

COURT OF APPEAL SITTING
TERRITORY OF THE VIRGIN ISLANDS
10th – 14th July 2017

APPLICATIONS & APPEALS

Case Name: [1] Sylvia Maduro-Dale
[2] Lucia Chalwell
v
The Registrar of Lands
[BVIHCVAP2010/0022]

Date: Monday, 10th July 2017

Coram: The Hon. Dame Janice Pereira, DBE, Chief Justice
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

Appearances:
Appellant: Mrs. Patricia Archibald-Bowers
Respondent: Mrs. Jo-Ann Williams-Roberts, Solicitor General

Issues: Application to remove solicitors from record – CPR 63.6 –
Two previous hearings – Counsel for appellant
unsuccessful each time effort made to contact the appellant
in order to receive instructions – All efforts exhausted to
contact the Appellant – Ownership of land – Prescriptive
title

Type of Oral
Result/Order
Delivered: Directions

Result: It is hereby ordered:
1. The solicitors for the appellants shall serve the notice of
application for removal from the record by an
advertisement in two consecutive issues of a newspaper
of general circulation in St. Thomas, USVI, being the last

- known place of residence of the appellants.
2. Thereafter the appellant solicitors shall file an affidavit in proof of the substituted service hereby directed.
 3. The application to be removed from the record as solicitors for the appellants is adjourned to the next sitting of the Court of Appeal in the Virgin Islands during the week commencing on 20th November 2017.

Reason:

The Court took notice of the submissions made by counsel for the appellant that she had made contact with the niece of the second appellant who was not on record and that no contact had been made with the first appellant.

Having regard to the fact that no part of the order made by the court in the matter on 21 November 2017 had been complied with so that substituted service had not been effected in a newspaper of general circulation in St. Thomas, USVI, which would satisfy the requirements under the Civil Procedure Rules, the Court directed that the order be executed accordingly.

Case Name:

Millicom (Tanzania) N.V.

v

[1] Golden Globe International Services Limited

[2] Yusuf Manji

[BVIHCMAP2016/0036]

Date:

Monday, 10th July 2017

Coram:

**The Hon. Dame Janice Pereira, DBE, Chief Justice
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. David Wolfson, QC, with him, Mr. Simon Hall

**Respondents: Ms. Tameka Davis (for the first respondent)
No appearance for the second respondent**

Issues:	Leave to appeal to Her Majesty in Council – Application for continuation of order of this Court dated 17th May 2017 pending determination of Millicom NV's appeal to Her Majesty in Council
Type of Oral Result/Order Delivered:	Oral Judgment or Decision
Result:	1. The Appellant is granted conditional leave to appeal to Her Majesty in Council in respect of the Order made by the Court of Appeal on 10 May 2017 on condition that: i. The Appellant shall within 14 days lodge with the Court the US dollar equivalent to GBP500 as security for the prosecution of its appeal to Her Majesty in Council and the payment of all such costs as may become payable by the Appellant in the event of it not obtaining an order granting final leave to appeal or the appeal being dismissed for non-prosecution or of the Judicial Committee ordering the Appellant to pay the costs of the appeal (as the case may be); ii. within 90 days of the date hereof, the applicant takes the necessary steps for the purposes of procuring the preparation of the record of appeal and the certification of the record by the Registrar of the Court of Appeal; and iii. the record shall be prepared in accordance with rules 18 to 20 of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 and its Practice Direction 4.2.1 to 4.3.2 and Practice Direction 5; and shall be transmitted to the registrar of the Judicial Committee of the Privy Council without delay where final permission to appeal has been granted. 2. The Applicant shall apply to the Court for final permission to appeal to Her Majesty in Council supported by the certificate of the Registrar that the security for cost ordered herein has been given within the time prescribed by this Order to the satisfaction of the Registrar;

3. The Appellant shall file its Notice of Appeal to Her Majesty in Council within 14 days of this Court granting final leave to appeal to Her Majesty in Council and pursue its appeal to Her Majesty in Council expeditiously.
 4. The Worldwide Freezing Order continued by paragraph 1 of the Order of this Court dated 25 May 2017 shall continue in full force and effect until the determination of the Appellant's appeal to Her Majesty in Council or further order of the Court.
 5. The Anti-Suit Injunction continued by paragraph 2 of the Order of this Court dated 25 May 2017 shall continue in full force and effect until the determination of the Appellant's appeal to Her Majesty in Council or further order of the Court.
- Costs shall be costs in the appeal to Her Majesty in Council

Case Name:

[1] John Shrimpton

[2] Pitcairn Limited

v

Dragon Capital Group Limited

[BVIHCMAP2016/0031]

Date:

Monday, 10th July, 2017

Coram:

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

The Hon. Mde. Gertel Thom, Justice of Appeal

The Hon. Mr. Eamon Courtenay, Justice of Appeal [Ag.]

Appearances:

Appellants: Ms. Claire Goldstein

Respondent: Mr. Grant Carroll

Issue:

Application for leave to appeal to Her Majesty in Council

**Type of Oral
Result/Order**

Oral Judgment or Decision

Delivered:

Result/Order:

It is hereby ordered:

1. The appellants are:

a) granted leave to appeal to the Privy Council against the Judgment whereby the Appellants' appeal against the Order of the Honourable Justice Sir Bernard Eder was dismissed with costs;

b) Shall within 90 days of the date of this Order enter into good and sufficient security to the satisfaction of the Court by paying into the Court the sum of £500 sterling (or its US dollar equivalent) for the due prosecution of the appeal and the payment of all such costs as may become payable in the event that it does not obtain an order granting it final leave to appeal or of the appeal being dismissed for want of prosecution or of the Privy Council ordering it to pay the cost of the appeal, as the case maybe; and

c) Shall apply for final leave to appeal to the Privy Council supported by the certificate of the Registrar that the condition of payment of the security for costs and prosecution of the appeal referred to at paragraph 1.b above has been given within the time prescribed for the satisfaction of the Registrar.

2. The Record of Appeal shall be prepared in accordance with rule 20 of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 and practice directions 4.2.1-4.3.2 the same to be transmitted to the Registrar of the Privy Council without delay where final permission to appeal has been granted.

3. The costs of and occasioned by the Notice of Motion for leave to appeal shall be costs in the appeal to the Privy Council.

Case Name:

**Moises Ovalle Almonte
v
The Commissioner of Police**

[BVIMCRAP2016/0005]

Date: Monday, 10th July, 2017

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

Appearances:

Appellant: Mr. Patrick Thompson

Respondent: Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel, Office of the Director of Public Prosecutions

Issue: Appeal against conviction and sentence – Whether appellant’s convictions, though founded on guilty pleas, were rendered unfair, unjust and unsafe by fact that appellant pleaded guilty to charges under duress – Whether charge of possession of prohibited weapon was not sustainable as weapon confiscated by the police was not of a caliber that could have it deemed as a prohibited weapon

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

Result/Order & Reason: It is hereby ordered that, a Notice of Abandonment having been filed on 7th July 2017, the appeal against conviction and sentence is dismissed.

Case Name: Olive Group Capital Limited
v
Gavin Mark Mayhew

[BVIHCMAP2016/0002]

Date: Monday, 10th July 2017

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

Appearances:

Appellant: Mr. Mark Rowlands

Respondent: Ms. Tameka Davis

Issues: Application for final leave to appeal to Her Majesty in Council – Costs – Whether respondent entitled to pre-litigation costs awarded in court below – Recoverability of lawyers' fees – Test of necessity in Michael Wilson & Partners Limited v Temujin International Limited and Others (BVIHCV2006/0307 (delivered 25th August 2008, unreported)) – Test in Grand Pacific Holdings Limited v Pacific China Holdings Limited (BVIHCV2009/0389 (delivered 3rd December 2010, unreported)) – Whether respondent entitled to costs of engaging foreign corporate lawyer – Whether burden of proof applied correctly or at all since doubts that fees claimed were reasonably incurred pursuant to rule 65.2 of the Civil Procedure Rules 2000 not resolved in appellant company's favour in circumstances where no other evidence or records were adduced to support claimed costs – Whether more costs awarded in relation to fees claimed than had actually been claimed

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

Oral Judgment or Decision

Result/Order:

It is hereby ordered that:

1. Final leave to appeal to Her Majesty in Council is granted.
2. The costs of this application are costs in the appeal to Her Majesty in Council.

Case Name:

Delta Petroleum (Caribbean) Limited

V
British Virgin Islands Electricity Corporation

[BVIHCVAP2016/0003]

Date: Monday, 10th July 2017

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

Appearances:

Appellant: Ms. Elizabeth Ryan

Respondent: Mr. Paul Dennis, QC, with him, Ms. Nadine Whyte

Issues: Application for conditional leave to appeal to Her Majesty in Council – Application for judgment of Court of Appeal delivered 8th May 2017 to be stayed pending hearing and determination of appeal to Her Majesty in Council – Whether learned judge erred in finding that the appellant had breached terms of contract which it had entered into with respondent on 30th August 2014 – Whether learned judge erred in awarding sum of \$794,000.00 to respondent as liquidated damages pursuant to clause 3(7) of contract in respect of appellant's failure to maintain level of fuel in its storage tanks for supply to respondent at stipulated level in the contract – Awarding of costs on interlocutory injunction application – Whether learned judge erred in awarding prescribed costs to respondent on basis of unvalued claim pursuant to rule 65.5 of Civil Procedure Rules 2000 – Whether judge erred in the awarding prescribed costs to respondent on sum of \$794,000.00 which had been awarded as liquidated damages

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

Oral Judgment or Decision

Result/Order:

It is hereby ordered:

1. The appellant is granted conditional leave to appeal to Her Majesty in Council from the decision of the Court of Appeal delivered on the 8th May 2017 in the matter of Delta

Petroleum (Caribbean) Limited v British Virgin Islands Electricity Corporation upon the following conditions:

a) that the appellant within 90 days from the date of this order enter into good and sufficient security in the sum of £500.00 for due prosecution of the appeal and the payment of all such costs that may become payable by it in the event of not obtaining an order granting final leave to appeal or of the appeal being dismissed for want of prosecution or of the judicial committee ordering it to pay the costs of the appeal; and

b) the appellant within 3 months from the date of this order shall take necessary steps for the purpose of procuring the preparation of the record and the dispatch thereof to England

2. that the execution judgment of the court of appeal dated 8th May 2017 be stayed as to the damages and the costs therein ordered pending the hearing and determination of final leave to appeal and should such leave be granted such execution shall be further stayed pending the disposal or determination of such appeal.

3. The costs of and incidental to this application shall be costs in the appeal to Her Majesty in Council.

Case Name:

**Thomas Martin Evans
v
Aman Resorts Group Limited**

[BVIHCMAP2017/0011]

Date:

Monday, 10th July 2017

Coram:

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

Appearances:

Applicant: No appearance

Respondent: Ms. Alana-J Joseph

Issues: Application for leave to appeal – Whether learned judge erred in exercise of his discretion in failing to find that applicant is creditor of respondent in the sum of USD\$3,360,000.00 pursuant to an Assumption and Assignment Agreement dated 30th January 2014 – Whether respondent was entitled to dispute applicant's debt on substantial ground in: dismissing application by applicant to be substituted as applicant in place of Eric Hollings; in refusing leave to appeal to applicant when applicant believes he has real prospect of success on appeal

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

Result/Order: It is hereby ordered that the application for leave to appeal is struck out for want of prosecution.

Reason:

Case Name: BCA International Limited
v
Aman Resorts Group Limited

[BVIHCMAP2017/0012]

Date: Monday, 10th July 2017

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

Appearances:
Appellant: No appearance
Respondent: Ms. Alana-J Joseph

Issues:	Application for leave to appeal – Appeal against decision contained in order of Mr. Justice Kaye in which he dismissed the applicant’s application to be substituted as applicant-creditor in place of Eric Hollings and declined leave to appeal – Whether learned judge erred in exercise of his discretion in: failing to find that applicant is creditor of respondent pursuant to a Consultancy Agreement; finding that respondent was entitled to dispute applicant’s debt on substantial grounds; dismissing application by applicant to be substituted as applicant in place of Eric Hollings; refusing applicant leave to appeal when applicant believes he has real prospect of success on appeal
Type of Oral Result/Order Delivered:	Oral Judgment or Decision
Result/Order & Reason:	It is hereby ordered that the applicant being absent and counsel for the appellant likewise being absent and no reasons being advanced for their absence, the application for leave to appeal is struck out for want of prosecution.

STATUS HEARING

Case Name:	Jevone Demming v The Queen [BVIHCRAP2015/0001]
	 Sherman Williams v The Queen [BVIHCRAP2015/0007]

Date: Monday, 10th July 2017

Before: The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant: BVIHCRAP2015/0001:
Mr. Patrick Thompson (representing Jevone Demming who was also present)
BVIHCRAP2015/0007:
Mr. Sherman Williams in person

Respondent: Mrs. Tiffany Scatliffe-Esprit, Principal Crown Counsel, with her, Ms. Reynela Rawlins, Crown Counsel

Issues: Status of matter – Appeal against sentence (BVIHCRAP2015/0001) – Appeal against conviction and sentence (BVIHCRAP2015/0007) – Attempted murder – Unlawful possession of firearm

Type of Oral Result/Order Delivered: Directions

Result/Order: It is hereby ordered:

1. The appellants shall file and serve skeleton arguments in support of their appeals on or before 31st August 2017.
2. The respondent shall file and serve skeleton arguments in response within 28 days of being served with the appellants' skeleton arguments or within 28 days of the date by which the appellants' skeleton arguments were to have been filed and served.
3. The appellants shall be at liberty to file and serve skeleton arguments in reply within 14 days of receipt of the respondent's skeleton arguments.
4. BVI appeals BVIHCRAP2015/0001 and BVIHCRAP2015/0007 shall be heard together at the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 20th November 2017.

Reason: Sherman Williams informed the Court that he did not have a lawyer, but he was told by the Social Development Department that a lawyer would be assigned to him by the next sitting of the Court.

Case Name:

Doyle Guishard

v

The Queen

[BVIHCRAP2015/0004]

Denzil Wheatley

v

The Queen

[BVIHCRAP2015/0005]

Samuel Harris

v

The Queen

[BVIHCRAP2015/0006]

Date: **Monday, 10th July 2017**

Coram: **The Hon. Mr. Mario Michel, Justice of Appeal**

Appearances:

Appellant: **Mr. Dave Marshall for Samuel Harris and Doyle Guishard (Mr. Harris and Mr. Guishard were also present)
Mr. Michael Maduro for Denzil Wheatley (Mr. Wheatley was also present)**

Respondent: **Mrs. Tiffany Scatliffe-Esprit, Principal Crown Counsel, with her, Ms. Reynela Rawlins, Crown Counsel**

Issues: **Status of matter – Appeal against conviction – Aggravated burglary**

Type of Oral **Directions**

**Result/Order
Delivered:**

Result/Order:

It is hereby ordered:

- 1. The appellants shall file and serve skeleton arguments in support of their appeals on or before 15th September 2017.**
- 2. The respondent shall file and serve skeleton arguments in response within 28 days of the receipt of the skeleton arguments of the appellants or within 28 days of the date limited for the filing and service of the appellants' skeleton arguments.**
- 3. Liberty to the appellants to file and serve skeleton arguments in reply within 7 days of receipt of the respondent's skeleton arguments.**
- 4. The appeal shall be set down for hearing at the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 20th November 2017.**

Reason:

The appellants had retained counsel and were ready to proceed.

Case Name:

Raymond Harrison

v

The Queen

[BVIHCRAP2014/0003]

Date:

Monday, 10th July 2017

Before:

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant: Mr. Patrick Thompson (Mr. Harrison is present)

Respondent: Mrs. Tiffany Scatliffe Esprit, Principal Crown Counsel, holding papers for Mr. O'Neil Simpson, Senior Crown Counsel

Issues: Status of matter – Appeal against conviction – Rape – Unlawful sexual intercourse with girl under the age of 16 – Possession of child pornography

Type of Oral Result/Order Delivered: Directions

Result/Order: It is hereby ordered:

1. The appellant shall file and serve skeleton arguments in support of his appeal on or before August 31st 2017.
2. The respondent shall file and serve skeleton arguments in response within 28 days of being served with the appellant's skeleton or within 28 days of the date by which the appellant's skeleton arguments were to have been filed and served.
3. The appellant shall be at liberty to file and serve skeleton arguments in reply within 14 days of receipt of the respondent's skeleton arguments.
4. Hearing of this appeal shall be fixed for the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 20th November 2017.

Reason:

Case Name: Stephen Fossi
v
The Queen
[BVIHCRAP2016/0003]

The Queen
v
Stephen Fossi
[BVIHCRAP2016/0002]

Date: Monday, 10th July 2017

Before: The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant: Mr. Patrick Thompson (Mr. Fossi was absent)

Respondent: Mrs. Tiffany Scatliffe Esprit, Principal Crown Counsel, holding papers for Ms. Kim Hollis, QC and Mr. O'Neil Simpson, Senior Crown Counsel

Issues:

BVIHCRAP2016/0003

Status of matter – Appeal against conviction – Manslaughter – Whether learned trial judge erred in failing to accede to appellant's submission of no case to answer – Whether learned trial judge's directions to jurors on how to deal with expert evidence were inadequate

BVIHCRAP2016/0002

Status of matter – Appeal against sentence – Manslaughter – Noncustodial sentence imposed on appellant – Fine of \$90,000.00 to be paid, in default 2 years imprisonment – Whether application for leave to appeal may be heard ex-parte – Whether Civil Procedure Rules 2000 apply to applications for leave to appeal from criminal jurisdiction – Application to set aside the order made on 27th May 2016 by His Lordship Mario Michel, Justice of Appeal granting appellant leave to appeal against sentence imposed on respondent

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

Directions

Result/Order:

It is hereby ordered:

- 1. The Registrar of the High Court is directed to cause the transcript of the proceedings of the trial of this matter in the High Court to be prepared within 1 month of the date of this Order and to notify Counsel for the parties accordingly.**
- 2. Directions for the filing of skeleton arguments shall be given by the Court at a status hearing during the next sitting of the Court of Appeal in the Territory of the Virgin Islands in the week commencing 20th November 2017.**

Reason: Counsel for Mr. Fossi indicated that even if the transcript would have been ready by July 31st 2017, it was unlikely that the appellant's skeleton arguments would be ready in time for the next sitting of the Court in the BVI.

Case Name: The Commissioner of Police
v
[1] Irene Penn O'Neal
[2] Zubida O'Neal
[3] Shameek Grant
[BVIMCRAP2015/0007]

Date: Monday, 10th July 2017

Before: The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant:	Mrs. Valerie Gordon (for 1 st respondent) (Mrs. Irene Penn O'Neal also present) Mr. E. Leroy Jones (for 2 nd respondent) (Ms. Zubida O'Neal also present) Ms. Ruthilia Maximea (for 3 rd respondent) (Mr. Shameek Grant also present)
Respondent:	Mrs. Tiffany Scatliffe Esprit, Principal Crown Counsel, holding papers for Mr. O'Neil Simpson, Senior Crown Counsel

Issues: Status of matter – Appeal against acquittal of respondent – Whether decision of learned senior magistrate wrong in law regarding law of possession – Whether decision unreasonable or cannot be supported having regard to evidence.

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

**Result / Order
& Reason:**

It is hereby ordered that:
This Court not having before it any notice of appeal in this matter but only a document indicating the intention of the Crown to enter and prosecute an appeal which document contains no grounds of appeal, there is no proper appeal before this Court so the matter listed as BVIMCRAP2015/0007 is struck out.

Case Name:

**Shaun Williams
v
The Commissioner of Police
[BVIMCRAP2014/0020]**

Date: Monday, 10th July 2017

Before: The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant: Mr. Patrick Thompson (Mr. Williams was not present)

Respondent: Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel, with her, Ms. Reynela Rawlins, Crown Counsel, holding papers for Mr. O'Neil Simpson Senior Crown Counsel

Issues:

Status of matter – Keeping unlicensed firearm – Unlawful possession of explosives – Whether decision of learned magistrate to convict appellant unreasonable and cannot be supported having regard to evidence – Whether ammunition is „explosive“ within meaning of Explosives Act (Cap. 124, Revised Laws of the Virgin Islands 1991) – Whether learned magistrate erred in so holding – Whether decision bad in law and ought to be set aside

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

Directions

Result/Order:

It is hereby ordered:

1. The Senior Magistrate is hereby directed to cause the transcript of proceedings of the trial of this matter to be prepared and the parties notified accordingly within 1 month of the date of this order.
2. The parties shall file and exchange written submissions in support of their respective appeals within 28 days of being notified of the availability of the transcript of proceedings.
3. The parties shall be at liberty to file and serve submissions in response to the submissions filed by the other party within 28 days of service thereof.
4. The hearing of the appeal shall be fixed for the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 20th November 2017.

Reason: The transcript was not ready.

Case Name: Georgia Hendricks
v
The Commissioner of Police
[BVIMCRAP2016/0002]

Date: Monday, 10th July 2017

Before: The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant:	Mrs. Valerie Gordon (Ms. Hendricks was absent)
Respondent:	Mrs. Tiffany Scatliffe-Esprit, Principal Crown Counsel, with her, Ms. Reynela Rawlins, Crown Counsel

Issues: Status of matter

Type of Oral Result/Order Delivered: Directions

Result / Order: It is hereby ordered:
Given the indication by Counsel for the Appellant that the Appellant no longer wishes to prosecute this appeal, the Appellant shall file a Notice of Discontinuance of the appeal by 4 pm tomorrow, Tuesday 11th July 2017 where upon the appeal shall stand dismissed.

Reason: Counsel was contacted by the Appellant and was informed that the Appellant is no longer interested in the prosecuting the appeal.

Case Name: The Commissioner of Police
v
Kitwana Thompson
[BVIMCRAP2016/0003]

Date: Monday, 10th July 2017

Before: The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant:	Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel, with her, Ms. Reynela Rawlins, Crown Counsel
Respondent:	No appearance

Issues: Status of matter

Type of Oral Result/Order Delivered: N/A

Result/Order: It is hereby ordered:
The respondent not having been served with notice of hearing of this matter, the matter is adjourned for further status hearing at the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 20th November 2017.

Reason: The bailiff was unable to locate the respondent.

Case Name: Leslie Smith
v
The Commissioner of Police
[BVIMCRAP2016/0001]

Date: Monday, 10th July, 2017

Before: The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:
Appellant: Ms. Valerie Gordon (Mr. Smith was absent)
Respondent: Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel, with her, Ms. Reynela Rawlins, Crown Counsel

Issues: Status of matter

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

Result / Order: It is hereby ordered:
Given the indication by counsel for the appellant that the appellant having served his sentence in full and no longer wished to prosecute this appeal, the appellant shall file a notice of discontinuance of the appeal by 4:00 p.m. tomorrow, Tuesday, 11th July 2017, whereupon the appeal shall stand dismissed.

Reason: Counsel was contacted by the appellant and was informed that the appellant was no longer interested in the prosecuting the appeal.

Case Name:

**Olando Bonnick
v
The Commissioner of Police**

[BVIMCRAP2016/0004]

Date:

Monday, 10th July, 2017

Before:

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant: Mr. Patrick Thompson (Mr. Bonnick also present)

Respondent: Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel, holding papers for Mr. O'Neil Simpson, Senior Crown Counsel

Issues:

Status of matter

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

Directions

Result/Order:

It is hereby ordered:

- 1. The Senior Magistrate is directed to cause the transcript of proceedings on the sentencing of the appellant to be prepared on or before 30th September 2017 and for counsel for the appellant to be notified accordingly.**
- 2. The appellant shall file and serve written submissions in support of the appeal against sentence within 21 days of receipt of the transcript.**
- 3. The respondent shall file and serve written submissions in response within 21 days of receipt of the appellant's submissions or within 21 days of the date limited for the filing and service of the appellant's submissions.**
- 4. The appeal shall be listed for hearing at the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 20th November 2017.**

APPLICATIONS AND APPEALS

Case Name:

**Joel Sprauve
v
The Queen**

[BVIHCRA2011/0006]

Date:

Tuesday, 11th July 2017

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

Appellant: Mr. Patrick Thompson (Mr. Sprauve also present)

**Respondent: Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel, with
her, Mr. O'Neil Simpson, Senior Crown Counsel**

Issue:

**Appeal against conviction – Indecent Assault – Incest –
Whether inquiry into question of whether virtual
complainant could give sworn evidence properly conducted
by learned trial judge – Whether Crown should have been
permitted to ask virtual complainant after she had given her
evidence whether her evidence was true – Whether trial
judge erred in permitting doctor to lead inadmissible
hearsay evidence of what virtual complainant said to him
when he examined her – Whether indictment upon which
appellant was tried was defective as it included 2 counts of
incest as alternatives to the 2 counts of rape – Whether said
defect was material irregularity which rendered appellant's
conviction on incest unsafe – Whether jurors wrongly
directed that incest was alternative to rape**

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

Oral Judgment or Decision

Result/Order:

It is hereby ordered:

The appeal against conviction is dismissed while the appeal against sentence is allowed, to the extent that the concurrent 8 year sentences imposed by the trial judge for incest will run concurrently with the concurrent 3 year sentences imposed for the counts of indecent assault.

Reason:

This is an appeal against the conviction and sentence of the appellant on 2 counts of incest and 3 counts of indecent assault. In his amended grounds of appeal, the appellant advanced seven grounds. Before this Court, counsel for the appellant pursued 4 of the 7 grounds which were elaborated as follows:

- 1. The learned judge erred in directing the jurors that incest was an alternative to rape. As a matter of law incest was neither a statutory nor common law alternative to rape. Further, on the basis of the evidence adduced at trial, incest, that is to say consensual sexual intercourse, never arose for consideration by the jurors. In the circumstances the learned judge erred in directing the jury that incest was an alternative to rape and this was a material irregularity which renders the appellant's conviction unsafe. The verdicts of not guilty of rape and guilty of incest are inconsistent since the jurors were directed that the facts relied on for the count of rape were the same for incest and no reasonable jury could have returned these verdicts and as such it would be unsafe to allow the guilty verdict on incest to stand.**
- 2. The learned trial judge erred in failing to give a good character direction to the appellant. The learned judge omitted to include any direction on propensity and this omission deprived the appellant of the full good character direction to which he was entitled thus rendering his conviction unsafe and unsatisfactory.**
- 3. The learned trial judge failed to direct the jurors in accordance with the provision of section 146 (1) and (2) of the Evidence Act. The Virtual Complainant was a child of tender years whose credibility was affected by her age. The learned trial judge omitted to warn the jury that her evidence may be unreliable, the reasons why it may be unreliable and the need for caution in determining whether to accept her evidence, and that the failure to give the reckless warning renders the appellant's conviction unsafe and unsatisfactory.**

4. The learned trial judge erred in sentencing the appellant to a consecutive term of imprisonment thus rendering the sentence imposed upon the appellant as excessive and thus liable to be set aside.

Counsel for the appellant commenced his submissions on the ground that the judge erred in imposing consecutive sentences of 8 years for incest and indecent assault arising from the same set of facts. Having noted the Crown's concession on this however, Counsel did not elaborate further on this ground.

On the second of the grounds pursued by counsel for the appellant, he argued that the trial judge erred in directing the jury that if they found that there was no rape or if they were in doubt as to whether the appellant raped his daughter, it was open to them to find him not guilty of rape but guilty of incest and in her summation she directed the jury that incest was an alternative to rape. Counsel further contended that there was the logical inconsistency between the finding of not guilty of rape but guilty of incest on the same facts because the evidence led by the prosecution was that the appellant had sexual intercourse with his daughter without her consent. If the jury did not accept this evidence then it was not open to them to find the appellant not guilty of rape but guilty of incest and they ought logically to have found him not guilty of either offence.

Counsel for the respondent conceded that it was a misdirection by the trial judge to say to the jury that incest was an alternative to rape but that this was not a sufficiently great misdirection to render a conviction unsafe. He also submitted that the verdict was not inconsistent. We are of the view that the judge misdirected the jury when she told them that incest was an alternative offence to rape. We however accept the submission of the respondent that the appellant had been separately charged on 2 counts of incest and that it was open to the jury on the evidence before them to be satisfied beyond reasonable doubt that the appellant was the father of the virtual complainant and he had sexual intercourse with her which is sufficient to justify a finding of guilt in respect of the charges of incest. The jury could have been satisfied on the evidence that there was sexual intercourse but not satisfied beyond reasonable doubt that the virtual complainant had not consented to the sexual intercourse which is an essential

ingredient of rape but not of incest. The fact of the judge's misdirection to the jury to the effect that a count of incest was an alternative count of rape did not therefore render the appellant's conviction unsafe. We accordingly dismiss this ground of appeal.

On the third ground pursued by the appellant, counsel for the appellant submitted that the judge erred in not giving the entire good character direction to the jury. Counsel having elicited evidence upon cross-examination of the investigating officer that the appellant had previous convictions of unlawful possession of a firearm and for larceny but that these convictions had been spent, it was incumbent on the trial judge, he submits, to give a good character direction to the jury comprising 2 limbs, a credibility limb and a propensity limb. Counsel submitted that the judge did give the credibility direction but failed to give the propensity direction which he submits was fatal and renders the appellant's conviction unsafe. After some degree of hesitation, counsel for the respondent conceded that the judge did not give the propensity direction and misdirected the jury by his failure to do so. He however submitted that this was not fatal and that even if she had given the full good character direction to the jury, they would have inevitably reached the same conclusion and convicted the appellant of the charges of incest and indecent assault. We accept the respondent's submission on this issue and find that although the judge clearly misdirected the jury by her failure to give a direction on the propensity limb of the good character direction, the jury would, on the evidence, inevitably have convicted the appellant for the offences of incest and indecent assault. We accordingly dismiss this ground of appeal.

Counsel for the appellant next pursued the section 146 ground. After some interrogation by the Bench, Mr. Thompson conceded that this ground lacked sufficient merit to justify persisting with it. Counsel for the respondent agreed with it and so do we. This ground is therefore also dismissed. In terms of the first of the four grounds pursued by counsel for the appellant as to the judge's error in imposing consecutive sentences on the appellant for the offences which arise from the same set of facts and circumstances, which the respondent, in our view, quite correctly conceded was an error, we will allow this ground of appeal and order that the concurrent sentences

of 8 years imposed on the appellant for each of the 2 counts of incest shall run concurrently with the concurrent sentences of 3 years imposed on the appellant for the 3 counts of indecent assault.

The order of this Court is therefore that the appeal against conviction is dismissed while the appeal against sentence is allowed to the extent that the concurrent 8 year sentences imposed by the trial judge for incest will run concurrently with the concurrent 3 year sentences imposed for the count of indecent assault. The appellant will therefore serve, if he has not already done so, a total of 8 years in prison.

Case Name:

Wendell Varlack

v

The Queen

[BVIHCRAP2012/0001]

Date:

Tuesday, 11th July 2017

Coram:

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

The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant: Mr. Patrick Thompson (Mr. Varlack also present)

Respondent: Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel, with her, Mr. O'Neil Simpson, Senior Crown Counsel

Issues:

Appeal against conviction and sentence – Causing death by dangerous driving – Whether jury given any or any sufficient direction as to how to deal with evidence of alcohol consumption by appellant – Whether appellant's case put fairly or at all to jury – Whether jury was properly directed on issue of whether appellant's vehicle may have been unlicensed at time of accident – Whether sentence of 18 months imprisonment too severe

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

Directions

Result/Order:

It is hereby ordered:

- 1. The respondent is to file and serve skeleton arguments and authorities on or before the 11th August 2017.**
- 2. Hearing of the appeal is adjourned to the next sitting of the Appeal Court in the Territory of the Virgin Islands during the week commencing 20th November 2017.**

Case Name:

**Sylon Forbes
v
The Queen**

[BVIHCRAP2016/0004]

Date:

Tuesday, 11th July 2017

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

Appellant: No appearance

Respondent: Mrs. Tiffany Scatliffe-Esprit, Principal Crown Counsel

Issues:

Appeal against conviction – Unlawful sexual intercourse with girl under age of 16 – Possession of child pornography – Whether learned trial judge failed to give mandatory statutory warning in accordance with sections 146(1) and 146(2) of the Evidence Act, 2006 (Act No. 15 of 2006, Laws of the Virgin Islands) – Whether learned trial judge erred in not issuing obligatory good character direction to jury – Pretrial publicity – Whether trial judge erred in allowing impermissible evidence to be introduced and relied on by prosecution – Whether conviction rendered unfair and unsafe

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

Oral Judgment or Decision

**Result / Order
& Reason:**

The appeal is dismissed for want of prosecution.

Case Name:

**Charmaine Rosan-Bunbury
v**

**[1] The Attorney General
[2] Commissioner of Police**

[BVIHCVAP2015/0017]

Date:

Tuesday, 11th July 2017

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

Appellant: Ms. Charmain Rosan-Bunbury in person

Respondent: Ms. Maya Barry

Issues:

**Interlocutory Appeal – Dismissal of appellant’s claim –
Payment of prescribed costs to respondents – Application**

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

N/A

Result / Order:

It is hereby ordered:

- 1. Hearing of this appeal is adjourned to the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 20th November 2017.**
- 2. The appellant shall file an additional bundle to complete the record of appeal containing the transcript of the**

proceedings in the Court below on or before 30th September 2017.

Reason: The appellant applied for an adjournment of the matter. There was no objection by the Crown to it being granted.

Case Name: The Attorney General of the Virgin Islands
v
Vernon Vanterpool
[BVIHCVAP2016/0014]

Date: Tuesday, 11th July 2017

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:
Appellant: Mr. Hakim Creque
Respondent: Mr. David Penn

Issues: Interlocutory Appeal – Whether the learned master erred in law in deciding that there had been a waiver of the limitation defence which was raised pursuant to the Public Authorities Protection Act (Cap. 62) – Whether the learned master erred in law in finding at paras. 4 and 5 of his 7th July, 2016 order that waiver had been established by virtue of document dated 4th June, 2014 from Head of Department, Mr. Jeffrey Skelton, to Social Security Board – Application for extension of time to file submissions in response

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

Result / Order: It is hereby ordered:
The application for extension of time to file submissions in

response is granted. The submissions of the respondent filed on 4th July 2017 are deemed to be properly filed.

Case Name: **The Attorney General of the Virgin Islands**
v
Vernon Vanterpool
[BVIHCVAP2016/0014]

Date: **Tuesday, 11th July 2017**

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

Appearances:
Appellant: **Mr. Hakim Creque**
Respondent: **Mr. David Penn**

Issue: **Interlocutory Appeal – Whether the learned master erred in law in deciding that there had been a waiver of the limitation defence which was raised pursuant to the Public Authorities Protection Act (Cap. 62) – Whether the learned master erred in law in finding at paras. 4 and 5 of his 7th July, 2016 order that waiver had been established by virtue of document dated 4th June, 2014 from Head of Department, Mr. Jeffrey Skelton, to Social Security Board**

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

Result / Order: **It is hereby ordered:**
1. The appeal is allowed.
2. The matter is remitted to the lower court to proceed in accordance with CPR 2000.
3. No order as to costs.

Reason: This is an appeal against the ruling of the learned master on an application to strike out the respondent's claim for damages. The Crown contends that the learned master erred in his determination that the Crown had waived the issue of the limitation pursuant to the Public Authorities Protection Act (Cap. 62). We have considered the submissions of the Crown and the submissions of the respondent and the concessions made and we are of the view that the issue of limitation as the learned master found is an issue to be determined at trial. We are also of the view that the learned master erred when he determined that the Crown had waived its right to appeal the limitation. We would therefore allow the appeal. We will make no order as to costs on the appeal. The respondent/claimant would be entitled to his costs in the court below. That is the ruling of the Court. So the appeal is allowed.

Case Name: The Telecommunications Regulatory Commission
v
Cable & Wireless (BVI) Limited
[BVIHCVAP2016/0013]

Date: Tuesday, 11th July 2017

Coram: The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. John Carrington, QC, Justice of Appeal [Ag.]
The Hon. Mr. Eamon Courtenay, Justice of Appeal [Ag.]

Appearances:
Appellant: Ms. Arabella di Iorio, with her, Mr. Simon Hall
Respondent: Ms. Kassie Smith, QC, with her, Mr. Callum McNeil

Issues: Whether learned judge erred in law in interpreting section 75(1)(a)(iii) of the Telecommunications Act 2006 so as to preclude enforcement action in respect of past conduct – Cross civil appeal – Whether learned judge erred in finding that section 75(1)(a)(iii) of the Act enabled Telecommunications Regulatory Commission to exchange in ex post regulation – Whether learned judge erred in

finding that despite her finding that Commission had acted ultra vires by proceeding against Cable & Wireless (BVI) Limited mobile network operators in other Caribbean jurisdictions, thereby acting outside their jurisdiction, the learned judge exercised her discretion nevertheless not to quash the Commission's decision on the basis that it was not sufficiently serious to be quashed

Type of Oral
Result / Order
Delivered:

N/A

Result / Order:

Judgment reserved.

Case Name:

Independent Asset Management Company Limited
v
Swiss Forfaiting Ltd.

[BVIHCMAP2016/0034]

Date:

Wednesday, 12th July 2017

Coram:

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

Appearances:

Appellant: Mr. Crowe, with him, Mr. Jonathan Addo

Respondent: Mr. Richard Parker, QC, with him, Ms. Arabella di Iorio and Mr. Simon Hall

Issues:

Appeal against the decision of the Honourable Justice Jules Sher, QC [Ag.] in Claim No. BVIHC (COM) 0044 of 2015 contained in judgment dated 29 June 2016 in relation to section 184B of the BVI Business Companies Act 2004 – Whether learned judge adopted correct approach in determining whether directors of respondent had acted for a proper purpose in issuing 500 A shares in respondent

company – Whether learned judge erred in failing to identify proper purpose of power to issue shares in respondent company – Whether learned judge should have held that only purpose of respondent’s directors in exercising power to issue shares was to dilute appellant’s voting control – Whether judge wrongly decided case on point that had not been pleaded by respondent – Whether judge wrongly decided that the directors of respondent were exercising the power to issue shares for management purposes – Whether judge wrongly considered the question whether directors were acting bona fide in interests of respondent instead of deciding whether power to issue shares was exercised for a proper purpose

Type of Oral
Result / Order
Delivered:

N/A

Result / Order:

Judgment reserved.

Case Name:

**Emaar Properties LLC
v
Giga Group Holding Limited
[BVIHCMAP2017/0014]**

Date:

Wednesday, 12th July 2017

Coram:

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

Appearances:

Appellant:	Mr. Richard Parker, QC, with him, Ms. Arabella di Iorio and Mr. Simon Hall
Respondent:	Mr. Paul Chaisty, QC, with him, Ms. Colleen Farrington and Mr. Murray Laing

Issues: Interlocutory appeal against grant of injunction order

**Type of Oral
Result / Order
Delivered
(if applicable):** Oral

Result: It is hereby ordered:

1. The appellant's interlocutory appeal against the injunction order is dismissed.
2. The appellant, whether acting by its directors, officers, or agents, is prohibited from relying on the Notice of Release dated 30 April 2017 and/or taking steps requiring the second defendant to release the disputed shares pending the determination of the dispute resolution in accordance with paragraph 17.2 of the Supplemental Agreement dated 25 November 2012 or until further order of the Court.
3. The second defendant, whether acting by its directors, officers, or agents, is prohibited from relying on the Notice of Release dated 30 April 2017 and/or effecting the release of the disputed shares pending the determination of the dispute resolution in accordance with paragraph 17.2 of the Supplemental Agreement dated 25 November 2012 or until further order of the Court.
4. The stay of the proceedings pursuant to paragraph 9 of the Injunction Order be lifted.
5. The undertakings as set out in Schedule B of the Injunction Order are to be continued.
6. Costs of the Interlocutory Appeal be reserved.

VARIATION AND DISCHARGE OF THIS ORDER

1. (a) Anyone served with or notified of this Order and/or the Injunction Order may apply to the Commercial Division of the High Court of the British Virgin Islands at any time to vary or discharge this Order and/or the Injunction Order (or so much of them as affects that person), but that person or entity must first inform the Respondent's Legal Practitioners, Walkers, 171 Main Street, PO Box 92, Road Town, Tortola, British Virgin Islands (the "Respondent's Legal Practitioners"), giving at least 3 days' notice except in the event of sufficient urgency, in which case the applicant may seek

leave to apply on shorter notice, which leave may be determined at the hearing of the application, the substance of it must be communicated in writing to the Respondent's Legal Practitioners 2 days in advance of such application, except in the case of urgent sufficiency.

(b) In the case of an urgency in relation to (a) above the notice referred to shall be substituted for 48 hours and 24 hours respectively.

INTERPRETATION OF THIS ORDER

2. A party who is ordered not to do something must not do it itself or by its directors, officers, partners, employees or agents in any other way.

PARTIES OTHER THAN THE APPELLANT, RESPONDENT AND SECOND DEFENDANT

3. It is contempt of court for any person notified of this Order knowingly to assist or permit a breach of this Order. Any person doing so may be imprisoned, fined or have his, her or its assets seized.
4. Except as provided in paragraph 11 below, the terms of this Order do not affect or concern anyone outside the jurisdiction of this Court.
5. The terms of this Order will affect the following persons in a country of state outside the jurisdiction of this Court:
 - a. The Appellant and the Second Defendant or their officer(s), director(s), partner(s) employees or agents appointed by power of attorney.
 - b. Any person who is (i) is subject to the jurisdiction of this Court; (ii) has been given written notice of this Order at his or her residence or his, her or its place of business within the jurisdiction of this Court; and (iii) is able to prevent acts or omissions outside the jurisdiction of this Court which constitute or assist in a breach of any of the terms of this Order and
 - c. any other person, only to the extent that this Order is declared enforceable by or is enforced by a court in that country or state.

Case Name:

**Bentley Roach
v
The Commissioner of Police
[BVIMCRAP2012/0004]**

Date:

Wednesday, 12th July 2017

Coram:

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

Appearances:

**Appellant: Mr. Patrick Thompson (Mr. Roach was absent)
Respondent: Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel**

Issues:

**Appeal against conviction and sentence – Indecent Assault
– Whether the decision of the learned magistrate
unreasonable and cannot be supported having regard to the
evidence – Whether learned magistrate’s failure to put to
appellant option provided for by s. 45 of the Magistrate’s
Code of Procedure Act is material irregularity and deprived
appellant of his right to due process**

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

N/A

Result / Order:

**It is hereby ordered:
1. The adjournment is granted.
2. The respondent has until the end of July for the filing of
submissions.**

Case Name:

**[1] Pico Amal Petroleum Corporation
[2] Greystone Petroleum Egypt Limited**

v
Shalakany Law Office

[BVIHCMAP2016/0006]

Date: Monday, 10th July, 2017

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

Appearances:

Appellants: Mr. Robert Nader

Respondent: Mr. David Welford

Issues: Application for leave to appeal to Her Majesty in Council – Forum non conveniens – Appellants’ application to stay claim in court below dismissed by learned judge – Whether correct legal test applied – Whether learned judge’s consideration of relevant factors was incorrect – Appellants’ appeal to this Court allowed by order dated 21st July 2016

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

Result/Order: Costs to the respondent in the amount of \$3,500.00.

Reason: The appellants discontinued their motion for leave to appeal to Her Majesty in Council.

Case Name:

[1] Falcon House UHV (BVI) Limited
[2] Mechiel Georg Kotze and Ian Paulus Van Zyl
[3] Canon Bridge Holdings Limited

v

[1] CH Trustees SA
[2] Omega Services Group Limited

[BVIHCMAP2017/0001]

Date: Wednesday, 12th July 2017

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The. Hon. Mr. John Carrington, QC, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Andrew Willins

Respondent: Mr. Adam Solomon (for the 1st respondent)

Issues: Application to strike out appeal

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

Result / Order: It is hereby ordered that:

1. The appeal is struck out.
2. The appellant must pay the 1st respondent's costs of the appeal to be assessed if not agreed within 14 days of the date of this order.

Reason: The Court was satisfied, having read the application, the supporting affidavits and the exhibits, that the application of the 1st respondent, CH Trustees SA, to strike out the appeal ought to be granted.

Case Name:

[1] Falcon House UHV (BVI) Limited
[2] Mechiel Georg Kotze and Ian Paulus Van Zyl
[3] Canon Bridge Holdings Limited
v
[1] CH Trustees SA
[2] Omega Services Group Limited

[BVIHCMAP2017/0001]

Date: Wednesday, 12th July 2017

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. John Carrington, QC, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Andrew Willins

Respondent: Mr. Adam Solomon (for the 1st respondent)

Issues: Unfair prejudice – Appeal against the decision of learned judge by which he made findings of unfair prejudice against appellants in relation to operation of 2nd respondent and granted consequential relief – Application to remove solicitor from the record

Type of Oral Result / Order Delivered: N/A

Result / Order:

1. There being no evidence before the Court of service of the application to remove solicitors from the record on the appellants pursuant to the CPR, the Court is of the view that it is not properly in a position to entertain the application at this time.
2. Counsel for the appellant remains on the record for the time being.

Reason:

Mr. Willins, for the law firm Appleby (BVI) Limited, filed an ex parte application to be removed from the record. Mr. Willins has confirmed that the relationship between the clients and his firm has been terminated.

Mr. Willins undertakes to file an affidavit of service in support of the application to be removed from the record and it is proposed that the application will be proper.

Case Name:

**Violet Delville Hodge
v
The Commissioner of Police**

[BVIMCRAP2015/0005]

Date:

Wednesday, 12th July 2017

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. John Carrington, QC, Justice of Appeal [Ag.]**

Appearances:

**Appellant: Mr. Julian Knowles, QC, with him, Mr. Patrick Thompson
(the appellant was also present)**

**Respondent: Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel, with
her, Mr. O'Neil Simpson, Crown Counsel**

Issues:

**Conspiracy to import controlled drug – Whether decision of
learned magistrate convicting appellant unreasonable and
cannot be supported having regard to the evidence –
Whether decision of learned magistrate erroneous in point
of law – Whether sentence imposed by magistrate based on
wrong principle such that magistrate viewing the
circumstance reasonably could not have so decided –
Whether the sentence imposed was unduly severe**

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

N/A

Result / Order:

Judgment reserved.

STATUS HEARING

Case Name:

David Wells

v
Century Group Enterprises Limited (In Liquidation)

[BVIHCVAP2015/0002]

Date: Wednesday, 12th July 2017

Before: Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant: No appearance

Respondents: Mr. Robert Nader

Issues: Status of matter

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

Result / Order: It is hereby ordered:
The Notice of Discontinuance is to be filed within seven (7) days.

Reason: Mr. Nader informed the Court that the appellant was not desirous of prosecuting the appeal.

Case Name: James Anthony
(as Personal Representative of the Estates of
Abraham, deceased and Clarita Anthony,
deceased)

v
[1] Eileen Papone
[2] Lourie Anthony

[BVIHCVAP2015/0014]

Date: Wednesday, 12th July 2017

Before: The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant: Ms. Charmaine Rosan-Bunbury

Respondents: Mr. Lewis Hunte, with him, Ms. Pauline Mullings

Issues: Status of matter

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

Result / Order: It is hereby ordered:

1. Leave is granted to withdraw the appeal and the appeal is accordingly dismissed.
2. Costs in the sum of \$750.00.

Case Name:

[1] Henry Osmond Hodge
[2] Reuben Rufus Hodge
[3] Elliot McKinley Hodge
v
[1] Sylvia Hodge
[2] Gordon M. Phillip
[3] Ruby Jacinta Phillip

[BVIHCVAP2012/0030]

Date: Wednesday, 12th July 2017

Before: The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellants: Ms. Patricia Burrows

Respondents: No appearance

Issues: Status of matter – Whether learned judge erred in finding that there was agreement between parties for settlement of proceedings BVIHCV2004/0065

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

Result / Order & Reason: It is hereby ordered:
A notice of discontinuance having been filed, the appeal is accordingly dismissed.

Case Name: [1] Thelma Fahie
[2] Denzil Daniel
[3] Willmor Daniel
v
Elaine Chapdelaine
[BVIHCVAP2016/0008]

Date: Wednesday, 12th July 2017

Before: The Hon. Madam Gertel Thom, Justice of Appeal

Appearances:
Appellants: Ms. Charmaine Rosan-Bunbury
Respondent: Ms. Anthea Smith

Issues: Status of matter

Type of Oral Result / Order Delivered: Directions

Result / Order: It is hereby ordered:
1. The Registrar of the High Court shall cause the

transcript of the proceedings to be prepared in the Court below and upon completion notify the parties of the availability of the transcripts.

2. The matter is adjourned for further status hearing at the next sitting of the Court of Appeal in the Territory of the Virgin Islands commencing the week of November 20th 2017.

Reason: The transcript was not ready.

Case Name: Charmine R. Rosan Bunbury
v
The Attorney General
[BVIHCVAP2016/0007]

Date: Wednesday, 12th July 2017

Before: The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant: Ms. Charmaine Rosan-Bunbury in person

Respondents: Ms. Giselle Lumy with Ms. Maya Barry

Issues: Status of matter

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

Result / Order: It is hereby ordered:
The matter is listed for further status hearing at the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing November 20th 2017.

Case Name:

**Nicholas Tranquille
v
The Commissioner of Police
[BVIHCVAP2016/0005]**

Date:

Wednesday, 12th July 2017

Before:

The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant: Ms. Lynette Ramoutar holding papers for Mr. Ronald Ferguson

Respondent: Ms. Giselle Lumy

Issues:

Status of matter

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

Directions

Result / Order:

It is hereby ordered:

- 1. The Registrar shall cause the transcripts of proceedings in the court below to be prepared without further delay and notify the parties upon completion.**
- 2. Upon receipt of the Notice of Availability of the transcript, the matter shall proceed in accordance with the Civil Procedure Rules 2000.**

Reason:

The transcript was not ready.

Case Name:

**Irvine Fletcher Scatliffe
v
Tortola Investment Trust Limited**

[BVICVAP2016/0012]

Date: Wednesday, 12th July 2017

Before: The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant: Mr. Irvine Fletcher Scatliffe in person

Respondents: Ms. Alana-J Joseph holding papers for Mr. Sydney Bennett, QC

Issues: Status of matter

Type of Oral Result / Order Delivered: N/A

Result / Order: It is hereby ordered:
The matter is listed for further status hearing for the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing November 20th 2017.

Reason: The appellant sought leave to make an application for extension of time.

Case Name: Andre Penn
v
[1] The Attorney General of the Virgin Islands
[2] The Director of Public Prosecutions

[BVIHCVAP2015/0005]

Date: Wednesday, 12th July 2017

Before: The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant: No appearance
Respondents: Ms. Maya Barry and Giselle Lumy

Issues: Status of matter

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

Result / Order: It is hereby ordered:
The matter is adjourned to Thursday 13th July 2017 at 8:45 a.m.

Case Name: Ciban Management Corporation
v
[1] CITCO (BVI) Limited
[2] Tortola Corporation Company Limited
[BVIHCVAP2013/0001]

Date: Wednesday, 12th July 2017

Before: The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:
Appellant: Mr. Andrew Chissick, with him, Ms. Olga Osachaya
Respondents: Ms. Kimberley Crabbe-Adams

Issues: Status of matter

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

Result / Order: It is hereby ordered:

The Registrar shall cause the transcripts of proceedings in the Court below to be prepared without further delay and notify the parties upon completion.

On notice being served on the Registrar, notification of the transcripts in the matter upon receipt shall proceed in accordance to the Civil Procedure Rules 2000.

The matter is listed for further status hearing for the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing November 20th 2017.

Case Name: **Fairfield Sentry Limited (In Liquidation)**
v
Farnum Place LLC
[BVIHCMAP2014/0026]

Date: **Wednesday, 12th July 2017**

Coram: **The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

Appellant:	Mr. Robert Nader
Respondents:	Mr. Richard Evans

Issues: **Status of matter**

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

Result / Order: **It is hereby ordered:**

- 1. The appellant shall file and serve the record of appeal by 15th October 2017.**
- 2. The appellant, if necessary, to file additional evidence upon which it proposes to rely subject to any order of the Court of Appeal on or before 31st August 2017.**
- 3. The respondent, if necessary, to file additional evidence upon which it proposes to rely on subject to any order of**

the Court of Appeal if required on or before 30th September 2017.

4. The appellant's submissions to be filed and served by 15th October 2017.
5. The respondent shall file and serve submissions with authorities on or before 31st October 2017.
6. Hearing of the appeal is set down during the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing November 20th 2017.

Reason: The parties were ready to proceed.

Case Name: Mr. Mukhtar Ablyazov
v
JSC BTA Bank

[BVIHCMAP2014/0029]

Date: Wednesday, 12th July 2017

Before: The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:
Appellant: No appearance
Respondent: Ms. Tameka Davis

Issues: Status of matter

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

Result / Order: It is hereby ordered:
1. That the notice of appeal is struck out for want of prosecution.
2. No order as to costs.

Reason: The Court noted its order dated 26th May 2015 for the appellant's attorney to be removed from the record. It also noted that the Certificate of Service of order of the Court was filed on 2nd June 2015. The Court further noted that the notice of appeal was filed on 18th November 2014 and no steps had been taken to pursue the appeal. There was no appearance of or on behalf of the appellant.

Case Name: Sport Financiera
v
Olympic Gold Holdings
[BVIHCMAP2014/0015]

Date: Wednesday, 12th July 2017

Before: The Hon. Madam Gertel Thom, Justice of Appeal

Appearances:
Appellant: Ms. Kimberley Crabbe-Adams
Respondent: No appearance

Issues: Status of matter

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

Result / Order: It is hereby ordered:

The matter is listed for further status hearing for the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing November 20th 2017.

Reason: The parties indicated that they had reached a settlement and the notice of discontinuance would be filed shortly.

Case Name:

**Julian Willock
v
National Bank of the Virgin Islands
[BVIMCVAP2016/0003]**

Date:

Wednesday, 12th July 2017

Before:

The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant: Mr. Jamal Smith

Respondents: Ms. Nadine Whyte

Issues:

Status of matter

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

Directions

Result / Order:

It is hereby ordered:

- 1. The appellant shall file and serve written submissions on or before 31st August 2017.**
- 2. The respondent shall file and serve response on or before 30th September 2017.**
- 3. The hearing of the appeal is scheduled for the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing November 20th 2017.**

Reason:

The magistrate's record was complete and would be delivered to the High Court on 13th July 2017.

JUDGMENTS

Case Name:

**Ahmed Williams
v
The Supervisory Authority**

[ANUHCVP2015/0035]

Date:

Thursday, 13th July 2017

Coram:

**The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal [Ag.]
The Hon. Eamon Courtenay, SC, Justice of Appeal [Ag.]**

Appearances:

Appellant: Ms. Tamara Cameron holding papers for Mr. David Dorsett

**Respondent: Ms. Ayodeji Bernard holding papers (in a limited capacity)
for the respondent**

Issues:

Antigua and Barbuda civil asset forfeiture regime – Whether regime infringes ss. 3(a), 7 and 15 of the Constitution of Antigua and Barbuda – Whether s. 20A(2) of the Money Laundering Prevention Act 1996 (as amended) unconstitutional, null and void – Whether judgment of learned judge in court below ordering that appellant’s interests in properties be forfeited to the Crown ought to be set aside

**Result &
Reason:**

Held: dismissing the appeal; upholding the ruling of the learned judge that section 20A(2) of the MLPA is constitutional; and ordering that each party bear its own costs, that:

- 1. The civil asset forfeiture regime which was introduced with the amendments made to section 20A of the MLPA, is distinct and separate from the criminal asset forfeiture regime which had been in existence for several years in the MLPA in its original form. In the case of civil asset forfeiture, there is absolutely no requirement for the defendant to have been charged with a criminal offence. In particular, in this regime, the Crown is able to recover property identified as being obtained merely from “money laundering activity”; the owner of the property**

need not have been charged with a money laundering offence for forfeiture to take place. On the other hand, the legislature stipulates that criminal asset forfeiture can only follow a conviction. The two separate and distinct regimes should not be conflated.

Walsh v Director of Asset Recovery Agency [2005] NICA 6 applied; *Allen v The United Kingdom* ECHR 2013 IV distinguished.

2. The civil asset forfeiture regime provides extensive due process of law guarantees, which guarantees Mr. Williams took full advantage of. He had a full trial and was given the opportunity to oppose the freeze order, lead evidence, and also cross examine witnesses. He therefore cannot properly complain that he was not afforded procedural fairness as provided by section 3(a) of the Constitution. Section 3(a) was not infringed, but rather, the appellant was afforded the full due process of law.

Attorney-General of Barbados and Others v Joseph (Jeffrey) and Boyce (Lennox) (2006) 69 WIR 104 applied; *Maya Leaders Alliance and Others v The Attorney General of Belize* (2015) 87 WIR 178

3. Civil asset forfeiture is civil in nature and should not be classified as criminal proceedings. It does not amount to a trial for a criminal offence without due process for such a trial. Accordingly, the regime in no way infringes the fundamental rights that are provided in section 15(2)(a) and 15(5) of the Constitution, which speak specifically to criminal offences.

R (on the application of the Director of Asset Recovery Agency) v Paul Ashton [2006] EWHC (Admin) 1064 applied; *Walsh v Director of Asset Recovery Agency* [2005] NICA 6 applied; *Director of Asset Recovery Agency v Charrington* [2005] EWCA Civ 334 applied; *Gale and Another v Serious Organised Crime Agency* [2011] UKSC 49 applied.

4. With regard to Mr. Williams' alternative argument based on section 7(1) of the Constitution that the civil asset forfeiture regime amounts to cruel and inhuman punishment, it has long been settled that the

fundamental right to protection from cruel and inhuman punishment has to do with a person's protection from bodily impairment. What is at issue in this matter is the seizure of one's property. The fundamental rights jurisdiction is a special jurisdiction and should only be used in appropriate circumstances. Mr. Williams' reliance on section 7(1) of the Constitution is misplaced.

Harrikisson v Attorney General of Trinidad and Tobago (1980) AC 265 applied; *Hinds v The Attorney General* (2001) UKPC 56 applied.

APPLICATIONS AND APPEALS

Case Name:

**Green Elite Limited
v
Delco Participation BV
[BVIHCMAP2016/0041]**

Date:

Thursday, 13th July 2017

Coram:

**The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mr. John Carrington, QC, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. Philip Jones, QC, with him, Mr. Nicholas Brookes

Respondents: Mr. Simon Hall, with him, Ms. Arabella di Iorio

Issues:

I Whether there were improper findings as to conduct as the attribution of such conduct of the company – Whether Regulation 19.2 of the Company's Memorandum and Article of Association ("M&A") is unlawful and contravenes the BCA meaning the Meeting cannot be lawfully requisitioned – Whether there was improper speculation about what might emerge at the meeting if the meeting were held and improper findings as to the validity of the supplemental

winding up resolution

Type of Oral
Result / Order
Delivered:

N/A

Result / Order:

Judgment reserved.

Case Name:

David Brandt
v
Director of Public Prosecutions
[MNIMCRAP2017/0001]
(Montserrat)

Date:

Thursday, 13th July 2017

Coram:

The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]
The Hon. Mr. John Carrington, QC, Justice of Appeal [Ag.]

Appearances:

Appellant: Dr. David Dorsett, with him, Mr. Kharl Markham (Mr. Brandt was absent)
Respondent: Ms. Annesta Weekes, QC with her Ms. Dee Connolley

Issues:

Appeal against order that accused appear before the High Court sufficiency hearing

Type of Oral
Result / Order
Delivered:

N/A

Result / Order:

Judgment reserved.

Case Name:

Dwight Minott

v

The Queen

[BVIMCRAP2014/0023]

Date:

Thursday, 13th July 2017

Coram:

The Hon. Mde. Louise E. Blenman, Justice of Appeal

The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mr. Eamon Courtenay, Justice of Appeal [Ag.]

Appearances:

Appellant: Ms. Ayodeji Bernard

Respondent: Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel, Office of the Director of Public Prosecutions

Issues:

Appeal against conviction and sentence – Unlawful importation of controlled drug – Unlawful importation of controlled drug with intent to supply – Fourth trial commenced after three previously aborted trials – Whether abuse of process and unfair to appellant – Whether there being no notice of discontinuance or *nolle prosequi* entered in the three aborted trials learned magistrate has no jurisdiction to commence fourth trial rendering the proceedings a nullity Whether there was miscarriage of justice – Whether verdict unreasonable and cannot be supported by the evidence – Whether sentence imposed too severe

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

N/A

Result / Order:

Leave to withdraw the appeal is granted and accordingly, the appeal stands dismissed.

Case Name:

[1] Kevin Greaves

[2] Nigel Registe

v

The Commissioner of Police

[BVIMCRAP2014/0022]

Date:

Thursday, 13th July 2017

Coram:

The Hon. Mde. Louise E. Blenman, Justice of Appeal

The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mr. Eamon Courtenay, Justice of Appeal [Ag.]

Appearances:

Appellants: Mr. Stephen Daniels (neither appellant was present)

Respondents: Mr. Garcia Kirt Kelly, Senior Crown Counsel

Issues:

Proceeds of Criminal Conduct Act, 1997 (Act No. 5 of 1997, Laws of the Virgin Islands) – Whether learned magistrate erred in interpreting Proceeds of Criminal Conduct Act

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

Oral Judgment or Decision

Result / Order:

It is hereby ordered:

With the leave of the Court the appeal is hereby withdrawn.

Reason:

The appellants no longer wished to prosecute the appeal.

JUDGMENTS

Case Name:

Lindsay Fitz-Patrick Grant

v

[1] Rupert Herbert

**[2] Leroy Benjamin
[3] Wentford Rogers**

[SKBHCVAP2012/0001]

Date: Friday, 14th July 2017

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

Appearances:

Appellant: Ms. Tamara Cameron holding papers for Ms. Marguerite Foreman

Respondent: No appearance (Mr. Andrew Willins on record for the respondents)

Issues: Election petition appeal – Quantification of costs of election petitions – Court of Appeal ordering costs to be quantified – Whether Civil Procedure Rules 2000 in particular Parts 64 and 65 apply to calculation of costs of election petitions – Whether learned judge erred in calculating election petition costs pursuant to inherent jurisdiction as opposed to Parts 64 and 65 of the Civil Procedure Rules 2000 – Whether costs awarded by learned judge unreasonable or excessive

Result & Reason: Held: dismissing the appeal; affirming the learned judge's award of costs in the lower court; and awarding the respondent costs of the appeal, such costs to be assessed, if not agreed within 21 days of the date of this order, that:

Per Webster JA [Ag.], Chong JA [Ag.]:

1. The general rule is that the High Court's jurisdiction to deal with election petitions is a statutory jurisdiction that is separate and distinct from the Supreme Court's ordinary civil jurisdiction.

Theberge and another v Philippe Laudry [1876] 2 AC 106 applied; *Devan Nair v Yong Kuan Teik* [1967] 2 WLR 846 applied; and *Patterson v Solomon* [1960] AC 579 considered.

2. There is no legislation in St. Kitts and Nevis incorporating either the CPR generally or the costs

regime in Parts 64 and 65 and therefore it does not apply to election petition cases. Section 100 of the National Assembly Elections Act is in very general terms and does not have the effect of incorporating the CPR into election court proceedings.

Section 100 of National Assembly Elections Act, Cap.1.62, Revised Laws of Saint Christopher and Nevis 2009 applied.

3. When the Court of Appeal in St Christopher and Nevis hears appeals from the High Court in election proceedings, it occupies a unique position in the court's hierarchy in that it is the final Court of Appeal. Section 36(1) of the Constitution vests the jurisdiction to hear and determine cases relating to the election of members of the National Assembly in the High Court and subsections (6) and (7) deal with appeals from decisions of the High Court in election cases. The effect of subsections (6) and (7) is that there is a right of appeal to the Court of Appeal from final decisions of the High Court in election cases, and importantly for the purposes of this appeal, there is no right of appeal from decisions of the Court of Appeal to Her Majesty in Council. The Court of Appeal is the final court in election proceedings. This affects the principle of stare decisis and how this Court should deal with its previous decisions. Section 36(1) of the Constitution of Saint Christopher and Nevis, Cap.1.01, Revised Laws of Saint Christopher and Nevis 2009 applied.
4. The decision of this Court in the Consolidated Appeals that the costs regime in the CPR applies to the costs of election petition proceedings is contrary to cases in the High Court, Court of Appeal and the Privy Council and is plainly wrong. It has not been followed by any other court and if it is overruled it will not affect the rights of persons not connected to the case.

Leroy Benjamin et al v Lindsay Fitzpatrick Grant SKBHCVAP2006/009/0111 (delivered on 15th July 2011, unreported) and *Leroy Benjamin et al v Eugene Hamilton* SKBHCVAP2006/0012 (delivered on 15th July 2011, unreported) overruled; *Ezechiel Joseph v Alvina Reynolds and Lenard "Spider" Montoute v Emma Hippolyte* SLUHCVAP2012/0014 (delivered 31st July

2012, unreported) followed; and *Ronald Green v Maynard Joseph and Peter Saint Jean v Roosevelt Skerrit* DOMHCVAP2012/0001 (delivered 11th March 2013, unreported) followed.

5. On the very special facts of this case, this Court, as the final court, should not set aside the learned judge's decision when it has found that he applied the correct legal principles, and by doing so avoided a manifest injustice to the 1st respondent. This is not a case of "falsifying history" as suggested by Lord Lloyd in the *Kleinworth Benson* case, but of overruling an incorrect decision of this Court in and upholding the correct decision of the trial judge. The 1st respondent should have the benefit of an order from this Court allowing him to recover his costs quantified in accordance with the law as this Court has found it and not on the basis of incorrect procedures resulting in an award that is less than two per cent of what the trial judge found to be his reasonable costs.

Kleinworth Benson Ltd. v Lincoln City Council [1998] 4 All ER 513 distinguished; and *Davis v Johnson* [1978] 1 All ER 1132 applied.

6. The learned trial judge erred in finding that the decision in the Consolidated Appeals was overruled sub silentio in *Jacqui Quinn-Leandro v Dean Jonas* (2010) 78 WIR 216. The learned trial judge appears to have used the phrase 'sub silentio' to mean that the court in *Quinn-Leandro*, in reaching a decision that was inconsistent with the decision in the Consolidated Appeals, implicitly overruled the decision in the Consolidated Appeals. While this meaning and use of the sub silentio principle appears to be consistently employed in the United States, it has not been similarly applied in the English or Commonwealth courts. This Court is not aware of any decision in which the phrase sub silentio has been used in the context of overruling a previous decision. There is no need to extend the meaning of the sub silentio principle to apply to this situation.

Haywood v R [2016] 4 LRC 101 considered; *Baker v R* [1975] 3 All ER 55 considered; *Barrs v Bethel* [1982] 1 All ER 106 considered.

7. It was within the learned judge's discretion to accept the fee notes produced by counsel without receipts and there is no basis for interfering with the exercise of his discretion in accepting them. Further, the learned judge did not restrict his finding of reasonableness to the fee notes but rather, he made specific findings of fact relating to the complexity of the matter, the duration of the court proceedings as well as the absence of pleadings by the appellant in relation to the bills of costs. The learned judge was satisfied that this was a sufficiently important, long and complex case to justify instructing senior and junior counsel and there is no basis for this Court to interfere with his decision.

Per Michel JA, dissenting:

8. Even if the CPR does not apply to the conduct of election petition proceedings generally, and even if the costs regime under the CPR is not applicable to the determination and quantification of costs in election petition cases, and even if costs in these cases are to be determined in accordance with the inherent jurisdiction of the court, it is open to the court to choose its mechanism for determining the costs to be awarded. The court may, in its discretion, choose to ask the party entitled to costs to prepare and submit a bill of costs, which the court can use in assessing the costs to be awarded, or the court may choose to use – not by dictation but by discretion – the costs regime contained in the CPR. In this way, even if the costs regime under the CPR is not applied to election petition cases as a matter of course, it can yet be applied by way of the exercise by the court of judicial discretion in accordance with its inherent jurisdiction.
9. There is no doctrine or principle that I am aware of that would permit a judge of an inferior court to disregard not merely a decision of a superior court, but a virtual directive of that court to the inferior court, and instead to make and act upon his own independent and contrary decision.
10. A lower court cannot choose to disregard what in essence is a directive to it by a superior court and to make its own determination contrary to the directive of the superior court, and this Court should not

countenance such disregard, far less legitimise it by overturning the decision of the superior court in line with the lower court's decision. This Court is free to criticise a previous decision of the Court in its determination of the costs regime to be applied in this case, but we ought not to reverse the decision so as to regularise what in effect is an ultra vires decision of the lower court. The Court's criticisms and expression of its position should provide sufficient guidance to be followed by this Court or a lower court in an appropriate case.

Case Name:

**Valery Rogalskiy
v
[1] JSC MCC Eurochem
[2] Eurochem Trading GMBH
[BVIHCMAP2017/0007]**

Date:

Thursday, 13th July 2017

Coram:

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

Appearances:

Appellant: Mr. Andrew Willins

Respondents: Mr. Andrew Gilliland

Issues:

Interlocutory appeal – Cross-examination order on asset disclosure affidavit – Whether foreign deponent subject to the jurisdiction of the court – Whether the BVI court has the power to order a foreigner who has not submitted to the jurisdiction to attend the BVI court sitting in the BVI or elsewhere to be cross-examined on his asset disclosure affidavit given in compliance with an order of the court – Whether the court has jurisdiction to make a cross-examination order in these circumstances and if so how should it exercise its discretion in making the order – What is the mechanism for making such a cross-examination order – What are the safeguards to be included in the cross-

examination order to protect the deponent

**Result &
Reason:**

Held: allowing the appeal, setting aside the order of the learned judge and ordering the respondents to pay the appellant's costs in this court and in the court below, that:

- 1. Section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act is the source for making cross-examination orders of deponents who make asset disclosure affidavits. The section also allows the court to make freezing injunctions with ancillary orders. The ancillary orders extend to and include orders that are necessary to make the injunction effective. The court's powers under this section extend to and include the power to order a defendant who has made an asset disclosure affidavit in compliance with the court's order and is within the court's territorial jurisdiction to attend to be cross-examined on that affidavit. However, it is an exceptional power that should be rarely exercised by the court.**

Section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act, Cap. 80 applied; *House of Spring Gardens Ltd and another v Waite and others* [1985] FSR 173 applied.

- 2. Where a foreigner has submitted to the jurisdiction the court, in exercising its wide powers under section 24, has the power to order him to attend for cross-examination on his asset disclosure affidavit. However, ordering a foreigner to attend for cross-examination on an affidavit that he gave in compliance with the court's order is an exercise of an exorbitant jurisdiction and could have extensive implications. In the case of a foreigner who is challenging the court's jurisdiction, a cross-examination order could include issues of sovereignty and comity, as well as service and submission to the jurisdiction; and may impose significant inconvenience and expense on the foreigner. The absence of authority on this issue is at the very least an indication that the settled practice and therefore wider jurisdiction of the court is not to issue a cross-examination order against a foreigner who is disputing service and challenging the court's jurisdiction. Based on the foregoing, the BVI court does not have**

jurisdiction in the wide sense to order Mr. Rogalskiy or any other person in his position who is disputing service and the court's jurisdiction, to attend the BVI court, whether in person or by video link, to be cross-examined on his asset disclosure affidavit.

Black Swan Investment ISA v Harvest View SA and another BVIHCV2009/0399 (delivered 23rd March 2010, unreported) distinguished; *Motorola Credit Corp. v Uzan* [2003] EWCA Civ 752 distinguished.

3. Even if the court has jurisdiction to order Mr. Rogalskiy to attend for cross-examination that would be an exceptional order and an exercise of exorbitant jurisdiction. In making the cross-examination order the learned judge misdirected himself in the exercise of his discretion and erred by (a) relying in part on rule 30.1 of the CPR and not identifying an alternative basis for finding that the court had jurisdiction to make the cross-examination order; (b) giving insufficient weight to the issue of sovereignty; (c) failing to satisfy himself that there were sufficient safeguards in place regarding the use of the cross-examination information, leaving that issue to be resolved at a subsequent hearing; and (d) introducing the issue of credibility into the cross-examination process. As a result of these matters, the learned judge's decision to order a foreigner who is disputing service and the court's jurisdiction to attend the BVI court in person or by video link for cross-examination exceeded the generous ambit within which reasonable disagreement is possible and, accordingly, the decision may be said to be clearly wrong.

Rule 30.1 of the Civil Procedure Rules, 2000 considered; *Dufour and others v Helenair Corporation Ltd and others* (1996) 52 WIR 188 applied; *Kensington International Limited v Republic of Congo and another* [2006] 2 CLC 588 considered.

APPLICATIONS AND APPEALS

Case Name:

**[1] Eric Lake
[2] Glen Flanders
v
Commissioner of Police**

[BVIMCRAP2014/0010]

Date: Friday, 14th July 2017

Coram: The Hon. Dame Janice Pereira, DBE, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellants: Ms. Ruthilia Maximea

Respondent: Mr. Garcia Kirt Kelly, Senior Crown Counsel

Issues: Whether learned magistrate misapprehended import of section 37B of Proceeds of Criminal Conduct Act, 1997 (Act No. 5 of 1997, Laws of the Virgin Islands) as amended – Whether learned magistrate erred in finding that cash which was subject of application in court below was proceeds of or intended for criminal conduct – Whether decision of learned magistrate cannot be supported by evidence

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

Result / Order: It is hereby ordered:
1. The appeal is dismissed and the order of the Magistrate is confirmed.
2. No order as to costs.

Reason: This appeal stems from the seizure and subsequent forfeiture by order of the magistrate under the Proceeds of Criminal Conduct Act ((Act No. 5 of 1997, Laws of the Virgin Islands) as amended) of the sum of USD\$44,120.00 in cash from the appellants. As the matter stands there is only one appellant before the Court today, Flanders. The other appellant, Lake, is dead and no one stands on his behalf in

this matter.

The brief background facts are that the appellants were about to depart the British Virgin Islands through the Terrance B. Lettsome Airport for St. Maarten. They were searched and \$44,120.00 was found in their luggage and on their person. This money had not been declared at Customs as required by law, being in excess of \$10,000. Both Lake and Flanders pled guilty to the offence of failure to declare at Customs. The money was detained and subsequently forfeited by the magistrate under section 37(b) of the Proceeds of Criminal Conduct Act. Section 37(b)(1) of the Act provides for the magistrate to make an order of forfeiture to the Crown of the whole or part of cash seized pursuant to section 37(a). If satisfied on application made by the police or Comptroller of Customs that cash is a) intended by any person for use in criminal conduct or b) directly or indirectly represents any person's proceeds of criminal conduct. The evidence presented in support of a forfeiture application showed that Lake had \$10,000.00 on his person. \$33,000 was found in a black bag belonging to Flanders and a further sum of \$300 on his person. Flanders indicated that the monies were his winning from gambling on cockfights in the British and US Virgin Islands and horseracing in the British Virgin Islands. He came to the BVI on 12th June 2011 for horseracing but missed the races as the flight arrived late. He was a gambler and engaged in cockfight gambling and raised and sold cocks for cockfighting. He indicated that he collected his winnings from a man in St. Thomas but that he did not count the money properly. Counsel for the appellant contended on appeal that 1) the magistrate misapprehended the import of section 37(b) of the Proceeds of Criminal Conduct Act 2) the magistrate erred when he found that the cash was proceeds of criminal conduct or intended criminal conduct; and 3) the decision of the magistrate cannot be supported having regard to the evidence.

Counsel for the appellant posited that the only evidence before the magistrate with respect to the prevalence of the cash was from the appellant Flanders that the cash came from gambling. Counsel argued that gambling is not an indictable or drug trafficking offence and does not trump the operation of the Proceeds of Criminal Conduct Act and further, that failure to declare at Customs is not an indictable offence. Counsel for the appellant pointed to the

meaning of criminal conduct in the Proceeds of Criminal Conduct Act. Section 2(1) states: "In this Act unless the context otherwise requires "criminal conduct" means conduct which constitutes an offence to which this Act applies or would constitute such an offence if it had occurred in the Territory and for the purposes of a confiscation order includes an offence under the Crimes Prevention and Misuse Act." Counsel also pointed to section 2(5)(d) which states that reference to an offence to which this Act applies are references to all indictable offences other than drug trafficking offences. Flowing from this counsel argues that gambling is not an indictable offence in the Territory. Counsel had also submitted in the skeletons that horseracing is the national sport in the Territory and is approved by the Government. Counsel submits that the magistrate erred in law when he found as he must have done that the gambling to which Flanders had been involved in was conduct which constituted an indicatable offence and accordingly an offence which yielded cash against which the provisions of the Proceeds of Criminal Conduct Act had been found to support the application of forfeiture. Counsel also posited in her skeleton arguments that if the criminal conduct to which the magistrate referred in his order is the offence of failure to declare at customs, the magistrate would have erred. The error would be on the grounds that a) the cash was not used in any criminal conduct nor was it directly or indirectly proceeds of any such conduct b) the offence is not indictable; in other words it is not an offence to which the proceeds of criminal conduct applies as defined in section 2(5)(d) of the Act. Counsel further submitted that as a matter of fact and law there was no evidence for which the magistrate could properly infer or find that the cash was intending for use in criminal conduct or represented directly or indirectly the proceeds of criminal conduct as compliments of the Proceeds of Criminal Conduct Act.

Counsel for the respondent in his skeleton arguments referred to the provisions of section 37(b) of the Act and submitted that legislature does not include any further requirement to prove that the money was the proceeds of particular crimes or intended for use in particular crimes. We agree with this observation. Counsel also submitted that from the circumstances there was sufficient evidence for the magistrate to conclude that the money was either the proceeds of criminal conduct or intended for use in

criminal conduct. In that regard counsel had pointed to the circumstances in which the money was found a) \$10,000 concealed in the waist of Lake. The fact that the money was not declared at customs. The fact that Flanders admitted travelling very early to St. Thomas and Tortola to engage in cockfighting and betting in horseracing but did not know that he had to declare monies over \$10,000. The inconsistency in the account of Flanders as to the source of the funds. First he indicated that the money came from cockfighting in the USVI. He then said that cockfighting and horseracing in Tortola. Further he missed the race day that would have counted for his winnings as he indicated that LIAT was late. It was thereafter that he collected the money that was due to him. And lastly the absence of any plausible explanation as to how he came by the sum.

Counsel for the respondent submits that an examination of the substantial evidence outlined above weighed alongside the evidence of the appellants without more would lead the magistrate to find or draw the inference that on the balance of probabilities the money was the proceeds of criminal conduct or intended for use in criminal conduct. I entirely agree. In my judgment, powerful evidence existed from which the magistrate could draw a strong inference of fact that the money was the proceeds of criminal conduct or intended for use in criminal conduct. In my judgment there is much force in the submissions of counsel for the respondent. The circumstances relating to how the money was found, the fact that it was not declared at customs, the sum of money found, the inconsistency in the account of Flanders as to the source of the funds and the absence of the plausible explanation as to the source were all powerful factors from which the magistrate could draw a visible inference of fact that the money was intended for use in criminal conduct or directly or indirectly represents any person's proceeds of criminal conduct. We see no reason to defer or set aside the magistrate's finding here. The inferences drawn were clearly open to him on the evidence. Counsel did point out that the Magistrate gave no reasons for his decision, but we the appeal court, looking at all the matters are in a position to draw the inferences that were referred to above.

On the question of criminal conduct the construction advanced by the appellant would essentially limit the aptitude of the Act to indictable offences only and

accordingly would exclude some offences. The appellant's contention while trumping on the surface would in our judgment potentially exclude a wide range of pertinent criminal conduct which otherwise would fall within the providence of the Act. The Act however provides that the meaning of "criminal conduct" has to be looked at in context. The context here would be the context of an application for forfeiture. When one looks at the context of the matter where there is an application for forfeiture, there is no need for one to limit the interpretation of the Act. It has to be looked at in its right context in regards to the evils which the Act seeks to contain. Numerous cases have looked at the matter of the weight and the aptitude of such legislation. The case of *Antonio Gellizeau v The State* SVGMCRAP2013/0058 (delivered 5th April 2017, unreported) which the appellants submitted this morning is a case in point and this provided useful guidance in this case as to how the Court goes about its business with respect to such matters. In this case learned Justice Blenman stated "The legislature in St. Vincent and the Grenadines in its wisdom did not stipulate that in order to succeed in the prosecution of a money laundering offence there is the need for the prosecution to establish the provenance offence." We agree with this. She continued, "There is great wisdom in not so requiring since as the Chief Magistrate explained and with which I agree 'the aim of money laundering is to obscure and disguise the origin of the money so that criminals are able to use it without being connected to the criminal activity from which it is generated.' The learned Chief Magistrate opined that due to the very nature of the offence, very rarely would it lend itself to the existence of direct evidence of any specific criminal conduct. 'The Court is therefore allowed to infer this from all the circumstantial evidence that is presented.'" And we wholly agree with and adopt this position. Later on in the judgment Justice of Appeal Blenman referred to the case of *R v Craig* [2007] EWCA Crim 2913 and *R v Anwoir and Others* [2008] EWCA 1354 and stated "In the course of rendering the decision, the Court of Appeal stated that there is nothing in the wording of the statute that required the Crown to demonstrate the provenance of the money." We also adopt this statement and apply it to the case before us. There is no need to show or to particularise the offence or offences which generated the proceeds of crime. In this case the initial trigger for the seizure and detainment of money under section 37(a)(2) of the Act and the subsequent order of

forfeiture pursuant to section 37(b) of the Act did not come about because of its origin or from an indictable or summary offence. Or for that matter, it did not depend on whether any particular criminal offence was committed. As I earlier said section 37(b) of the Act establishes that in order to succeed on an application for forfeiture there must be a visible ground to conclude that the money must be intended by any person for use in criminal conduct whether it directly or indirectly represents any person's proceeds of criminal conduct. There is no requirement to prove that the money was proceeds of particular crimes or was intended to be used in particular crimes.

During the course of her submissions counsel for the appellant addressed the issue of the exercise of discretion of the magistrate. Counsel conceded that when one looks at the law which relates to the circumstances in which the exercise of discretion of the judge can be determined there was no basis for which this counsel can properly negate the exercise of discretion of the magistrate. We find that the magistrate properly exercised his discretion in the matter. We also conclude that the inferences which were present for the events presented properly support for his conclusion in this matter. In the circumstances we dismiss the appeal and confirm the order of the magistrate. There is no order as to costs.

Case Name:

[1] Kevin Greaves

[2] Nigel Registe

v

The Commissioner of Police

[BVIMCRAP2014/0022]

Date:

Friday, 14th July 2017

Coram:

The Hon. Dame Janice Pereira, DBE, Chief Justice

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

The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant: Mr. Stephen Daniels for both appellants (the appellants were absent)

Respondent: Mr. Garcia Kirt Kelly, Senior Crown Counsel

Issues: Proceeds of Criminal Conduct Act, 1997 (Act No. 5 of 1997, Laws of the Virgin Islands) – Whether learned magistrate erred in interpreting Proceeds of Criminal Conduct Act

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

Result / Order: It is hereby ordered:
With the leave of the Court the appeal is hereby withdrawn.

Reason: Appellants no longer wish to prosecute appeal.

Case Name: Sayied Scatliffe
v
Smith Seaman

[BVIMCVAP2016/0002]

Date: Friday, 14th July 2017

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:
Appellant: Mr. Michael Maduro
Respondent: Ms. Christina Hart

Issues: Whether learned magistrate erred in finding that appellant had contractual arrangement with respondent regarding repairs to vehicle – Whether learned magistrate erred in

finding appellant had a contractual arrangement with respondent concerning rental of vehicle

Type of Oral
Result/Order
Delivered:

Oral Judgment or Decision

Result / Order:

It is hereby ordered:
The appeal is removed from the Court's list.

Reason:

There is no appeal currently pending due to lack of service.

Case Name:

David "Canono" Fahie
v
Alphonso Enterprises Ltd.

[BVIMCVAP2015/0004]

Date:

Friday, 14th July 2017

Coram:

The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant: Ms. Charmaine Rosan-Bunbury

Respondent: Mr. Michael Maduro

Issues:

Breach of contract – Whether the magistrate erred in finding that the appellant had a contractual relationship with the respondent regarding repairs to the vehicle – Whether the magistrate erred in fact and misdirected herself in finding that the appellant owed the respondent

Type of Oral
Result / Order

Directions

Delivered:

Result / Order:

It is hereby ordered:

- 1. The appellant shall file and serve skeleton arguments together with any copies of authorities relied on by Friday 15th September 2017.**
- 2. The respondent shall file and serve skeleton arguments in response together with copies of authorities relied on by Monday 16th October 2017.**
- 3. The appeal is fixed for hearing at the next sitting of the Court commencing on 20th November 2017.**

Reason:

The transcripts were ready for collection.

Case Name:

Pickle Properties Limited

v

Mr. Stephen Leslie Plant

[BVIHCMAP2016/0032]

Date:

Friday, 14th July 2017

Coram:

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

The Hon. Mr. John Carrington, QC, Justice of Appeal [Ag.]

The Hon. Mr. Eamon Courtenay, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Romie Tager, QC, with him, Mr. William Willson

Respondent: Ms. Elspeth Talbot Rice, QC, with her, Mr. David Welford

Issues:

Commercial appeal - Appeal against the orders of learned judge ordering that Pickle Properties pay to Mr. Stephen Plant sum of £346,790.00 and that Pickle Properties pay Mr. Plant interest at a rate of 3.5% per annum, compounded annually – Whether learned judge erred in both law and fact in concluding that there was express agreement to contribute as between Mr. Plant and Pickle Properties and/or that Pickle Properties was otherwise contractually obliged to make contribution to Mr. Plant (or was estopped

from not doing so) – Whether learned judge erred in finding that Mr. Plant has not lost his right to contribution – Whether learned judge erred in law in concluding that the applicable rate of interest was 3.5% and that interest should be compounded annually – Whether as consequence of learned judge's delay in delivering judgment judge's assessment of the factual and expert evidence was flawed and delay constitutes serious procedural irregularity

Type of Oral
Result / Order
Delivered:

N/A

Result / Order:

Judgment reserved.