for disposal. There is the need for the reasons for decision from the Magistrate filed in time for a hearing.

Case Name:

Tevin Dominique

v

The Queen

[GDAHCRAP2015/0004]

Date:

Wednesday, 31st January 2018

Before:

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

Appearances:

Appellant:

Ms. Sabina Gibbs

Respondent:

Mr. Brendon La Touche

Issue:

Status of the matter

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

Directions

Result/Order:

[Oral delivery]

- 1. By consent this appeal is consolidated with GDAHCRAP2015/0015 Elvis Lewis v the Queen and GDAHCRAP2015/0012 Shaquain Horsford v the Queen.**
- 2. The consolidated appeal will be adjourned to the next sitting of the Court of Appeal in Grenada during the week commencing 28th May, 2018 before the full Court.**
- 3. Counsel for the parties to agree to a record of the facts in the Court below by 28th February 2018.**

Reason:

The three appeals, though filed separately arose out of one trial where all three defendants were jointly charged.

The transcripts are not yet ready.

Case Name:

**Dickon Mitchell
v
Rita Joseph-Olivetti**

[GDAHCVAP2014/0026]

Date:

Wednesday, 31st January 2018

Before:

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

Appearances:

Appellant:

Mr. Alban John

Respondent:

Mr. Deloni Edwards, holding papers for Mr. John Carrington, QC

Issue:

Status of the matter

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

Directions

**Result/ Order
& Reason:**

[Oral delivery]

- 1. By consent the transcript of these proceedings are to be prepared and produced by Mrs. Gail Mahon-Grainger an approved transcriptionist, and thereafter the matter is to proceed in accordance to CPR 2000.**
- 2. Costs of the transcript to be advanced in equal shares by the parties.**

Case Name:

**Kenthon St. Bernard
v
The Queen**

[GDAHCRAP2015/0002]

Date: Friday, 2nd February 2018

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

Appearances:

Appellant: Mr. Darshan Ramdhani

Respondent: Mr. Howard Pinnock, Senior Crown Counsel

Issue: Status of the matter

Type of Oral Result/Order Delivered: Directions

Result/Order: [Oral delivery]

1. The appellant's bail is revoked.
2. The Registrar is to issue a bench warrant for the arrest of the appellant.
3. The matter is adjourned to the next status hearing at the next sitting of the Court of Appeal in Grenada during the week commencing 28th May, 2018.

Reason: The appellant was absent without excuse.

Case Name:

Richardson Mapp
v
The Queen

[GDAHCRAP2015/0001]

Date: Friday, 2nd February 2018

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

Appearances:

Appellant: Mr. Darshan Ramdhani

Respondent: Mr. Howard Pinnock, Senior Crown Counsel

Issue: Status of the matter

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

Result/Order: [Oral delivery]
1. The learned magistrate, Her Honour Karen Noel is directed to produce reasons for the decision by 31st day of March 2018.
2. The matter is adjourned to the next status hearing at the next sitting of the Court of Appeal in Grenada during the week commencing 28th May 2018.

Reason: The matter was adjourned so that a determination can be made as to whether the matter can be placed before the Full Court for adjudication.

APPLICATIONS AND APPEALS

Case Name: Capital Bank International Limited
v
[1] Keith C. Mitchell
(Minister of Finance in the Government of
Grenada)
[2] The Attorney General of Grenada
[GDAHCVAP2015/0034]

Date: Monday, 29th January, 2018

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

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

Appearances:

Applicant/Respondent: Mr. Dwight Horsford, with him, Ms. Maurissa Johnson and Mr. Sasha Michael Courtney

Respondent/Appellant: No appearance

Issue:

Application for leave to appeal to Her Majesty in Council

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

N/A

Result/Order:

**[Oral delivery]
The matter is stood down until 2 p.m. in the afternoon.**

Reason:

Counsel on behalf of the applicant/respondent was not present.

Case Name:

**Andy John
v
The Commissioner of Police
[GDAMCRAP2016/0013]**

Date:

Monday, 29th January 2018

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Louise Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal**

Appearances:

Appellant: No appearance

Respondent: Mr. Brendon La Touche

Issue:	Application for counsel to be removed from the record
Type of Oral Result / Order Delivered:	Directions
Result/Order:	[Oral delivery] 1. The appeal is adjourned to the next sitting of the Court during the week beginning 28th May 2018. 2. The application for counsel to be removed from the record is stood down.
Reason:	Counsel for the appellant was not present so it was therefore not possible to hear the application.
Case Name:	[1] Joshua Matheson [2] Madeline Matheson v [1] George Allert (Administrator of the Estate of Gordon Matheson, Deceased) [2] George Allert [3] Edmund Allert [4] Anthony Allert [5] Mary Glennie Allert [6] Pearl Allert [GDAHCVAP2017/0009]
Date:	Monday, 29th January 2018
Coram:	The Hon. Dame Janice M. Pereira, DBE, Chief Justice The Hon. Mde. Louise Blenman, Justice of Appeal The Hon. Mr. Mario Michel, Justice of Appeal
Appearances:	
Appellant:	Mr. Nigel Stewart

Respondent:	Mr. Alban John
Issues:	Interlocutory Appeal – Application to set aside the order of a High Court Judge
Type of Oral Result / Order Delivered:	Oral Judgment or Decision
Result/Order:	[Oral delivery] 1. The appeal is withdrawn with the leave of the Court. 2. No order as to costs.
Reason:	The attorney on behalf of the appellant applied to the Court for leave to withdraw the appeal and the application was granted.
Case Name:	Andy John v The Commissioner of Police [GDAMCRAP2016/0013]
Date:	Monday, 29th January 2018
Coram:	The Hon. Dame Janice M. Pereira, DBE, Chief Justice The Hon. Mde. Louise Blenman, Justice of Appeal The Hon. Mr. Mario Michel, Justice of Appeal
Appearances:	
Appellant:	Ms. Herrica Willis
Respondent:	Mr. Brendon La Touche
Issue:	Application for removal of counsel from the record

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

Directions

[Oral delivery]

- 1. Once the Court is satisfied of proof of service, the Court of Appeal Registry may list this matter to be dealt with at Chambers.**
- 2. The application is adjourned to a date to be fixed for Chamber Hearing.**

Reason:

The matter is one that can be sufficiently dealt with in chambers once the applicant proves service on her client.

Case Name:

**In the Matter of the Land Acquisition Act Cap.
159, Grenada
In the Matter of the Grand Anse Riviera Limited
In the Matter of the Board of Assessment**

Grand Anse Riviera Limited

v

The Attorney General of Grenada

[GDAHVAP2016/0016]

Date:

Monday, 29th January 2018

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Louise Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal**

Appearances:

Appellant:

Mrs. Celia Edwards, QC, with her, Ms. Celene Edwards

Respondent:

Mr. Gregory Delzin and Mrs. Michelle Emmanuel-Steele, with them, Mrs. Chevaughn Spencer-Joseph

Issues:	Civil Appeal – Appeal against a decision of a Board of Assessment
Type of Oral Result / Order Delivered:	N/A
Result /Order & Reason:	[Oral delivery] The matter is stood down to be recalled at 2:30 p.m. for the Court’s decision.
Case Name:	Capital Bank International Limited v [1] Keith C. Mitchell (Minister of Finance in the Government of Grenada) [2] The Attorney General of Grenada [GDAHCVAP2015/0034]
Date:	Monday, 29th January 2018
Coram:	The Hon. Dame Janice M. Pereira, DBE, Chief Justice The Hon. Mde. Louise Blenman, Justice of Appeal The Hon. Mr. Mario Michel, Justice of Appeal
Appearances:	Applicant/Respondent: Mr. George Prime, with him, Mr. Henry Paryag Respondent/Appellant: Mr. Dwight Horsford, with him, Ms. Maurissa Johnson and Mr. Sasha Michael Courtney
Issue:	Application for leave to appeal to Her Majesty in Council
Type of Oral Result / Order Delivered:	Oral Judgment or Decision

Result/Order:

[Oral delivery]

The application is dismissed with costs agreed in the sum of \$750.00, to be paid on or before 31st March 2018.

Reason:

There is nothing which demonstrates that the application is one which meets the requirements of section 104(1)(a) of the Constitution, in that the decision of the Court from which leave to appeal to the Privy Council is sought is clearly an interlocutory decision. Secondly, it is not in any way demonstrated that the matter in issue is one of a value of \$1,500.00 and upwards so that it does not qualify on those two grounds that are contained in section 104(1)(a) of the Constitution of Grenada.

Thirdly, the applicant has on his feet sought to place the application within the context of section 104(2)(a) of the Constitution which states that a decision may be appealed to the Privy Council where there is great general or public importance. There has been absolutely nothing put forward which persuades this Court even remotely that it meets the requirement of great general or public importance, or any matter that poses dire consequences for the public, as was said in the case of Martinus Francois v Attorney General and other cases which demonstrate that it is a matter which ought to be referred to Her Majesty in Council for determination.

Therefore, not being satisfied the application is hereby dismissed.

Case Name:

**In the Matter of the Land Acquisition Act, Cap 159, Grenada
In the Matter of The Grand Anse Riviera Limited
In the Matter of the Board of Assessment**

**Grand Anse Riviera Limited
v
The Attorney General of Grenada**

[GDAHVAP2016/0016]

Date: Monday, 29th January 2018

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

Appearances:

Appellant: Mrs. Celia Edwards, QC, with her, Ms. Celene Edwards

Respondent: Mr. Gregory Delzin and Mrs. Michelle Emmanuel-Steele, with them, Mrs. Chevaughn Spencer-Joseph

Issue: Appeal against a decision of a Board of Assessment

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

Result/Order: [Oral delivery]

1. The matter ought to be remitted for an assessment to be conducted by a new Board of Assessment constituted for the purpose, and the Court would direct that in relation to the new Board of Assessment that all witness statements and expert reports placed before the first Board shall be placed before the new Board. For the avoidance of doubt no party shall put before the new Board any new or fresh evidence, but the parties shall be at liberty to cross-examine each other's witnesses on their witness statements and reports.
2. The Court also directs that the Board shall determine using established principles the market value of the leasehold property in accordance with section 19 of the Land Acquisition Act and to state the methodology applied.

3. It shall be left to the determination of the Board whether the market value so determined should take into account the option to renew contained in the instrument of lease.
4. In the event that the Board determines that the option to renew is not to be taken into account, the Board shall also determine the market value of the property where the option to renew has not been so taken into account.
5. The new Board shall not be at liberty to conduct any extraneous fact-finding exercise.
6. It would be open to the Chairman of the Board to direct an assessment of costs by the Registrar utilizing the provisions relative to an assessment contained in the Civil Procedure Rules. In relation to this appeal, the Court further orders that each party shall bear its own costs.

Reason:

The appellant appeals against an assessment made by a Board of Assessment constituted under the Land Acquisition Act of Grenada in respect of the appellant's leasehold interest which was compulsorily acquired by the Crown. The Board assessed the market value of the appellant's leasehold interest which had fifteen years to run under the instrument of lease, and which contained an option to renew for a further 33 years at 2.7 million dollars, having taken into account the option to renew.

The appellant's essential complaint is that the Board's determination is arbitrary, in that they applied arbitrary discounts based on no stated principle, thus ending up with a market value of the appropriated interest of \$12.40 per square foot - a value far below other comparable or not so comparable properties.

The respondent has counter-appealed and also claims that the Board applied the comparative sales analysis method irrationally by failing to compare properties of similar circumstances with the appropriated property and applying a method of assessment contrary to established principles of law. They also complained about the failure of the Board to adhere to the rules of natural justice in relation to research conducted by the Board unknown to the parties.

The appellant seeks to have the Court assess the market value of the leasehold interest, whereas the respondent asks that the matter be remitted to a new Board of Assessment. The Court having considered the ruling of the Board agrees with both sides that the Board erred in applying a method in determining the market value in a manner contrary to the well-established principles. In essence, it appears that the Board sought to marry two different methodologies, but with no discernable or understandable method or basis for the approach taken.

Also, the Court finds that it was improper for the Board to have carried out its own research into the matter, and then failing to allow the parties an opportunity to address any such material such that the Board may have found, although the ruling makes clear that it relied for their ruling partially on its own research. The Court finds itself unable to unravel the muddle into which the Board inevitably fell as many factors have not been analysed or reasoned. This has not enabled the Court to take the position of assessing the market value and accordingly the matter ought to be remitted for an assessment to be conducted by a new Board of Assessment constituted for the purpose. Therefore:

- (1) the Court would direct that in relation to the new Board of Assessment that all witness statements and expert reports placed before the first board shall be placed before the new board. For the avoidance of doubt no party shall put before the new Board any new or fresh evidence but the parties shall be at liberty to cross examine each other's witnesses on their witness statements and reports.
- (2) The Court also directs that the Board shall determine using established principles the market value of the leasehold property in accordance with section 19 of the Land Acquisition Act and to state the methodology applied.
- (3) It shall be left to the determination of the Board whether the market value so determined should take into account the option to renew contained in the instrument of lease.
- (4) In the event that the Board determines that the option to renew is not to be taken into account the

Board shall also determine the Market Value of the property where the option to renew has not been so taken into account.

(5) The new Board shall not be at liberty to conduct any extraneous fact finding exercise. As it relates to costs, the Court is of the view that the provisions of the Act enable the Chairman of the Board pursuant to section 22 to direct to and by whom and in what manner costs shall be paid and in any case may direct such costs to be taxed by the Registrar of the Supreme Court. Accordingly, we consider that the provision is broad enough in scope to encompass the Chairman directing that provisions analogous to an assessment of costs under the Civil Procedure Rules 2000 for the purpose of quantifying the costs to be paid on an assessment would be an appropriate approach in the circumstances.

Having regard to the fact that costs are no longer considered as taxed but where the Court is satisfied that the objective of taxation or an assessment is to quantify costs on the basis of reasonableness. Accordingly, it would be open to the Chairman of the Board to direct an assessment of costs by the Registrar utilizing the provisions relative to an assessment contained in the Civil Procedure Rules. In relation to this appeal, the Court further orders that each party shall bear its own costs.

Case Name:

Joel Pascal

v

The Queen

[GDAHCRAP2017/0007]

Date:

Tuesday, 30th January 2018

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. George Prime
Respondent: Mr. Howard Pinnock, Senior Crown Counsel

Issues: Criminal appeal against conviction and sentence – Indecent assault

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

Result/Order: [Oral delivery]
The appeal against conviction is dismissed and the appeal against sentence is varied to the extent that the sentence of four years and two months is varied to 18 months.

Reason: The appellant has appealed his conviction and sentence of four years and two months for the offence of indecent assault. The appellant was charged for the counts of rape which he was found not guilty and indecent assault for which he was found guilty.

The first of the appellant's contention was that the verdicts are inconsistent and therefore the conviction is unsafe. The appellant's counsel, Mr. George Prime posited that it is irreconcilable that an individual consented to sexual intercourse but did not consent to indecent assault. We have reviewed the law in respect of inconsistent verdicts and when one looks at the transcript it is patent that there was adequate evidence on which the jury could have properly found the appellant guilty of indecent assault. For instance, the virtual complainant was asked, "Tell me did you at one point tell the accused to stop?" the response was, "Yes." She said also, "I was doing the exam he started touching me and rubbing my legs and I pushed him away, I pushed his hands. He turned to me and said don't fight me." So, there is clear evidence which the jury accepted and which would justify the verdict of indecent assault, even if they found the accused not guilty of rape. In the premises, we find no basis in the

submission or ground that the verdict was inconsistent.

With respect to the sentence, the Director of Public Prosecutions, Mr. Pinnock, SC properly considered that the sentence of four years and two months was manifestly excessive as the maximum sentence for the offence was five years, the accused was a man of previous good character before conviction and there were no known factors in aggravation. He in fact was given a sentence which was just short of the maximum which the judge could have imposed. We have been referred by Mr. Pinnock to various sentencing cases which touch and concern such offences. We are of the view that an appropriate sentence would be 18 months' imprisonment. So, for the reasons indicated it is ordered that the appeal against conviction is dismissed and the appeal against sentence is varied to the extent that the sentence of four years and two months is varied to 18 months. The sentence to run from the date of conviction.

Case Name: **The Trustees of the Public Workers Union**
v
[1] A'M Track Construction
[2] Michael Samuel
[GDAHCV2016/0015]

Date: **Tuesday, 30th January 2018**

Coram: **The Hon. Mr. Davidson K. Baptiste, Justice of Appeal**
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:
Appellant: **Mr. James Bristol, with him, Ms. Aloytha Thomas**
Respondent: **Mrs. Celia Edwards, with her, Mr. Deloni Edwards and Celene Edwards. Mr. Michael Samuel present.**

Issue: Civil Appeal – Building contract – Frustration of the contract – Whether the learned judge erred in finding that the building contract was frustrated

Type of Oral Result / Order Delivered: N/A

Result/Order: [Oral delivery]
Judgment is reserved to Friday, 2nd February 2018.

Reason: The Court required time to deliver a judgment.

Case Name: David Joseph
v
Frank Gordon

[GDAHMCVAP2017/0002]

Date: Tuesday, 30th January 2018

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:
Appellant: Mr. Henry Paryag

Respondent: No appearance

Issues: Civil Appeal - Motor vehicle accident - Negligence

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

Result/Order:

[Oral delivery]

The appeal having been filed out of time without the approval of the Court, the notice of appeal filed on the 21st August 2017 is hereby withdrawn and accordingly dismissed.

Reason:

The Court noted that the notice of appeal was filed on 21st August 2017 in relation to a decision of the Magistrates' Court which was made on the 2nd March 2017. Mr. Paryag Counsel for the appellant having sought leave of the Court to withdraw the appeal the appeal having been filed out of time without the approval of the Court the notice of appeal filed on the 21st August 2017 is hereby withdrawn and accordingly dismissed.

Case Name:

**[1] Allan Forrester
[2] Kenrick Forrester
(Personal Representative of the Estate of
Cosmos Forrester, Deceased)
v
Carl Forrester**

[GDAHCVAP2017/0014]

Date:

Tuesday, 30th January 2018

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**

Appearances:

Appellants:

Mr. Ian Sandy, with him, Ms. Claudette Joseph

Respondent:

**Ms. Celia Edwards, with her, Mr. Deloni Edwards and
Celene Edwards**

Issues:

**Interlocutory Appeal – Administration of an Estate –
Whether the appellants as administrators should have**

access to use the Boucans which comprised a part of the Estate of Cosmos Forrester

Type of Oral
Result / Order
Delivered:

Oral Judgment or Decision

Result/Order:

[Oral delivery]

1. The respondent is hereby restrained from in any way preventing the appellants from accessing the Boucan and drying facilities which form part of the Estate of Cosmos Forrester deceased situated at Paraclete St. Andrew until further order for the trial and determination of this matter.
2. The appellants are awarded costs of the appeal and in the court below. Costs of the court below \$1,000.00 and costs in the appeal \$667.00. The costs for the appeal and in the court below shall be borne by the Estate.

Reason:

The respondent claims to be entitled to the land on which the Boucan and draws stand by virtue of a will of the testator. He objected to the appellants using the Boucan and draws. The appellants applied for an injunction to restrain the respondent from interfering with the Boucan and draws. The learned judge refused the injunction on the grounds that the appellants could be adequately compensated by an award of damages. The appellant appealed the judges' decision. On appeal, they submitted that the learned judge erred by adopting too narrow an approach and focused her decision on the sole ground of the adequacy of damages.

The appellants further submitted that the judge should have considered where the greater risk of injustice lies and also the strength of the appellants' case. They relied on the *Jet Pak v BWIA* (1998) 55 WIR 362 case and also the Privy Council decision from the Jamaican Court of Appeal in *National Commercial Bank Jamaica Ltd. v Olint Corp Ltd (Jamaica)* [2009] UKPC 16.

We agree that the judge took a narrow approach to the

application and should have considered other important factors in the case. These factors include:

1. That the appellants are the executors of the Estate of the testator and as such the property on which the Boucan and draws stand vests in them for the administration of the estate. Reference was made to the Real Estate Devolution Act.

2. The appellants have been using the Boucan and draws since the death of testator and up to the time the injunction was granted for the benefit of the estate. They are now restrained from using the Boucan and draws and have been forced to use alternative measures which they say are more expensive and unreliable.

3. The evidence discloses that the respondent will not suffer significant prejudice by the continued use of the Boucan and draws by the appellants pending the outcome of the proceedings. The only alleged prejudice is that the respondent will have to pay the costs of electricity for the operation of the Boucan and draws. In the circumstances, we set aside the exercise of the learned judge's discretion and exercising our own discretion we will allow the appeal and grant an injunction in the following terms:

i. The respondent is hereby restrained from in any way preventing the appellants from accessing the Boucan and drying facilities which form part of the Estate of Cosmos Forrester deceased situated at Paraclete St. Andrew until further order for the trial and determination of this matter.

ii. Appellants are awarded costs of the appeal and in the court below. Costs of the Court below \$1,000.00 and in the appeal \$667.00. The costs for the appeal and in the court below shall be borne by the Estate.

What is needed by this Court is that the Estate should administered without further delay. Until that is done we may have further problems. So, we urge the parties to get on with the administration.

Case Name:

Karen Roden-Layne

v

Grenada Cooperative Bank Ltd.

[GDAHCVAP2017/0012]

Date: Tuesday, January 30th 2018

Coram: The Hon. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Jerry Edwin
Appellant present

Respondent: Ms. Deborah St. Bernard, Lewis and Renwick
Bank representative, Ms. Susan Redhead present

Issues: Application to set aside a decision of a judge -
Disclosure pursuant to Part 34(2) of the CPR 2000

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

Result/Order: [Oral delivery]

1. Pursuant to Part 34(2) of CPR 2000, the respondent is ordered to disclose the documents listed in paragraphs 1-6 of the request for information to the appellants.
2. The information is to be disclosed to the appellants within 28 days.
3. The appellants are entitled to costs in the Court below in the sum of \$350.00 and in the Court of Appeal in the sum of \$250.00.

Reason: This appeal arises out of the order of the learned judge in which the learned judge refused an application for disclosure pursuant to Part 34 CPR 2000. The brief background to the application is that the appellant instituted proceedings against the respondent and Gittens Agency Ltd. in which she alleged that she is entitled to commission on the sale of a property for

which she found a purchaser. The second defendant denied that she is entitled to the commission and acknowledged that it paid the commission to a third party.

The learned judge having considered the application dismissed the application on the basis that disclosure of the information sought will not resolve any issue between the parties. She also found that the applicant's case was not pleaded in contract and also that the respondent was not a trustee of the applicant and for those reasons she dismissed the application.

The learned judge also found that the information which the applicant requested related to the business of a third party who was not a party to the claim. Having reviewed the provisions of part 34, we are of the view that the learned judge in considering the application for disclosure applied the wrong test. Part 34 requires that when an application is made for disclosure for the court to consider whether the information requested to be disclosed is necessary in order to dispose fairly of the claim or to save costs. That is the test which the court must apply, and in so considering whether to make such an order the court must have regard to the likely benefit which will result if the information is given, the likely cost of giving it and whether the financial resources of the party against whom the order is sought are likely to be sufficient to enable that party to comply with the order.

We are of the view that the test which the learned judge applied was incorrect having regard to the provisions of Part 34. The learned judge applied the test where she found that the applicant had to satisfy the Court that the information sought will resolve an issue between the parties and her having found that the information sought in this case will not resolve any issue she dismissed the application. We are of the view that this approach was wrong. The test applied was wrong and the Learned Judge having applied the law incorrectly we found she erred in the exercise of the discretion under Part 34. This court is therefore entitled to exercise that discretion afresh.

We have considered the application and the affidavit in

support, the submissions of both sides and having examined the documents we have found that the documents listed at paragraphs 1-6 of the request are all documents that are necessary to dispose fairly of the claim and also that will save costs in the determination of this matter as those documents relate directly to the finding of the purchaser for the MBH property in this case.

For those reasons, we will exercise the discretion granted to the Court pursuant to CPR Part 34(2) of and we will make the order for disclosure by the respondent to the appellants of the documents listed in paragraphs 1-6 of the request for information. The information to be disclosed to the appellants within 28 days. The appellants are entitled to costs in the Court below in the sum of \$350.00 and in the Court of Appeal in the sum of \$250.00.

Case Name:

[1] Yvonne John (otherwise known as Yvonne John nee Williams and Meryl John)
[2] Hensley Williams

v
Paul John

[GDAHCVAP2017/0009]

Date:

Wednesday, 31st January 2018

Coram:

The Hon. Dame Janice M. Periera, DBE, Chief Justice
The Hon. Mde. Louise Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant:

Mr. Anselm Clouden

Respondent:

Ms. Evette John, with her, Mr. Joshua John

Issues:

Application for an extension of time to file a notice of appeal out of time – Application for leave to appeal

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

Oral Judgment or Decision

Result/Order:

[Oral delivery]

The application for an extension of time to file a notice of appeal out of time is accordingly dismissed with costs to the respondent to be paid by 15th February 2018 in the sum of \$1,500.00.

Reason:

The ruling of the Court is that the Court having heard this application for the grant of an extension of time, and having considered the evidence placed before the Court for the grant of that extension, finds the evidence proffered to be woefully inadequate for enabling the Court to exercise its discretion in extending time to appeal in favour of the applicants.

The application for an extension of time is accordingly dismissed with costs to the respondent to be paid by 15th February 2018 in the sum of \$1,500.00.

Case Name:

Denis Thomas

v

[1] Harry Ranger

[2] Vinnes Ranger

[GDAHCVAP2011/0006]

Date:

Wednesday, 31st January 2018

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Louise Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal**

Appearances:

Appellant:

Ms. Pauline Hannibal

Respondents:	Mr. Henry Paryag for the 1st and 2nd Respondents 1st Respondent present 2nd Respondent deceased
Issues:	Civil Appeal – Adverse possession – Whether the paper title owner should be entitled to possession of the property – Application for substitution of Administratrix
Type of Oral Result / Order Delivered:	Oral Judgment or Decision
Result/Order:	[Oral delivery] It is hereby ordered that Nyoka Ranger is hereby substituted as Administratrix of the Estate of Vinnes Ranger, deceased and is hereby substituted as the 2nd named respondent in this appeal.
Reason:	Counsel for the respondent was not yet ready to proceed with the substantive appeal and so the matter was stood down.
Case Name:	Godwin Bibby v Public Workers Union [GDAHCVAP2015/0011]
Date:	Wednesday, 31st January 2018
Coram:	The Hon. Dame Janice M. Pereira, DBE, Chief Justice The Hon. Mde. Louise Blenman, Justice of Appeal The Hon. Mr. Mario Michel, Justice of Appeal
Appearances:	
Appellant:	In person, no appearance

Respondent:	Mrs. Ria Marshall-Ghust, with her, Ms. Aloytha Thomas
Issues:	Interlocutory Appeal – Whether the Court had the right to make an award of damages under section 40 of the Labour Relations Act (“LRA”) – Whether the appellants claim in the court below is an abuse of process as it is statute barred
Type of Oral Result / Order Delivered:	Adjournment
Result/Order:	[Oral delivery] The hearing of this appeal is adjourned to the next sitting of the Court in the State of Grenada during the week commencing 28th May 2018.
Reason:	Given the illness of the appellant evidenced by the medical certificate produced to the Court dated 31st January 2018 which states that the appellant will be incapacitated until 9th February 2018, the Court is not in a position to proceed with the hearing of the appellant’s appeal, more so as the appellant is a pro se litigant. Accordingly, the hearing of this appeal is adjourned to the next sitting of the Court in the State of Grenada during the week commencing 28th May 2018.
Case Name:	Anderson Dino Clement v Commissioner of Police [GDAMCRAP2017/0006]
Date:	Wednesday, 30th January 2018
Coram:	The Hon. Dame Janice M. Pereira, DBE, Chief Justice

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

Appearances:

Appellant:

Mr. Darshan Rhamdani

Respondent:

Mr. Howard Pinnock, Senior Crown Counsel

Issues:

**Appeal against sentence and conviction – Stealing –
Application for adjournment**

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

Adjournment

Result/Order:

[Oral delivery]

- 1. The adjournment is granted.**
- 2. The hearing of this appeal is adjourned to the sitting of the Court during the week of 28th May 2018.**

Reason:

Counsel for the appellant requested an adjournment as he had only recently been retained in the matter.

Case Name:

**Dwayne Lambert
v
Commissioner of Police
[GDAMCRAP2017/0005]**

Date:

Wednesday, 31st January 2018

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Louise Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal**

Appearances:

Appellant:

No appearance

Respondent:	Mr. Howard Pinnock, Senior Crown Counsel
Issues:	Appeal against conviction – Six offences committed within a similar time period – Stealing – Housebreaking
Type of Oral Result / Order Delivered:	Adjournment
Result/Order:	The Court grants a final adjournment of the appeal to be heard at the sitting of the Court in the State of Grenada during the week commencing 28th May 2018.
Reason:	The appellant was absent and unrepresented.
Case Name:	Michael Dottin v Commissioner of Police [GDAMCRAP2017/0007]
Date:	Wednesday 31st January, 2018
Coram:	The Hon. Dame Janice M. Pereira, DBE, Chief Justice The Hon. Mde. Louise Blenman, Justice of Appeal The Hon. Mr. Mario Michel, Justice of Appeal
Appearances:	
Appellant:	In person
Respondent:	Mr. Howard Pinnock, Senior Crown Counsel
Issues:	Appeal against sentence – Stealing – Application for adjournment

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

Adjournment

**Result /Order
& Reason:**

[Oral delivery]

At the request of the appellant, the hearing of the appeal is adjourned to the next sitting of the Court in the State of Grenada during the week commencing 28th May 2018.

Case Name:

**Denis Thomas
v
[1] Harry Ranger
[2] Nyoka Ranger
(Administratrix of the Estate of Vinnes Ranger)**

[GDAHCVAP2011/0006]

Date:

Wednesday, 31st January 2018

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Louise Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal**

Appearances:

Appellant:

Ms. Pauline Hannibal

Respondents:

**Mr. Henry Paryag
Respondents present**

Issues:

Civil Appeal – Adverse possession – Whether the paper title owner should be entitled to possession of the property

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

Oral Judgment or Decision

Result/Order:

[Oral delivery]

- 1. The appeal against the judgment of His Lordship Mr. Justice Cumberbatch is dismissed.**
- 2. The judgment of the court below is affirmed.**
- 3. The respondents are awarded costs in the sum of 2/3 of \$5,000.00 which was the costs in the court below.**

Reason:

This is an appeal against the judgment of His Lordship Mr. Justice Cumberbatch contained in his judgment dated 21st December 2010. There are a number of grounds of appeal but they can be crystallised into the main grounds that the learned judge erred in his conclusion of facts and secondly that the learned judge erred in the application of law to the circumstances of this matter.

We have listened to and read the submissions of learned counsel for the appellants and we have read the submissions of learned counsel for the respondents, and we are agreed that based on the closely reasoned judgment of His Lordship Mr. Justice Cumberbatch there is no basis on which this Court can properly interfere with the findings of fact to which the learned judge had come to, bearing in mind that he had the advantage of having heard the witness of the claimant and seen him and was able to assess the credibility of the evidence on behalf of the claimant and juxtapose that with having heard the witnesses of the defendant and assessed their credibility.

The learned trial judge clearly rejected the evidence of the claimant and accepted the evidence from the defendant. Also, in coming to his conclusion the learned trial judge properly paid regard to the other aspects of the evidence, including the survey and a statutory declaration, in coming to the conclusion that the claimant had not made out his case against the defendant, but further that the defendants have established adverse possession to the property in question. We see no basis on which we can properly conclude that the learned trial judge made any errors as advocated by counsel Mrs. Hannibal in his application of the law. In fact, to the contrary, this was a very proper and closely reasoned judgment.

Accordingly, we dismiss the appeal against the judgment of His Lordship Mr. Justice Cumberbatch. We affirm the judgment of the Court below and we award the respondents costs in the sum of 2/3 of \$5,000.00, which was the costs in the Court below.

Case Name: **Devon Charles**
v
Commissioner of Police
[GDAMCRAP2016/0008]

Date: **Thursday, 1st February 2018**

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

Appearances:
Appellant: **No appearance**
Respondent: **Mr. Howard Pinnock, Senior Crown Counsel**

Issues: **Appeal against sentence – Damage to property – Causing harm**

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

Result / Order & Reason: **[Oral delivery]**
1. The appellant not having not been served with notice of the hearing, the appeal is traversed to the next sitting of the Court of Appeal in Grenada during the week commencing 28th May 2018.
2. The Registrar is to cause the appellant to be served with the adjourned notice.

Case Name:

Ernest Campbell

v

The Queen

[GDACRAP2017/0005]

Date:

Thursday, 1st February 2018

Coram:

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

Appearances:

Appellant:

Mr. Darshan Rhamdani, with him, Mrs. Sabrita Khan-Rhamdani

Respondent:

Mr. Howard Pinnock, Senior Crown Counsel

Issues:

Appeal against conviction and sentence – Indecent assault – Incest

Type of Oral

Oral Judgment or Decision

Result / Order

Delivered:

Result/Order:

[Oral delivery.

- 1. The appeal is allowed with respect to the appellant's appeal against conviction of incest.**
- 2. The convictions of the appellant for indecent assault on 25th July 2013 and 12th December 2012 are affirmed.**
- 3. The conviction for incest is quashed and the sentence of 11 years with respect of the incest is also quashed.**
- 4. The sentence of three years in respect of the first act of indecent assault of 12th December 2012 is manifestly excessive and the appeal is allowed to the extent that the sentence in respect of this offence is varied to one year in prison.**
- 5. With respect to the conviction for indecent assault for the acts committed on 25th July 2013, the sentence of seven years was manifestly**

excessive. The appeal is allowed with respect to the appeal against sentence for this offence and the sentence of seven years is replaced with a sentence of three years in prison.

6. The appellant is to serve a total of four years' imprisonment, with the sentences of one year and three years to run consecutively from the date of conviction. Time spent on remand to be deducted from the sentence.

Reason:

This is an appeal against the conviction and sentence of the appellant on three counts: one of indecent assault which occurred on 12th December 2012, one count of indecent assault dated 25th July 2013 and also of incest on that same date, 25th July 2013. The appellant appealed against both conviction and sentence putting forth 4 grounds of appeal against conviction and 12 grounds of appeal against sentence.

Counsel for the appellant argued in two of the four grounds of appeal against conviction that the learned trial judge misdirected the jury on the case of the appellant rendering the conviction unsafe, and that the learned trial judge materially misdirected the jury on how they should approach the evidence contained in the statement of the appellant given to the police under caution, which in turn rendered the conviction unsafe. With respect to the grounds of appeal against sentence although there were 12 separate grounds put forward, the appeal in that regard was really that the sentences for the three offences were manifestly excessive.

In terms of the first ground of appeal, the appellant's argument was essentially that the judge prejudiced the appellant's alibi defence when she misrepresented the evidence of the virtual complainant. The virtual complainant had said in her evidence with respect to incident of 25th July 2013 that the incident took place at around 10 am on the morning of 25th July 2013, whereas the trial judge stated that the virtual complainant indicated in evidence that she could not recall the time that the offences of 25th July 2013 took place. This misrepresentation was carried through to the extent that even Counsel for the respondent in the

address to the jury also referred to the virtual complainant stating that she could not recall the time that the offence took place. Having regard to the fact that the virtual complainant's evidence was that the offences took place at 10 o'clock which was within the time that the appellant himself admitted that he was at home as was the virtual complainant, we do not regard this error on the part of the judge as causing any unfairness to the appellant. If anything, it could have prejudiced the case of the prosecution rather than the case of the defence. We accordingly see no merit in this ground of appeal and the ground of appeal is accordingly dismissed.

The appellant's argument in respect to the second ground of appeal is essentially that the judge erred in directing the jury that they should not give the same weight to the explanatory aspect of the record of interview of the accused, having regard to the incriminatory aspect of that interview. The appellant's counsel submitted that this direction by the trial judge was inappropriate in light of the fact that the appellant gave evidence at the trial in which he essentially adopted the record of his interview with the police. The trial judge should instead, in the submission of the appellant, have directed the jury that the contents of the appellants record of interview was part of his evidence and should be so treated by the jury and that they would in treating with that evidence deal with it in the same manner as the sworn evidence which he gave before the court. We accept the appellant's submission on this ground that in so directing the jury to give little weight or not as much weight to the explanatory statements in the accused's record of interview, the judge fundamentally prejudiced the defence's case and rendered his trial unfair.

We considered whether this was an appropriate case for applying the proviso but we could not feel sure that but for this misdirection the jury would inevitably have come to the same conclusion and render the verdict of guilty of incest. We would therefore allow the appellants appeal on this ground with respect to the conviction for incest. Having regard though to the appellant's admission of conduct on that day which amounted to indecent assault, the conviction of the

appellant for indecent assault on 25th July 2013 will stand, as will his conviction for indecent assault on the 12th December 2012 which was unaffected by the misdirection of the judge in relation to the record of interview. The conviction of the appellant with respect to the first count of the indecent assault in December 2012 will also remain. The effect of these determinations by the Court is that the appellant is properly convicted with respect to the act of indecent assault in December of 2012 and the act of indecent assault in July of 2013.

With respect to the appeal against sentence, as indicated, although 12 grounds were stated the appeal amounts essentially to the sentences imposed by the judge being manifestly excessive. We heard the arguments of counsel for the appellants in this regard, and the responses of counsel for the respondent. We are dealing now with the sentences in respect of the two separate acts of indecent assault. Having determined that the conviction for incest is quashed as of course we will quash the sentence of 11 years with respect of the incest. We find that the sentence of three years in respect of the first act of indecent assault which really amounted to the touching of the breasts is manifestly excessive and we would allow the appeal to the extent that the sentence in respect of this offence would be varied to one year in prison.

With respect of the conviction for indecent assault for the acts on 25th July 2013, we also find that the sentence of seven years was manifestly excessive. We accordingly allow the appeal against sentence for this offence and replace it with a sentence of three years in prison. We agree with the trial judge that the two sentences with respect to offences that took place on two different dates ought properly to run consecutively, so that the appellant will serve one year in prison with respect to the conviction for indecent assault in December 2012 and will serve three years in prison for the conviction of 25th July 2013. The appellant to serve a total of four years' imprisonment, with the sentences of one year and three years to run consecutive to each other.

Case Name:	Nichol Trevor Williams v [1] Raphael Sylvester [2] John Ettienne [GDACVAP2015/0018]
Date:	Thursday, 1st February 2018
Coram:	The Hon. Mr. Davidson K. Baptiste, Justice of Appeal The Hon. Mde. Louise Blenman, Justice of Appeal The Hon. Mr. Mario Michel, Justice of Appeal
Appearances:	
Appellant:	Mr. Jerry Edwin
Respondents:	Ms. Dennies Burris
Issues:	Civil Appeal – Assessment of damages - Whether the amount arrived at by the master was correctly arrived at in terms of the evidence before her as to the amount to which the respondent was entitled
Result/Order:	[Oral delivery] 1. The appeal is dismissed. 2. Costs to the respondents agreed in the \$1,250.00.
Type of Oral Result / Order Delivered:	Oral Judgment or Decision
Reason:	This is an appeal against a judgment of the master in an assessment of damages performed by the master on 26th May 2015. The master gave judgment in the assessment prior to which there was a judgment in default against the appellant, the appellant not having put in a defence to the claim.

When the matter came up for assessment of damages before the master, the master gave judgment in favour of the respondents assessing damages in the sum of \$261,624.00. The appellant appealed against the judgment of the master on several grounds of appeal. The grounds of appeal however focused mainly on issues of liability as opposed to quantum which is really all that the master was required to do in the assessment.

Therefore, the thrust of the appellant's appeal really was not such as this Court could properly entertain. The only aspect of the appeal that this Court could properly entertain is whether the amount arrived at by the master was correctly arrived at in terms of the evidence before her as to the amount to which the respondent was entitled.

The master having heard the evidence of the respondents in which there was extensive cross examination and the evidence of the appellant determined that she accepted the evidence as given by the respondents and made the award of damages that she did. The master set out her reasons for decision very clearly in terms of how she arrived at the sum of \$261,824.00. Despite a very spirited oral submission by counsel on behalf of the appellant, we have found no basis upon which we can interfere the determination made by the master of the quantum of damages to which the respondents were entitled.

In the circumstances, this Court can only dismiss the appeal that was brought against the decision of the master and ask the parties whether they can agree on any costs. Appeal dismissed. Costs to the respondents agreed in the sum of \$1,250.00.

Case Name:

- [1] Emmerson International Corporation
- [2] Tomsa Holdings Limited
- [3] Alabaster Associates Limited
- [4] Gardendale Investments Limited
- [5] Mikhail Abyzov

[6] Romos Limited
 [7] Fresko Financial Limited
 v
 [1] Renova Industries Limited
 [2] Wedgewood Management Limited
 [3] Zapanco Limited
 [4] Lamesa Holdings SA
 [5] Viktor Vekselberg
 [6] Integrated Energy Systems Limited
 [7] Odvin Financial Inc.

[BVIHCMAP2017/0024]

Date:	Thursday, 1 st February 2018
Coram:	The Hon. Dame Janice M. Pereira, DBE, Chief Justice The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
Appearances:	
Appellants:	Mr. Robert Weekes QC, with him, Mr. Ajay Ratan and Ms. Colleen Farrington
Respondents:	Mr. Mark Howard, QC, with him, Mr. Simon Burt, QC Ms. Arabella Di Lorio and Mr. Michael Balding
Issues:	Interlocutory appeal - Commercial Appeal - Case management powers – Whether the learned judge should have granted permission for the amendment of statement of case
Type of Oral Result / Order Delivered:	N/A
Result/Order:	[Oral delivery] Decision reserved until Monday, 5 th February 2018.

Case Name:

Kenston Grimes

v

The Queen

[GDAHCRAP2014/0004]

Date:

Friday, 2nd February 2018

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. Anselm Clouden

Respondent:

Mr. Howard Pinnock, Senior Crown Counsel

Issue:

Application for the appeal to be set down for final disposition

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

Directions

Result/Order:

**[Oral delivery]
The matter is consolidated with High Court Criminal Appeal GDAHCRAP2014/0009, Todd Sylvester v the Queen, there being no objection by the appellant.**

Reason:

The matters emanated from the same criminal proceedings at the High Court.

Case Name:

Todd Sylvester

v

The Queen

[GDAHCRAP2014/0009]

Date: Friday, 2nd February 2018

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Anselm Clouden

Respondent: Mr. Howard Pinnock, Senior Crown Counsel

Issue: Application for the appeal to be set down for final disposition

Type of Oral Result / Order Delivered: Directions

Result/Order: [Oral delivery]
The matter is consolidated with High Court Criminal Appeal GDAHCRAP2014/0004, Kenston Grimes v the Queen, there being no objection by the appellant.

Reason: The matters emanated from the same criminal proceedings at the High Court.

Case Name:

**Kenston Grimes
v
The Queen
[GDAHCRAP2014/0004]**

Consolidated with

**Todd Sylvester
v
The Queen**

[GDAHCRAP2014/0009]

Date: Friday, 2nd February 2018

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Anselm Clouden

Respondent: Mr. Howard Pinnock, Senior Crown Counsel

Issues: Application for the appeal to be set down for final disposition – Application for bail

Type of Oral Result / Order Delivered: Directions

Result / Order: [Oral delivery]

1. The hearing of the consolidated appeals is traversed to the next sitting of the Court of Appeal during the week commencing 28th May 2018.
2. The oral application for bail is denied.

Reason: The transcript is not yet fully prepared. However, it is near completion. The parties were denied bail because the matter it is intended that the matter should be heard at the next sitting of the Court of Appeal.

Case Name: The Trustees of the Public Workers' Union
v
[1] A'M Track Construction
[2] Michael Samuel

[GDAHCV2016/0015]

Date: Friday, 2nd February 2018

Coram:	The Hon. Mr. Davidson K. Baptiste, Justice of Appeal The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Mr. James Bristol
Respondents:	Mrs. Celia Edwards, QC, with her, Mr. Deloni Edwards
Issues:	Civil Appeal – Building contract – Frustration of the contract – Whether the learned judge erred in finding that the building contract was frustrated
Type of Oral Result / Order Delivered:	Oral Judgment or Decision
Result/Order:	[Oral delivery] 1. The appeal is allowed. 2. The respondent is to pay the appellant's costs in the court below of \$78,350.00 and 2/3 of that sum on the appeal, that is \$52,234.00. 3. The issue of the counterclaim is remitted to the court below for it to consider and make a determination.
Reason:	The issue in this appeal is whether the learned judge erred in finding that the building contract was frustrated. The short background facts are that the appellant and A'M Track Construction ("A'M Track") contracted to reconstruct the Public Workers Union Building at the fixed cost of \$3,030,500. The prices of material increased during the contract and A'M Track requested adjustment to the contract price which was not forthcoming. However, the Public Workers' Union ("PWU") made certain advances to assist A'M track. The appellant terminated the contract for substantial breach before completion of the works effective 8th April 2009. The termination was not challenged. Subsequent to the termination, the appellant engaged other contractors to finish the works at an increased

cost over the contract price. A'M Track filed a claim alleging that severe increases in material prices during the contract frustrated the contract thereby enabling it to be numerated on a quantum meruit basis. A'M Track claimed that the contract price increased by EC 1.2 million dollars. The appellant filed a defence and counterclaim and attributing A'M Track's difficulty to mismanagement of the works. The judge found that the contract was frustrated and that A'M Track was entitled to be paid on a quantum meruit basis. The appellant appealed contending that the judge erred in holding that the contract was frustrated.

The Law

Where one party alleges that the contract has been frustrated, the proper construction of the contract would be the necessary starting point of the Court's investigation. As Lord Reid said in *Davis Contractors Limited v Fareham Urban District Council* [1956] AC 696:

"Frustration depends in most cases not on adding any implied term but on the true construction of the contractible terms read in light of the nature of the contract and relevant surrounding circumstances when the contract was made."

National Carriers Ltd v Panalpina (Northern) Ltd [1981] AC 675 states that if a contract takes place where there supervenes an event without the fault of either party and for which the contract makes no sufficient provision which so significantly changes the nature not merely the expense or onerousness of the outstanding contractual rights and or obligations from what the parties could reasonably have contemplated at the time of its execution, that it would be unjust to hold them to the literal sense of the stipulations in the circumstances. In such cases the law declares both parties to be discharged from further performance.

In *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, if a contract takes place where there supervenes an event without the fault of either party and for which the contract makes no sufficient provision which so significantly changes the nature not merely the expense or

onerousness of the outstanding contractual rights and or obligations from what the parties could reasonably have contemplated at the time of its execution, that it would be unjust to hold them to the literal sense of the stipulations in the circumstances. In such cases the law declares both parties to be discharged from further performance.

In *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854 at 909 it was said that “there must be some outside event or extraneous change of situation not foreseen or provided for by the parties at the time of contracting, which makes it impossible for the contract to be performed at all or at least renders its performance something radically different from what the parties contemplated when they entered into it.”

The doctrine of frustration operates within narrow confines, frustration is not likely to be invoked to relieve the contracting parties of the normal consequences of imprudent commercial bargains. See *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* (No 2) [1982] AC 724 (HL) at 751–752. The leading case in frustration in a construction contract is *Davis v Fareham* in that case the House of Lords rejected the contention that the contract was frustrated because of inadequacy in the labour supply available to the contractor shortly after the war. Lord Radcliffe had defined the relevant principle this way, “frustration occurs whenever the law recognizes that without the fault of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract, it was not this that I promised to do.”

In his speech, Lord Radcliffe stated that full weight ought to be given to the requirement that the parties must have made their bargain on the particular footing, that is on the footing that a particular thing or state of things would continue to exist, and that frustration was not to be widely invoked as the dissolution of a contract. It is also pertinent to observe that the reasons given by Lord Radcliffe for

finding against the principle of frustration included that, “the cause of the day was not any new state of things which the parties could not reasonably have foreseen.”

In this appeal, the appellants contend that the judge’s analysis of frustration was flawed. The judge reasoned that:

1. In *Davis*, the contract was completed whereas in the present case the contract was terminated after the contractor admitted to the impossibility of completing
2. Constructing the building at a good price had become impossible and the deciding factor is that even the defendant could not complete it at anywhere near the contract price.
3. Could it be said that the contract was wide enough to apply to the new situation where the cost of material had doubled and it is clear from the subsequent event that if the defendant could not complete anywhere near that that clearly it was not wide enough to apply to the new situation?
4. A very significant increase in value had gone into that construction (incomplete as it was) and that showed that the contract was in fact rendered impossible. Nobody in their right mind would say that these parties ever agreed that the building which would be quantified subsequently incomplete as it was could be worth between 4 and 5 million should have been erected by the claimant for only 3 million.
5. Was the hike in prices fundamental enough to transmute the job the contractor had undertaken into a job of a different kind? It became a job to build a 5-million-dollar building for only 3 million dollars and the contract did not contemplate that.
6. In the circumstances what the matter reduces to is that the Public Workers’ Union wanted something which it was impossible for them to have.

In support of the judge’s judgment, learned counsel Mrs. Edwards, QC contended that the increase in steel and cement was beyond anything contemplated. It changed the fundamental nature of what had been contracted for. Mrs. Edwards relied on the case of *Island Construction Corporation v Urban Development* and posited that increase in costs can result in frustration. Mrs. Edwards submitted that the judge was

cognizant of the absence of the fluctuation clause, but on the basis of the finding of impossibility of the promise and the fact that the factors giving rise to impossibility being beyond the scope of contemplation, the absence of a fluctuation clause is irrelevant. Mrs. Edwards submitted that the judge was right in his decision.

Discussion

The question was whether applying Lord Radcliffe's enunciation of the doctrine, the facts justified the invocation of the doctrine of frustration. In both *Davis* and the instant case, both contractors complained of price increases and both claimed frustration after the contracts came to an end, with neither contractor treating the contracts as at an end during its existence by reason of frustration. The foregoing is important because notwithstanding that frustration may be caused by the series of events at the time, the Court must go on and ask the question, "Can the contractor satisfy the Court that at some time before termination, the contract came to an end so that in continuing to carry out the works they were no longer working under the contract?"

As Lord Reid said in *Davis*, "It may be that frustration can occur as a result of gradual change, but if so the first question I would be inclined to ask would be when the frustration occurred and when the contract came to an end."

In *Davis*, the contractor could not say when the contract came to an end. In the present appeal, A'M Track never alleged that the contract came to an end by the severe price increases such that A'M Track in continuing to work was no longer doing so under the contract. Its evidence is that it continued to work until termination by PWU and far from alleging a new contract they asked for increases in the contract price. A'M Track never said that the contract came to an end at any time other than when it was terminated by PWU.

Is this defined to be fatal?

Frustration discharges the contract immediately and automatically so that the parties in continuing the work must necessarily be doing so under new arrangements. The judge thereby erred and had he

asked the question would have come to the same conclusion as in *Davis* that the contract was not frustrated.

A more onerous obligation does not by itself constitute a ground for discharging the contract. The obligation must be completely different such that it would be unjust to uphold the bargain. The law is that it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play, there must also be such a change in the significance of an obligation that the same undertaking would if performed be a different thing from that contracted for. The contract here was for certain works at a fixed price with no fluctuation clause to allow A'M Track to obtain an increase in the contract price in light of increase in material prices. A'M Track could have requested that fluctuation clause be inserted but did not. A'M Track therefore undertook the risk of material price increases. In a contract of this kind, the contractor undertakes to do the work for a definite sum and takes the risk of the cost being greater or lesser than expected - per Lord Reid in *Davis*. Having accepted the risk of an increase, the job could only prove to be more onerous but never that of a different kind. Common sense dictates that prices do fluctuate. The Court should give full weight to this as frustration is not to be lightly invoked.

A'M Track could have insisted on the fluctuation clause as price increases were reasonably foreseeable. This assumption of risk is fatal to a claim that contract was frustrated by price increase. The judge failed to consider the effects of a lack of a fluctuation clause and the subsequent assumption of risk of price increases by A'M Track. Had he done so on the facts, he would in our judgment have found that the contract was not frustrated. The Court notes Mrs. Edwards' reliance on the case of *Island Contractors*, a decision of the High Court of St. Lucia 1998. In that case the judge stated that "a mere increase in expenditure would not ordinarily suffice to frustrate a contract." The authorities indicate however that "a severe increase in costs may excuse a party from performing its contractual obligation." Mr. Bristol for the appellants observed that the learned judge in that

case did not refer to any authority in support. In my judgment, *Island Construction* must yield to the higher authority of *Davis*.

The judge failed to consider the uncontroverted evidence from A'M Track that it underbid on the contract and therefore the severity of increase was caused by its default. The judge accepted the evidence of the 1.2 million dollars increase in price. Mr. Bristol pointed out that that was not the true increase as the judge discounted that sum to take account of inefficiency and the lack of use of duty free concessions. The judge discounted the increase to \$780,000.00. Mr. Bristol argued that it is not known what percentage of that sum amounted to underbidding. Mr. Bristol submitted quite properly that these matters go to the issue of fault and once the judge found the fault then frustration is out of the door. In the circumstances the judge erred in law in finding that the contract was not frustrated. The appeal accordingly on that issue is upheld.

On the issue of costs in the court below, the judge awarded costs of \$78,350.00 to the respondents. This award is set aside. On the issue of the counterclaim, it is clear from a perusal of the judgment that the judge did not really treat with the counterclaim, and this Court is not properly equipped to make any determination on that matter. In the circumstances, it would be proper and fair that the issue of the counterclaim be remitted to the Court below to consider that matter.

Case Name:

Prickly Bay Waterside Limited

v

**British American Insurance Company Limited
(Under Judicial Management)**

[GDAHCVAP2015/0026]

Date:

Friday, 2nd February 2018

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Stephen Auld, QC, with him, Mr. Ian Sandy and Ms. Claudette Joseph

Respondent: Mr. Sydney A. Bennett, QC, with him, Mr. James Bristol

Issues: Civil Appeal – Trust – Whether a trust relationship had been formed – Annuity policy

Type of Oral Result / Order Delivered: N/A

Result/Order: The decision is reserved in this matter.

Case Name:

[1] Emmerson International Corporation
[2] Tomsa Holdings Limited
[3] Alabaster Associates Limited
[4] Gardendale Investments Limited
[5] Mikhail Abyzov
[6] Romos Limited
[7] Fresko Financial Limited

v

[1] Renova Industries Limited
[2] Wedgewood Management Limited
[3] Zapanco Limited
[4] Lamesa Holdings SA
[5] Viktor Vekselberg
[6] Integrated Energy Systems Limited
[7] Odvin Financial Inc.

[BVIHCMAP2017/0024]

Date: Monday, February 5th 2018

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

Appearances:

Appellants: Ms. Yurana Phillip, holding papers for Mr. Robert Weekes, QC

Respondents: Ms. Aloytha Thomas, holding papers for Mark Howard, QC

Issues: Interlocutory appeal – Commercial Appeal – Case management powers – Whether the learned judge should have granted permission for the amendment of statement of case

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

Result/Order: [Oral delivery]

1. The appeal is dismissed.
2. Costs to the Renova parties, such costs to be assessed by the lower court, if not agreed within 28 days of the date of this order.

Reason: This is an appeal against the decision of the learned judge made on 27th November 2017 on the respondents’ application under CPR 20.1(2) for permission to amend their statement of case. The judge’s order has not been settled to date and its terms, as we have found them, are gleaned from the transcript of the hearing and are set out below.

We will refer in this judgment to the appellants as the Abyzov parties and the respondents as the Renova parties. These definitions are for convenience only and are not meant to convey in any way findings as to the persons and entities making up the two groups from time to time.

In 2006 when the parties started negotiations, the Renova parties were the owners of Integrated Energy Systems, an entity that owned substantial assets in the energy industry in Russia. The negotiations were geared towards forming a joint venture between the Renova parties and the Abyzov parties regarding the existing and future assets of Integrated Energy Systems (“IES”). The terms of proposed joint venture were set out in a document called the Principal Terms. The Principal Terms contemplated that the parties would enter into a formal joint venture agreement and a shareholders’ agreement in respect of the holding company that would own the assets of the joint venture. The parties’ respective contributions would then be converted into equity in the holding company.

The Principal Terms contemplated that the Abyzov parties would make what was described as a balancing payment to the Renova parties and would become equity partners in the joint venture. The Abyzov parties contributed approximately \$356 million in five payments. Each payment was made pursuant to a signed loan agreement.

The negotiations leading to the formation of the joint venture failed and the joint venture was not formed. The issue then became on what terms should the investment by the Abyzov parties, which by then grown to approximately \$750 million with interest, be recovered from the failed venture.

The Renova parties contended that the loan agreements evidencing the cash paid into the venture by the Abyzov parties were legally binding on the parties and created a debtor/creditor relationship. As a result, the Abyzov parties had a contractual right to be repaid by the companies named in the loan agreements as borrowers.

The Abyzov parties contended that the cash payments that they made into the venture were equity contributions and were to be treated as such. The loan agreements are not and were never intended to be legally binding.

The difference between the positions taken by the parties could have very significant consequences. The Abyzov parties have submitted, and it does not appear to be seriously disputed, that the creditor companies in the loan agreements do not have any, or any significant assets and therefore any judgment obtained against them may be worthless. This would leave the Abyzov parties with significant judgment debts of more than \$700 million that may not be enforceable against the creditor companies in the loan agreements. On the other hand, if the cash payments are treated as equity contributions they will be able to pursue claims in equity against the Renova parties.

In December 2013, four of the Renova parties commenced proceedings in the British Virgin Islands against four of the Abyzov parties seeking declaratory orders in respect of the disposition of the interests of the Abyzov parties' in the failed joint venture. The pleadings in the claim are voluminous and complicated and have gone through several amendments by the parties. For the purposes of this decision, we will only deal with the pleadings that are necessary to dispose of the issues in the appeal.

The Renova parties pleaded in their June 2014 reply and defence to counterclaim that the payments by the Renova parties were "...intended and understood as equity contributions ...were documented as loans" because further that "Mr. Abyzov did not want to be seen to have an equity participation in IES at that time...".

In paragraph 60 of their 2015 amended defence and counterclaim, the Abyzov parties accepted the Renova parties pleaded position. Paragraph 60 reads – "The parties agree with the Claimant's contention, pleaded at paragraph 3(3) of the reply and defence to counterclaim that there was never any intention that these loans were to be treated as repayable in terms of

principal or with interest. The loans were not, therefore, intended by the parties to be legally binding as loans.”

As the pleadings stood at this point, it was common ground that the Abyzov parties’ cash payments were being treated by the parties as equity contributions, the parties did not intend that the contributions would be repaid, but would be converted into equity in the holding company for the joint venture, and the loan agreements were not intended to be legally binding.

On 19th December 2016, the Renova parties filed a response to a request for further information by the Abyzov parties. Response 13 states –

“The loan agreements, amendments to loan agreements and deeds of pledge... were intended to be (and were) legally binding and effective but it was generally understood by the Renova Group and the MA Group (the Abyzov parties) that the terms of those documents would not in practice be enforced ...” (“Response 13”)

This statement is inconsistent with the Renova parties’ prior pleading that it was intended by the parties that the loan agreements were not legally binding.

On 7th February 2017, the Abyzov parties applied to strike out Response 13 on the ground that it was inconsistent with the rest of the Renova parties’ pleaded case. The application came on for hearing on 27th February 2017. The judge acknowledged that the Renova parties’ pleadings were not clear. He also observed that the pleadings on both sides had seen various iterations as the matter progressed. He did not grant the application to strike out Response 13. Instead, he directed the Renova parties to file an amended statement of case so as to make clear the case that they were seeking to run at trial. The actual wording of his order appears at page 154 of the transcript of the hearing (page 1647 of the record of appeal):

“In order for clarity to be imposed so that when this matter of entry comes to the trial the judge is not left to tease out obscure meanings from ancillary documents such as answers to RFIs, what I shall

direct is that the Vekelsberg Parties shall within a certain time file an amended pleading and the Abyzov Parties shall file a response to that pleading and that those pleadings shall supersede the question which is set in Request 15 and Response 13. So, that the matter here is a laid to bed on the face of the pleadings once and for all.”

Further, on page 155 of the transcript (page 1648 of the record of appeal):

“I want to restrict this particular permission or direction rather, direction for amending, to deal with the question of the binding nature or otherwise of the purported (loan). It is not carte blanche to open everything up and read the areas.”

We are satisfied, having heard the submissions of counsel and read the transcript of the hearing on 27th February 2017, that the learned judge did not grant the Abyzov parties’ application to strike out Response 13 and that he gave the Renova parties permission to amend their statements of case to plead that the loan agreements were legally enforceable. This is reflected in the order that was eventually settled by the judge. Paragraph 16 of the sealed order reads:

“By 4 pm on 27th March 2017 the Renova/Vekselberg parties shall file and serve a re-amended reply and defence to counterclaim in which they amend, if so advised, paragraphs 5(5), 30(2) and 50(2) thereof. All such amendments shall be limited to the issue of whether the loan agreements were legally enforceable. Such amended pleading shall supersede Response 13 of the further information dated 19th December 2016. The Renova/Vekelsberg parties shall make necessary amendments to other paragraphs of the Renova/Vekelsberg parties’ statements of case to make those paragraphs consistent with the amended paragraphs 5(5), 30(2) and 50(2) of the re-amended reply and defence to counterclaim.”

The Abyzov parties were given leave to amend their defence and counterclaim making such amendments as are consequential to the amended pleadings to be filed by the Renova parties.

The Renova parties filed their re-amended reply and defence to counterclaim on 28th March 2017 highlighting in green the changes that they say were permitted by the judge's order made on 27th February 2017 ("the February Order").

There being no appeal against the February Order, the issues relating to the Renova parties' right to amend their statements of case to allege that the loan agreements were legally binding was settled.

In June 2017, the Renova parties filed an application seeking leave to make further amendments to their re-amended reply and defence to counterclaim. The application was accompanied by a draft re-amended reply and defence to counterclaim showing the amendments granted by the February Order in green (as they appeared in the re-amended reply and defence to counterclaim filed in March), and further proposed amendments to the document shown in violet. The application was heard on 27th and 28th November 2017. The judge allowed the green amendments in the re-amended reply and defence to counterclaim finding that these amendments did not stray beyond what the February Order allowed. He disallowed the amendments shown in violet because the Renova parties stated position was that their case had not changed and it was therefore unnecessary for them to further plead a case that was already pleaded.

The Abyzov parties were granted leave to appeal against the judge's decision. Lead counsel for the Abyzov parties, Mr. Robert Weekes, summarized the appeal as being focused on the judge's decision to allow the green amendments. Further, that the effect of the amendments was to allow the Renova parties to withdraw their pleading that the Abyzov parties' cash contributions were intended as equity contributions with no intention to repay, and to now assert that the contributions are repayable under the loan agreements which are binding on the parties.

The issues that arise from the grounds of appeal are:

1. The scope of the February Order (ground 3).
2. The judge's power to withdraw an admission on the pleadings in the absence of an application

supported by good reasons (ground 1).

3. Whether the green amendments amount to a change of case (ground 2)

Issue 1 - Scope of the February Order

The scope of the February Order has been dealt with in detail earlier in the judgment under the heading “Background”. What we said then and repeat now in summary is that the judge gave the Renova parties permission to amend their statement of case to plead that the loan agreements are legally binding. That interpretation of the judge’s order was confirmed when he heard the application to amend in November. In delivering his decision on the amendment application, the judge found that the amendments in green conformed to the permission granted by the February Order. He also confirmed to Mr. Mark Howard, QC, lead counsel for the Renova parties, that the amendments in green were approved. To put the matter beyond doubt the judge concluded on page 38 of the transcript:

“What I am doing, in essence, is treating the pleading that was served in response to the February Order as water under the bridge. What I am not allowing is further amendments to that document except for those matters which I’ve identified which are factual updates and corrections. I am not allowing what could be construed as a change in the case.”

We think that the judge was correct to treat the re-amended reply and defence to counterclaim as “water under the bridge”. The February Order permitted the amendment of that document to plead that the loan agreements are legally binding. The Abyzov parties did not appeal against this order. Once the green amendments do not go outside the scope of this permission, and there is no suggestion that they do, then it is, as the judge said in November, water under the bridge, and that issue is closed. We do not agree with the submissions of Mr. Weekes that it was open to this Court to challenge the judge’s approval of the green amendments at the November hearing. Mr. Weekes’ challenge to the green amendments could only have been made by appealing against the February Order or satisfying this Court that the green

amendments are outside the scope of that Order. The time for appealing has long passed and there is no allegation or submission that the green amendments are outside the scope of the permission granted in the February Order. The challenge is to the making of the February Order.

In the circumstances, it is our view that the scope of the February Order precludes the Abyzov parties from challenging the permission given to the Renova parties to amend their statements of case to allege that the loan agreements are legally binding. This can only be done by an appeal against the February Order.

In any event, the learned trial was exercising a case management discretion and an appellate court is very reluctant to interfere with the exercise of that jurisdiction. Here, the learned trial judge was intimately involved with the pleaded cases and the nuances in respect of each parties pleaded case and would be best placed in making decisions managing the case. This finding by the Court is sufficient to dispose of the appeal.

In relation to issues two and three, these are in substance challenges to the February Order and as stated above there was no appeal against the February order. In the circumstances, the appeal is dismissed with costs to the Renova parties, such costs to be assessed by the lower court, if not agreed within 28 days of the date of this order.