

COURT OF APPEAL SITTING

TERRITORY OF THE VIRGIN ISLANDS

30th January – 3rd February 2017

APPLICATIONS AND APPEALS

Case Name:

**The Bank of Nova Scotia Trust Company
(Bahamas) Limited
(in its capacity as trustee of the Southampton
Trust)**

v

**[1] The Registrar of Companies
[2] Wembley, Ltd
[3] The Bank of Nova Scotia Trust Company
(Bahamas) Limited
(in its capacity as trustee of Portsmouth Trust)**

[BVIHCMAP2016/0009]

consolidated with

**The Bank of Nova Scotia Trust Company
(Bahamas) Limited
(in its capacity as trustee of the Battersea
Trust)**

v

**[1] The Registrar of Companies
[2] Sutton, Ltd**

[BVIHCMAP2016/0010]

Date:

Monday, 30th January 2017

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Douglas Mendes, SC, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Mr. Michael Black, QC, with him, Ms. Sara-Jane Knock

Respondent: Mr. George Bompas, QC, with him, Ms. Dian Fahie and Mr. Stephen Grayson

Issues: Appeal against decision dismissing fixed date claim form in court below – Whether the learned judge erred in failing to give any or any proper effect to paragraph 36 of Schedule 2 to the BVI Business Companies Act, 2004 (as amended) (“the Act”) – Whether learned judge erred in failing to give effect to policy behind the Act – Whether judge erred in concluding that relief sought by appellant would undermine policy behind immobilisation of bearer shares – Whether judge erred in her conclusion as to the “public policy” behind the Act and in concluding that relief sought was contrary to such policy

Type of Oral Result/Order Delivered: N/A

Result: Judgment reserved.

Case Name: In the Matter of Part XIX of the Insolvency Act
AND
In the Matter of Vipin Kumar Sharma
A Bankrupt
v
Toshiaki Aiba
Respondent
[BVIHCMAP2016/0022]

Date: Monday, 30th January 2017

Coram: The Hon. Dame Janice M. Pereira DBE, Chief Justice
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]

Appearances:

**Appellant /
Respondent:**

Mr. Lewis Hunte, QC, with him, Ms. Pauline Mullings

**Respondent /
Applicant:**

**Ms. Rosalind Nicholson, with her, Ms. Colleen
Farrington**

Issues:

Whether the order of lower court irregular – Whether the learned judge erred in law by making final order in ex parte proceedings without fixing date for inter partes hearing or granting appellant opportunity for his case to be heard – Application pursuant to which order below was made not served on appellant prior to hearing pursuant to rule 17 of Insolvency Rules, 2005 (S.I. No. 45 of 2005) – Whether failure to observe proper procedures prescribed by the Insolvency Rules, 2005 deprived appellant of opportunity to make representations for stay pending outcome of appeal in Japanese proceedings – Application for leave to adduce fresh evidence

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

Oral Judgment or Decision

Result / Order:

It is hereby ordered that:

The fresh evidence of the decision of the Court of Appeal in Japan is hereby admitted.

Case Name:

**In the Matter of Part XIX of the Insolvency Act
AND**

In the Matter of Vipin Kumar Sharma

A Bankrupt

v

Toshiaki Aiba

Respondent

[BVIHCMAP2016/0022]

Date:

Monday, 30th January 2017

Coram: The Hon. Dame Janice M. Pereira DBE, Chief Justice
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Lewis Hunte, QC, with him, Ms. Pauline Mullings

Respondent Ms. Rosalind Nicholson, with her, Ms. Colleen Farrington

Issues: Whether the order of lower court irregular – Whether the learned judge erred in law by making final order in ex parte proceedings without fixing date for inter partes hearing or granting appellant opportunity for his case to be heard – Application pursuant to which order below was made not served on appellant prior to hearing pursuant to rule 17 of Insolvency Rules, 2005 (S.I. No. 45 of 2005) – Whether failure to observe proper procedures prescribed by the Insolvency Rules, 2005 deprived appellant of opportunity to make representations for stay pending outcome of appeal in Japanese proceedings

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

Result / Order: The appeal is dismissed.

Reason: The unanimous decision of the Court is that the appeal be dismissed. It is for these short reasons.

The application that came before the court below is an application by the trustee in bankruptcy of a debtor in the foreign court, situated in Japan, for recognition as a foreign representative (within the meaning of Part XIX of the Insolvency Act, 2003). That court appointed the respondent as trustee of the debtor's estate. Section 466 of Part XIX of the Insolvency Act, 2003 (Act No. 5 of 2003, Laws of the Virgin Islands) as amended, which is entitled "Orders in Aid of Foreign Proceedings" sets out what is meant by "foreign proceeding", "foreign representative" and "relevant foreign country". "Relevant foreign country" is defined as 'a country, territory or jurisdiction designated by the Commission

as a relevant foreign country for the purposes of this Part'. It is not disputed that Japan is considered a relevant foreign country and so the question which was raised singularly is whether or not the trustee could apply for recognition of his status as foreign representative pursuant to section 467 of the Insolvency Act, 2003. "Foreign representative" is defined as 'a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the re-organisation or the liquidation of the debtor's property or affairs or to act as a representative of the foreign proceeding'.

Section 467(2) states that '[a] foreign representative may apply to the Court for an order under subsection (3) in aid of the foreign proceeding in respect of which he is authorized'. Section 467(3) sets out orders that the Court may make upon an application made under section 467(1). The Court, however, is of the view that the application would have to be made under subsection (2) and not subsection (1) as stated in subsection (3). All those orders stand clearly as orders made simply to ensure that the relevant status could be gotten in relation to that foreign jurisdiction, which in this case would be the Virgin Islands.

Section 468 basically outlines the matters to be considered by the court in determining an application under section 467. The court is guided by what will best ensure the economic and expeditious administration of the foreign proceeding. This section is clearly geared towards aiding in the administration of an insolvent estate or an estate which has been instructed to become insolvent whether by way of a debtor, trustee or indeed a company which is adjudged to be insolvent and for which liquidators have been appointed. When one looks at section 467(3), the list is not exhaustive but it basically allows the court to grant orders such as one requiring a person to deliver up to the foreign representative any property of the debtor or the proceeds of such property; or to make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of a Virgin Islands insolvency proceeding with a foreign proceeding; or generally to make such order or grant such other relief as the court considers appropriate.

Therefore, all these various orders which the Court can make would allow the court in the Virgin Islands to give

aid to the principal proceedings in the country where the trustee was appointed. The question then is, is there any provision that requires the debtor/bankrupt in this case to be specifically named as a party in the application for recognition as a foreign representative? Also, is this something that can be contemplated in the scheme of the above provisions?

In our view, there is nothing to suggest that the scheme intended that the bankrupt be made a party to the application before the foreign court for the purposes of recognising his status as a foreign representative and therefore, there is no need for the bankrupt to be served with the application for recognition made pursuant to section 467(2).

So far, the appellant has taken us to the Insolvency Rules, 2005, in particular, to rule 17, which he says suggests that all applications made are required to be served on persons or parties. We, however, are of the view that when one considers the combination of rules 14, 16 and 17, the rules cannot be construed in such a manner to say that they require that the bankrupt be served with the application for recognition, merely because the matter is entitled 'in the estate of the bankrupt' where the recognition being sought is for the status of foreign representative.

As previously mentioned, there is nothing in the Insolvency Rules, 2005 which suggests that it is a requirement that the debtor or bankrupt in this case (the proceedings in Japan having been concluded by its highest Court) should be made a party and accordingly, have to be served. Furthermore, when one considers the tenor of the rules, it is clear that the learned judge, if necessary, could have exercised his discretion in determining whether any other person should be joined or was required to be named as a party. From the transcript of the proceedings, it is clear to us that all of these considerations were raised, the nature of the application, the points that could be taken in relation to the bankrupt and any other person who claimed an interest and the judge was satisfied that there was no need to join the bankrupt or anyone else prior to making the order. Furthermore, it is clear that where a party considers themselves aggrieved by an order made in their absence, if they were a party, or if they were not, and thought they ought to have been a party, if they hold the view that the order has affected them, that person can apply to the court to set aside

the order. Accordingly, we can find no reason to set aside the order made by the learned judge and the set order is confirmed.

The court having dismissed the appeal, the stay ordered by Justice of Appeal Thom on 4th August 2016 is set aside.

As to costs, the appellant shall personally bear the costs of this appeal to be assessed unless agreed within 14 days. The security for costs paid into court on the order dated 12th August 2016 shall be applied towards the respondent's costs upon agreement or assessment.

Case Name:

Jessroy McKelly

v

The Queen

[BVIHCRAP2014/0002]

Date:

Monday, 30th January 2017

Coram:

**The Hon. Dame Janice M. Pereira DBE, Chief Justice
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. Jessroy Kelly in person

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

Issues:

Appeal against conviction and sentence – Murder – Whether Crown ought to have been permitted to adduce identification evidence in breach of s. 110 of the Evidence Act, 2006 (Act No. 15 of 2006, Laws of the Virgin Islands) – Whether trial judge erred in finding that identification parade would not serve useful purpose – Whether trial judge erred in inviting jurors to return verdict before deliberations were complete or before jurors had indicated that they had difficulty returning verdict – Whether sentence of life

imprisonment with eligibility for parole after 40 years manifestly excessive

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

Directions

Result / Order:

It is hereby ordered:

- 1. The Court hereby assigns Mr. Patrick Thompson to represent the appellant in his appeal before the Court of Appeal unless Mr. Thompson has a conflict of interest or for some other good reason is unable to take on assignment as ordered by the Court.**
- 2. The next sitting of the Court of Appeal is the 10th July 2017. The appellant shall file and serve skeleton arguments in support of the appeal by Friday 28th April 2017. The respondent shall file and serve skeleton arguments in response by Friday 9th June 2017. The hearing of the appeal is adjourned to be heard on a day during the week commencing 10th July 2017. A copy of this order shall be served by the Registrar on the appellant, the respondent and counsel hereby assigned on behalf of the appellant by Friday 10th February 2017.**

Reason:

The Court was of the view that counsel met the qualifications for the assignment. He was the next person on the Legal Aid Roster of Legal Practitioners kept by the Registrar.

Case Name:

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

v

Shalakany Law Office

[BVIHCMAP2016/0006]

Date:

Monday, 30th January 2017

Coram:

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

**The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]**

Appearances:

**Appellants /
Respondents:**

Mr. Robert Nader

**Respondent /
Applicant:**

Mr. David Welford

Issues:

Application for leave to appeal to Her Majesty in Council – Application for adjournment – 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:**

N/A

Result / Order:

It is hereby ordered that:

The adjournment is granted with the Court being satisfied that the further reasons being promised by the Court at the conclusion of the hearing of the appeal on 21st July 2016 are due to be given.

Reason:

The Court was of the view that the respondent/applicant should be given a chance to obtain reasons for the decision under appeal. Costs in the motion and are to be reserved. Costs on the application for an adjournment are reserved.

Case Name:

Olive Group Capital Limited

v

Mr Gavin Mark Mayhew

[BVIHCMAP2016/0002]

Date: Monday, 30th January 2017

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Mark Rowlands

Respondent: Ms. Tameka Davis

Issues: Interpretation of s. 179(9)(c) of BVI Business Companies Act, 2004 (Act No. 16 of 2004, Laws of the Virgin Islands) (“the Act”) – Whether learned judge erred in determining preliminary issue which concerned court’s jurisdiction to grant declarations sought by appellant company by a consideration of whether court should exercise its discretion to grant relief sought by appellant – Whether learned judge accordingly failed to distinguish between jurisdiction (which was relevant to preliminary issue) and question of discretion (which was not relevant to it) – Whether learned judge erred in holding that court has no jurisdiction to make declarations of law or otherwise interpret meaning and scope of s. 179(9)(c) of the Act under s. 246 of the Act or under its inherent jurisdiction – Application for conditional leave to appeal to Her Majesty in Council – Appeal arises under section 3(1)(a) of the Virgin Islands (Appeals To Privy Council) Order 1967 (S.I. No. 234 of 1967)

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

Result / Order: It is hereby ordered that:

1. Olive Group Capital Limited, the Appellant/Applicant in Civil Appeal No. 2 of 2016 (Olive), is hereby granted leave to appeal the order and judgment of the Honourable Court of Appeal dated 7 November 2016 to Her Majesty in Council on the following conditions:
 - 1.1 Olive do pay into Court the sum equivalent to

500 pounds sterling pursuant to section 5(a) of the Virgin Islands (Appeals to Privy Council) Order 1967 (Statutory Instruments 1967 No 224), such payment to be made within ninety (90) days from today's date for the due prosecution of the appeal and the payment of all such costs as may become payable by the Appellant in the event of its not obtaining an order granting final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee of the Privy Council ordering the appellant to pay the costs of the appeal (as the case may be);

1.2 Olive shall apply to this Court for an order for final leave to appeal to Her Majesty in Council within thirty (30) days of receipt the certificate of the Registrar that the payment of security for costs ordered herein at paragraph 1.1 above has been given within the time prescribed to the satisfaction of the Registrar and that Olive has otherwise complied with this Order;

1.3 Olive shall prepare the record of appeal in accordance with Rule 20 of the Judicial Committee (Appellate Jurisdiction) Order 2009 and shall transmit the same to the Registrar of the Judicial Committee of the Privy Council without delay once final appeal has been granted and shall include a copy of the orders granting conditional leave and final leave;

2. The costs of and occasioned by this Notice of Motion be costs in the appeal to her Majesty in Council.

Case Name:

Sylon Forbes

v

The Queen

[BVIHC RAP2016/0004]

Date:

Monday, 30th January 2017

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]

Appearances:

Appellant / Applicant:	Mr. Walter Barrett (friend of Mr. Forbes, who appeared on his behalf) No appearance of Mr. Forbes
Respondent:	Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel

Issues: Application for permission to appeal against conviction out of time – 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: It is hereby ordered that:

The application to extend for leave to appeal is granted and the hearing is adjourned to the next sitting of the Court in the Virgin Islands in the week commencing 10th July 2017.

Reason:

The affidavit of Ms. Dianah George which was handed up to the Bench informed the Court that the appellant was out of the Territory and that he had been made aware of the day's hearing.

The Crown told the Court that their initial understanding was that the appellant had been deported from the Territory. However, they were informed by Mr. Barrett that he left voluntarily.

Mr. Barrett also informed the Court that the appellant's passport was expired and he was therefore unable to travel. The Court considered that with the appellant being out of the Territory he would not be able to file the proper documents for his appeal and so he should be given a chance to do so.

Case Name: [1] Wendell Anthony
[2] Marvin Robinson
v
The Commissioner of Police
[BVIMCRAP2014/0016]

Date: Monday, 30th January 2017

Coram: The Hon. Dame Janice M. Pereira DBE, Chief Justice
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]

Appearances:

Appellants / Applicants:	Ms. Valerie Gordon holding papers for Mr. Hugh Wildman
Respondent:	Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel, with her, Mr. Garcia Kirt Kelly, Senior Crown Counsel

Issues: Application for leave to appeal to Her Majesty in Council – Whether grounds of appeal relating to appellants' good character and the visit to the locus in quo meet the threshold of general or public importance required to obtain leave to appeal to Her Majesty in Council

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

Result / Order: The application for leave to appeal is refused.

Reason:

This is an application by the appellants for leave to be granted to appeal to Her Majesty in Council from a decision of the Court of Appeal that was rendered on 23rd November 2016.

The appellants relied on several grounds of appeal (as stated in paragraph three of the Notice of Motion for Leave to Appeal to Her Majesty in Council). Learned counsel Ms. Gordon indicated to the Court that the basis on which she was seeking leave to appeal was section 3(2) of the Virgin Islands (Appeals to Privy Council) Order 1967 (S.I. No. 234 of 1967).

The Court has had the benefit of reading the helpful submissions of learned counsel for the appellants as well as those of the learned Principal Crown Counsel Ms. Scatliffe-Esprit, ably assisted by Senior Crown Counsel, Mr. Kelly. We are of the view that in order for the appellants to be granted leave to be able to prosecute this appeal before Her Majesty in Council, they are required to satisfy the threshold that the points that they should have determined are matters of great general or public importance.

We have reviewed the grounds of appeal including those that deal with the learned magistrate's treatment of the medical report and the Court of Appeal's treatment of the report, and in particular, the grounds in relation to the treatment of the good character issue by the Court of Appeal, read together on the issues about the locus in quo, and we are satisfied that these are matters that have been well settled at this level of the Court, and were properly and correctly dealt with in the judgment of the Court of Appeal of 23rd November 2016.

Accordingly we are of the view that on the matters such as good character the law is well settled, both by the Privy Council and this Court, which has consistently applied the law without any difficulty. In our view there is no issue of general or public importance that Her Majesty in Council should be troubled with in relation to good character.

Locus in Quo

In relation to the relation to the issue on the locus in quo, the Court is also of the view that this is a well

ventilated matter that has been settled by this Court and dealt with consistently and adequately and it does not raise any matter of controversy or inconsistency in the Court's treatment of this issue.

Accordingly, there is no basis on which the Court should grant the appellants leave to appeal to Her Majesty in Council since the issue relating to the locus in quo was not one of great general or public importance.

We note that the fact that the appellants were police officers is a matter to be taken into account as is any other matter that touches and concerns appellants. But this fact in and of itself does not suffice to make a conviction in relation to the police officers, a matter of great general or public importance with which Her Majesty in Council ought to be troubled.

Taking into account the judgment of the Court of Appeal which, in our view, properly reflects the law which has been applied by this Court in a consistent fashion for several years; and reviewing the circumstances of the appeal and the grounds of appeal, we are of the view that there is no basis on which we can properly grant the appellants leave to appeal to Her Majesty in Council pursuant to section 3(2)(a) of the Virgin Islands (Appeals to Privy Council) Order 1967.

STATUS HEARING

Case Name: Alberto Rosa De La Rosa
v
The Queen

[BVIHCRAP2016/0001]

Date: Monday, 30th January 2017

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

Appearances:
Appellant: Mr. Patrick Thompson

Respondent: Mr. Garcia Kirt Kelly, Senior Crown Counsel, holding papers for Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel

Issues: Status of matter – Appeal against conviction and sentence – Manslaughter – Whether appellant’s case put fairly to jury by learned judge – Appellant sentenced to 10 years imprisonment – Whether sentence excessive in all circumstances of case

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

Result / Order: It is hereby ordered that:

1. The Registrar shall cause the record of appeal to be prepared and shall notify the parties within two (2) weeks of the date of completion.
2. The appellant shall file and serve written submissions with authorities on or before 31st May 2017.
3. The respondent shall file and serve written submissions authorities on or before 14 July 2017
4. Hearing of the appeal is set down for the sitting of the Court of Appeal in the Territory of the Virgin Islands commencing during the Michaelmas term.

Case Name: Jevone Demming
v
The Queen

[BVIHCRA2015/0001]

Date: Monday, 30th January 2017

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

Appearances:

Appellant: Mr. Patrick Thompson

Respondent: Mr. Garcia Kirt Kelly, Senior Crown Counsel, holding papers for Ms. Tiffany Scatliffe-Esprit, Principal Crown

Counsel

Issues: Status of matter – Appeal against sentence – Attempted murder

Type of Oral Result/Order Delivered: Directions

Result: It is hereby ordered that:

1. The appellants shall file and serve written submissions and authorities on or before 31st March 2017.
2. The respondents shall file and serve written submissions on or before 1st May 2017.
3. Hearing of the appeal is set down for the next sitting of the Court of Appeal in the Territory of the Virgin Islands commencing the week of 10th July 2017.

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

Date: Monday, 30th January 2017

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

Appearances:

Appellant:	In person
Respondent:	Mr. Garcia Kirt Kelly, Senior Crown Counsel, holding papers for Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel

Issues: Status of matter – Appeal against conviction and sentence – Attempted murder – Unlawful possession of firearm

Type of Oral Directions

**Result/Order
Delivered:**

Result / Order:

It is hereby ordered that:

- 1. The appellants shall file and serve written submissions and authorities on or before 31st March 2017.**
- 2. The respondents shall file and serve written submissions on or before the 1st May 2017.**
- 3. Hearing of the appeal is set down for the next sitting of the Court of Appeal in the Territory of the Virgin Islands commencing the week of 10th July 2017.**

Case Name:

Doyle Guishard

v

The Queen

[BVIHCRA2015/0004]

Denzil Wheatley

v

The Queen

[BVIHCRA2015/0005]

Samuel Harris

v

The Queen

[BVIHCRA2015/0006]

Date:

Monday, 30th January 2017

Before:

The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant:

Mr. Samuel Harris in person

Mr. Michael Maduro for Mr. Denzil Wheatley

Respondent:

Mr. Garcia Kirt Kelly, Senior Crown Counsel, holding papers for Ms. Tiffany Scatliffe-Esprit, Principal Crown

Counsel

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

Type of Oral Result/Order Delivered: N/A

Result / Order: It is hereby ordered that:
These appeals are adjourned for status hearing at the next sitting of the Court of Appeal in the Territory of the Virgin Islands commencing during the week of 10th July 2017.

Case Name: Raymond Harrison
v
The Queen
[BVIHCRA2014/0003]

Date: Monday, 30th January 2017

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

Appearances:

Appellant: Mr. Patrick Thompson

Respondent: Mr. Garcia Kirt Kelly, Senior Crown Counsel, holding papers for Ms. Tiffany Scatliffe-Esprit, Principal 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: It is hereby ordered:

1. The appellant shall file and serve written submissions and authorities on or before 31st March 2017.
2. The respondents shall file and serve written submissions on or before the 1st May 2017.
3. The appeal is set down for hearing at the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing the 10th July 2017.

Case Name: **David Wells**
v
Century Group Enterprises Limited (In Liquidation)
[BVIHCVAP2015/0002]

Date: **Monday, 30th January 2017**

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

Appearances:

Appellant:	No appearance
Respondent:	No appearance

Issues: **Status of matter**

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

Result / Order: **It is hereby ordered:**
The matter is set down before the full Court at the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing the 10th July 2017.

Reason: **The Court noted that since the notice of appeal was filed on 8th January 2015 no other step had been taken by the appellant to prosecute the appeal. In the circumstances, the appeal could be struck out for want**

of prosecution and dismissed.

Case Name: James Anthony
v
[1] Eileen Pappone
[2] Lourie Anthony
[BVIHCVAP2015/0014]

Date: Monday, 30th January 2017

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

Appearances:
Appellant: Ms. Charmaine Rosan-Bunbury
Respondents: Mr. Lewis Hunte, QC, with him, Ms. Pauline Mullings

Issues: Status of matter

Type of Oral Result/Order Delivered: N/A

Result: It is hereby ordered that:

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 10th July 2017.

Case Name: Charmaine Rosan-Bunbury
v
[1] Attorney General
[2] Commissioner of Police

[BVIHCVAP2015/0017]

Date: Monday, 30th January 2017

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

Appearances:

Appellant: In person

Respondents: Ms. Vareen Vanterpool for the Attorney General

Issues: Status of matter

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

Result / Order: It is hereby ordered that:

1. The appellant shall file and serve written submissions with authorities on or before 8th May 2017.
2. The respondent shall file and serve written submissions with authorities on or before 9th June 2017.
3. Hearing of the Appeal is set down for the sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 10th July 2017.

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: Monday, 30th January 2017

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

Appearances:

Appellants: Ms. Patricia Archibald-Bowers

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: N/A

Result / Order: It is hereby ordered that:

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 10th July 2017.

Case Name:

[1] Eric Lake

[2] Glen Flanders

v

Commissioner of Police

[BVIMCRAP2014/0010]

Date: Monday, 30th January 2017

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

Appearances:

Appellant: Ms. Ruthilia Maximea for the estate of Mr. Eric Lake (deceased)

Respondent: Mr. Garcia Kirt Kelly, Senior Crown Counsel holding papers for Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel

Issues: Status of matter – 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:

Directions

Result / Order:

It is hereby ordered that:

1. The appellants shall file and serve written submissions and authorities on or before 3rd April 2017.
2. The respondents shall file and serve written submissions on or before the 19th May 2017.

Reason:

The Court was informed that Mr. Glen Flanders and the widow of the first appellant, Mr. Eric Lake, were in the process of seeking the permission of the Chief Immigration Officer to gain entry into the jurisdiction to prosecute the appeal.

Case Name:

The Commissioner of Police

V

[1] David Hodge

[2] Elvis Thomas

[BVIMCRAP2015/0008]

Date:

Monday, 30th January 2017

Coram:

The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant:

Mr. Garcia Kirt Kelly, Senior Crown Counsel holding papers for Mr. O'Neil Simpson, Crown Counsel

Respondents:

Mr. Stephen Daniels

Issues: Status of matter – Appeal against decision of learned Senior Magistrate to uphold no case submission – Unlawful importation of goods at place other than customs port – Whether decision of learned magistrate unreasonable or cannot be supported by the evidence -

Type of Oral Result/Order Delivered: Directions

Result: It is hereby ordered that:
1. The appellant shall file and serve written submissions on or before 1st May 2017.
2. The respondent shall file and serve written submissions on or before 2nd June 2017. Hearing of the appeal is set down for the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing the 10th July 2017.

Case Name: Gershon Browne
V
The Commissioner of Police
[BVIMCRAP2015/0009]

Date: Monday, 30th January 2017

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

Appearances:

Appellant: Mr. Patrick Thompson

Respondent: Mr. Garcia Kirt Kelly, Senior Crown Counsel

Issues: Status hearing – Appeal against sentence – Possession of controlled drug – Appellant sentenced to 23 month term of imprisonment – Whether sentence of learned magistrate was based on wrong principle – Whether sentence of learned magistrate excessive in all the circumstances of the case

Type of Oral Directions

**Result/Order
Delivered:**

Result / Order:

It is hereby ordered that:

The appellant shall file a notice of discontinuance on or before 14th February 2017 thereupon the appeal shall stand dismissed.

Reason:

This was an appeal against sentence and the sentence had already been served.

Case Name:

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

Date:

Monday, 30th January 2017

Before:

The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant:

Mr. Patrick Thompson

Respondent:

Mr. Garcia Kirt Kelly, 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:

It is hereby ordered that:

1. The appellant shall file and serve written

submissions with authorities on or before 31 May 2017

2. The respondent shall file and serve written submissions with authorities on or before 14th July 2017. Hearing of the appeal is set down for the sitting of the Court of Appeal in the Territory of the Virgin Islands commencing during the Michaelmas term.

Case Name: **Vaughn Williams-Dyer**
v
Natalie Huggins

[BVIMCVAP2015/0006]

Date: **Monday, 30th January 2017**

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

Appearances:
Appellant: **Mr. Jamal Smith**
Respondent: **No appearance**

Issues: **Status of matter**

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

Result / Order: **It is hereby ordered that:**
Learned counsel for the appellant, Mr. Jamal Smith,
shall file a notice of discontinuance within 7 days,
thereupon the appeal shall stand dismissed.

Reason: **The learned magistrate heard the substantive matter**
during the week of 25th January 2017 and the matter
was dismissed. Leave to withdraw was therefore
sought.

Case Name: David “Canono” Fahie
V
Alphonso Enterprises Ltd.

[BVIMCVAP2015/0004]

Date: Monday, 30th January 2017

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

Appearances:

Appellant: Ms. Charmaine Rosan-Bunbury
(The appellant was not present)

Respondent: No appearance

Issues: Status of matter

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

Result:

It is hereby ordered that:

1. The appellant shall file and serve written submissions with authorities on or before 1st May 2017.
2. The respondent shall file and serve written submissions with authorities on or before 2nd June 2017.
3. Hearing of the appeal is set down for the sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 10th July 2017.

APPLICATIONS AND APPEALS

Case Name: [1] Sheikh Mohamed Ali Alhamrani
[2] Sheikh Siraj Ali Alhamrani
[3] Sheikh Khalid Ali Alhamrani
[4] Sheikh Mohamed Ali Alhamrani
(as representative of the Late Sheikh Abdulaziz Ali Alhamrani)

[5] Sheikh Ahmed Ali Alhamrani

[6] Sheikh Fahad Ali Alhamrani

v

Sheikh Abdullah Ali Alhamrani

[BVIHCMAP2016/0030]

Dates:

Tuesday, 31st January 2017

Wednesday, 1st February 2017

Coram:

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

The Hon. Mr. Mario Michel, Justice of Appeal

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

Appearances:

Appellants:

Mr. Lynton Tucker, with him, Mr. James Brightwell

Respondents:

Ms. Elizabeth Jones, QC

Issues:

Interlocutory Appeal – Whether learned judge erred in law in determining as preliminary point that any doubts as to whether any element of costs claimed by respondent were reasonable for purposes of CPR 65.2(a) were not to be resolved in favour of paying party – Whether judge erred in carrying out detailed assessment process on indemnity basis even though CPR does not provide for an assessment to be carried out on such a basis

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

N/A

Result / Order:

Judgment reserved.

Case Name:

Green Elite Limited

v

Delco Participation BV

[BVIHCMAP2016/0041]

Dates:

Tuesday, 31st January 2017

Wednesday, 1st February 2017

Coram:	The Hon. Mr. Davidson K. Baptiste, Justice of Appeal The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]
Appearances:	
Appellant / Applicant:	Mr. Brian Lacy, with him, Mr. Nicholas Brookes
Respondent:	Mr. Simon Hall
Issues:	Application for stay pending determination of appeal and related reliefs – Whether order of judge in court below final – Application for stay of paragraphs 1, 2, and 3 of judge’s order pending outcome of the applicant’s appeal against the order
Type of Oral Result/Order Delivered:	Oral Judgment or Decision
Result / Order:	It is hereby ordered that: 1. Paragraphs 1, 2 and 3 of the order are stayed pending the outcome of the appeal. 2. The costs of the application of stay are costs in the appeal.
Reason:	The Court considered the arguments of the applicant and respondent as well as the applicable legal principles as set out in the case of <i>C-Mobile Services Limited v Huawei Technologies Co. Limited</i> (BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported) that: i) the court must take into account all the circumstances of the case; ii) the party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted; iii) in exercising its discretion the court should apply what is in effect a balance of harm test in which the likely prejudice to the successful party is clearly considered; and iv) the court should take account of the prospect of the appeal succeeding but only where strong grounds of appeal are shown or where there is a strong likelihood that the appeal will succeed will the court usually order that a stay be granted. The Court also considered the case of <i>William Engineering</i>. In relation to the prospects of the appeal succeeding,

the Court found that this was no more than a neutral factor, bearing in mind however that leave to appeal was in fact granted.

The Court was cognizant of the particular nature of the claim made and of the stated purposes of the meeting of the members of the appellant company and concluded that the appeal will in fact be stifled or rendered nugatory unless a the stay is granted.

The Court also considered that the likely prejudice to the successful party in the court below (i.e. the respondent) if a stay is granted, did not outweigh the likely prejudice to the applicant if the appeal is rendered nugatory.

In the exercise of its discretion the Court granted the application.

Case Name:

Alcedo Tyson

v

The Queen

[BVIHCRA2013/0008]

Date:

Tuesday, 31st January 2017

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. Patrick Thompson

Respondent:

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

Issues:

Appeal against conviction and sentence – Murder – Appellant sentenced to life imprisonment with no eligibility for parole – Whole life order – Whether learned trial judge erred in permitting Crown to adduce identification evidence – Whether learned trial judge erred in failing to exclude the evidence of one Mereen

Stoddard – Whether learned trial judge erred in permitting Crown to adduce opinion evidence from Detective Sergeant Harford – Whether trial judge erred in permitting the Crown to adduce evidence that appellant only gave answers to general questions in his interviews with police

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

N/A

Result / Order:

Judgment reserved.

Reason:

N/A

Case Name:

Allen Baptiste

v

The Queen

[BVIHCRA2013/0003]

(consolidated with)

Yan Edwards

v

The Queen

[BVIHCRA2013/0004]

Date:

Wednesday, 1st February 2017

Coram:

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

The Hon. Mde. Gertel Thom, Justice of Appeal

**The Hon. Mr. Douglas Mendes, SC, Justice of Appeal
[Ag.]**

Appearances:

Appellants:

Mr. Patrick Thompson for Allen Baptiste

(Mr. Baptiste was also present)

Mr. Andrew Morrison for Yan Edwards

(Mr. Edwards was also present)

Respondent:	Ms. Leslie-Ann Faulkner, Senior Crown Counsel and with her Mr. Garcia Kelly, Senior Crown Counsel
Issues:	Appeals against conviction and sentence – Murder – Appellants sentenced to life imprisonment with no eligibility for parole – Whether the learned trial judge’s directions to jury on issue of voice recognition and/or voice identification were inadequate in light of evidence in case and particularly in light of requirements of section 112 of the Evidence Act, 2006 (Act No. 15 of 2006, Laws of the Virgin Islands).
Type of Oral Result/Order Delivered:	N/A
Result / Order:	Judgment is reserved.
Case Name:	[1] J F Ming Inc. [2] Ming Shui Sum, Lawrence v [1] Ming Siu Hung, Ronald [2] Shaw Siu Kuen, Bertha [3] Ming Shiu Tong v [BVIHCMAP2016/0039]
Date:	Thursday, 2nd February 2017
Coram:	The Hon. Mde. Louise E. Blenman, Justice of Appeal The Hon. Mr. Paul Webster, Justice of Appeal [Ag.] The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]
Appearances:	
Appellants:	Mr. Paul Chaisty, QC, with him, Mr. Richard Evans and Mr. Adam Hinks
Respondents:	Mr. Christopher Parker, QC, with him, Mr. Stuart Cullen

Issues: Commercial appeal – Unfair prejudice – s. 184I of BVI Business Companies Act, 2004 (as amended) – Financial statements not provided to members of company contrary to Article 120 of company’s Articles of Association – Article 120 amended by second appellant as majority shareholder to waive requirement for production of financial statements – Whether conduct of second appellant capable of amounting in law to unfair prejudice – Whether court ordered buy-out appropriate form of relief – Exercise of discretion of learned judge

Type of Oral Result/Order Delivered: N/A

Result / Order: Judgment reserved.

Case Name: The Attorney General of the Virgin Islands
v
Global Water Associates Limited
[BVIHCMAP2016/0007]

Date: Thursday, 2nd February 2017

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Douglas Mendes, SC, Justice of Appeal
[Ag.]

Appearances:
Appellant: Ms. Giselle Jackman-Lumy, with her, Ms. Maya Barry
Respondent: Mr. Benjamin Strong, QC

Issues:	Interlocutory appeal – Whether learned judge erred in finding that loss of profits from Management Operation and Maintenance Agreement (“MOMA”) was naturally arising and notionally contemplated consequence of breach of Design Build Agreement (“DBA”) – Whether learned judge’s finding that damages were payable under DBA contrary to evidence tendered on behalf of respondent during arbitration proceedings – Whether learned judge erred in determining that MOMA had commenced
Type of Oral Result/Order Delivered:	N/A
Result / Order:	Judgment reserved.

STATUS HEARING

Case Name:	The Commissioner of Police v [1] Irene Penn O’ Neal [2] Zubida O’Neal [3] Shameek Grant [BVIMCRAP2015/0007]
Date:	Friday, 3rd January 2017
Before:	The Hon. Mde. Gertel Thom, Justice of Appeal
Appearances:	
Appellant: Respondents:	Mr. Garcia Kirt Kelly, Senior Crown Counsel, Mr. O’Neil Simpson, Crown Counsel Mr. E. Leroy Jones holding papers for Ms. Valerie Gordon representing Mrs. Irene Penn-O’Neal Mr. Leroy Jones for Zubida O’Neal Ms. Ruthilia Maximea for Mr. Shameek Grant
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:

N/A

Result / Order:

It is hereby ordered that:
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 the 10th July 2017.

Reason:

To allow the Crown to review its position on whether to proceed with the appeal

JUDGMENTS

Case Name:

[1] Rustam Yusufovich Gilfanov
[2] Sergey Aleksandrovich Tokarev
v
[1] Maxim Valeriovich Polyakov
[2] Valeriy Oleksandrovich Polyakov
[3] Phoenix Holdings Limited

[BVIHCMAP2016/0009]

Date:

Friday, 3rd February 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:

Appellants:

Mr. David Welford

Respondents:

Mr. Richard Evans

Issues:

Interlocutory appeal – Worldwide freezing injunction –
Rescission of commercial contract – Restitution in

integrum – Monetary award where full restitution not possible – Damages for fraudulent misrepresentation – Freezing injunction against non-cause of action respondent

Result and Reason:

Held : allowing the appeal to the extent that the domestic freezing order that this Court made on 19th July 2016 is affirmed except that the expression “US\$12 million” is deleted where it appears in paragraphs 1, 4, 5(3) and 14 and replaced by “US\$10 million”; dismissing the appeal against the discharge of the worldwide freezing order; and ordering the respondents to pay 50% of the appellants’ costs here and in the court below, that:

1. On an interlocutory application for a freezing injunction where there is a good arguable case of fraud, and the fraud is a central issue in the case, the judge should consider whether that finding by itself or with other relevant evidence could lead to an inference of a general risk of dissipation.

Dicta of Lloyd, LJ in *VTB Capital plc v Nutritek International* [2012] EWCA Civ 808 and Flaux, J. in *Madoff Securities International Ltd and another v Raven and others* [2011] EWHC 3102 (Comm) applied.

2. Based on the evidence and the finding of a specific act of dissipation, the learned judge erred in not finding a general risk of dissipation.

3. In assessing damages where the claimant has been induced to purchase property by the defendant’s fraudulent misrepresentation, the claimant is entitled to receive by way of damages the full price paid for the property less any benefits received as a result of the transaction. As a general rule, the value of the benefit received is assessed as at the date of the acquisition of the benefit. However, the rule is not inflexible and is subject to exceptions where the fraud is continuing or the defendant is locked into continuing to hold the shares. Both exceptions apply in this case.

Smith New Court Securities Ltd. v Citibank NA [1997] AC 254 applied.

4. The remedy of rescission usually results in the

setting aside of a contract and restoring the parties as far as possible to the position they were in before the contract, or restitutio in integrum. In this case rescission would normally result in the setting aside of the Share Transfer Agreement and restoring the Framework Agreement. However, the Framework Agreement was a part of a process that involved separating the interests of various persons including the appellants and Dr. Polyakov, and it was not possible to restore the parties to the position under the Framework Agreement. The Court has the power to rescind a contract and restore the claimant to the nearest position possible, if necessary by a payment of money. In this case, the judge at trial could order rescission and a monetary award based on the court's assessment of the facts of the case and the circumstances of the parties.

Halsbury's Laws of England (5th edn., 2013) vol. 76, para 829; *Compagnie Chemin de fer Paris-Orleans v Leeston Shipping Co.* (1919) 36 TLR 68 at 69 applied.

5. Alternatively, the judge at trial could award damages for fraudulent misrepresentation in an amount up to the claim of \$12 million less the value of the shares.
6. The court can order a freezing order against a non-cause of action defendant. The appellants do not have a cause of action against Phoenix but the injunction against the company is justified because the appellants have an interest in preserving the value of the assets of Phoenix so as to maintain the value of the shares in the company if it becomes necessary to enforce a judgment against the shares.

Case Name:

[1] Andrey Adamovsky
[2] Stockman Interhold S.A.

v

[1] Andriy Malitskiy
[2] Igor Filipenko

[BVIHCMAP2014/0022]

Date:	Friday, 3 rd February 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:	
Appellants:	Mr. Andrew Willins
Respondents:	Mr. Dan Wise
Issues:	Commercial appeal – Cross appeal against quantum of pre-judgment interest award made by trial judge – Whether pre-judgment interest rate attached to compensatory award inappropriate – Whether trial judge erred in awarding pre-judgment interest at a rate of less than 1% per annum – Calculation of pre-judgment interest – Measure to be applied when awarding pre-judgment interest
Result and Reason:	Held : allowing the respondents' cross appeal to the extent that the award made by the trial judge of pre-judgment interest of US\$1,270,636.05 to be paid by the first appellant and US\$1,309,274.23 to be paid by the second appellant is set aside and substituted by an award of pre-judgment interest from 18th January 2010 to 1st October 2014 at the rate of 8.5% per annum on the sum of US\$34,745,442.00 in the case of the first appellant and US\$35,802,000.00 in the case of the second appellant, and awarding costs to the respondents on the cross appeal to be assessed, if not agreed within 6 weeks from the date of this order, that: 1. The jurisdiction of the Court to award pre-judgment interest is clear. A party wrongfully deprived by another of money to which the first party is entitled ought to be compensated for his loss, not just by an award to him of the sum of money to which he was entitled, but so too by an award of the time value of the money from the date of its appropriation to the date on which it is ordered to be paid to him. The rate of pre-judgment interest awarded by a judge is an exercise by him of a judicial discretion. <i>Creque v Penn</i> [2007] UKPC 44 applied; <i>Jennifer Prescott v Aldrick Parris and John H. Primus</i> SLUHCVAP2013/0013 (delivered

30th October 2015, unreported) consolidated with *Aldrick Parris v Jennifer Prescott* SLUHCVP2013/0025 (delivered 30th October 2015, unreported) followed; *Wallersteiner v Moir* (No 2); *Moir v Wallersteiner and others* (No 2) [1975] 1 All ER 849 applied.

2. An award of interest, being an exercise of discretion by a trial judge, an appellate court is entitled to set aside the award only if it is satisfied (1) that in exercising his or her judicial discretion the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. In the case at bar, there was no basis in law or in fact for the judge to have made a determination that business persons would allow huge sums of money to remain on non-interest or low-interest bearing accounts for nearly 5 years instead of using it in more profitable ways. The application of an objective test would lead a court to a determination that business people would use funds in a commercially reasonable manner.

Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 applied.

3. The measure to be applied when awarding pre-judgment interest will depend on the basis upon which interest is grounded. An award of interest can be made by statute, in equity or at common law. Where equity is invoked in aid of the common law, only simple interest is available. In this case, the principal award made by the judge was compensatory damages for the loss of value of the shares, which is a common law remedy. The award of interest in this case was not therefore founded upon equity's exclusive jurisdiction and as such only simple interest is available.

Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Her Majesty's Commissioners of Inland Revenue and another [2007] UKHL 34 applied; *Wallersteiner v*

Moir (No 2); Moir v Wallersteiner and others (No 2) [1975] 1 All ER 849 applied.

4. The appropriate rate for pre-judgment interest to be applied in commercial cases must be a realistic rate if the award is to serve its purpose. In this case, the appropriate rate is 8.5%, since the parties had agreed that that was the term deposit rate offered by the bank during the period.

Creque v Penn [2007] UKPC 44 applied.

Case Name:

[1] Andrey Adamovsky
[2] Stockman Interhold SA
v
[1] Andriy Malitskiy
[2] Igor Filipenko

[BVIHCMAP2014/0031]

Date:

Friday, 3rd February 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:

Appellants: Mr. Andrew Willins

Respondents: Mr. Dan Wise

Issues:

Commercial appeal – Anti-suit injunction – Anti-enforcement injunction – Whether learned trial judge erred in restraining enforcement of foreign judgment – Whether learned trial judge erred in holding that different considerations apply to restraining litigation and restraining enforcement of judgment – Whether learned trial judge applied or correctly applied principles governing grant of anti-enforcement injunction – Whether learned trial judge was justified in making findings of fact about motive of first appellant in bringing foreign proceedings – Whether foreign proceedings were vexatious or oppressive

**Result and
Reason:**

Held : allowing the appeal, dismissing the cross appeal and setting aside the order granting the anti-enforcement injunction; and ordering that the appellants are entitled to their costs here and in the court below to be assessed by the court below unless agreed within thirty days with the costs in the appeal where assessed fixed at two thirds of the assessed costs below, that:

- 1. The principles on which English and BVI courts will act to restrain the bringing or continuing of foreign proceedings abroad are the same for the exercise of a power to restrain enforcement of a foreign judgment in the BVI or worldwide. The court will have the power to do either of these provided that the following requirements are satisfied: firstly, the party to be restrained must be amenable to the court's jurisdiction; secondly, it must be the case that either: (1) the injunction is required to protect against the invasion or threat of invasion of a legal or equitable right; or (2) unconscionable conduct on the part of the party to be restrained has been made out. Once these requirements are met, the trial judge must go on to evaluate whether it would be a right exercise of discretion to grant the injunction. In the present case, it being clear that the appellants were amenable to the jurisdiction of the court, and with neither the application for the anti-suit injunction nor the application for the anti-enforcement injunction being hinged on protection against an invasion or threatened invasion of a legal or equitable right of the respondents, principle required the trial judge to proceed to the next level of evaluation in order to identify evidence to satisfy unconscionable conduct, at least at a vexatious level. Considerations of comity and the need for caution are critical to this evaluative stage.**

***Ellerman Lines, Limited v Read and Others* [1928] 2 KB 144 applied; *British Airways Board v Laker Airways Ltd. and Others* [1985] AC 58 applied; *Kenneth M. Krys et al v Stichting Shell Pensioenfonds* BVIHCVAP2011/0036 (delivered 17th September 2012, unreported) followed; *South Carolina Insurance Co. v Assurantie Maatschappij "De Zeven Provinciën" N.V.* [1987] AC 24 applied; *Star Reefers Pool Inc. v JFC Group Co. Ltd.* [2012] EWCA Civ 14 applied; Lord Collins of Mapesbury, Dicey, Morris and Collins on The**

Conflict of Laws (15th edn., Sweet & Maxwell 2012), Vol. 1, para. 12R-001 cited.

2. While the weakness or hopeless/baseless nature of a case sought to be pursued in the foreign court is a factor to be taken into account in deciding whether conduct is unconscionable, it must be considered along with more weighty factors. The present case was not one in which the learned trial judge was entitled to take a view that the claim was baseless as a factor in determining unconscionable conduct, having found: that the claims relating to the SHA should be dealt with in Ukraine; that action estoppel, issue estoppel and *Henderson v Henderson* abuse did not apply to the claim in Ukraine; that the appellants had the right to bring the action in the courts of Ukraine.
3. The learned trial judge could not properly find any unconscionability on the part of the appellants for doing precisely what he had indicated was within their legal right to do. To pursue a juridical advantage in a foreign court which is the court of forum is not, without more, unconscionable conduct. The fact that the appellants filed the claim in Ukraine the day after the 1st October Judgment was handed down is not sufficient to draw a conclusion that the jurisdiction of the courts of Ukraine was cynically invoked. The learned judge applied the wrong test in determining whether to grant the anti-enforcement judgment (i.e., whether the appellants should be permitted to use the Ukrainian Judgment to cancel out the 1st October Judgment) and accordingly, he made an error of principle. Rather, the questions which he ought to have posed, having regard to the facts and circumstances of this case were: (1) whether the appellants acted vexatiously/unconscionably by invoking the jurisdiction of the Ukraine court; and (2) whether, in the circumstances, the 'ends of justice' called for the grant of the anti-enforcement injunction.

Star Reefers Pool Inc. v JFC Group Co. Ltd. [2012] EWCA Civ 14 applied.

4. An anti-enforcement injunction may be granted against a party in pursuit of the ends of justice although the party did not act vexatiously or oppressively in invoking the jurisdiction of the

foreign court. In exercising the discretion, the court must look at the respective interests of the appellants and the respondents and balance these interests, having regard to considerations of comity. In the present case, the trial judge erred in principle in failing to undertake any weighing and balancing of the injustice to the respective parties if the injunction was granted or refused.

Elektrim SA v Vivendi Holdings 1 Corp. [2008] EWCA Civ 1178 applied.

Case Name:

**Cordell O'Neal
v
The Commissioner of Police
[BVIMCRAP2015/0003]**

Date:

Friday, 3rd February 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. E. Leroy Jones
(The appellant was also present)**

Respondent: Mr. O'Neil Simpson

Issues:

Appeal against sentence – Keeping unlicensed firearm contrary to section 11(2)(a) of the Firearms Act – Appellant sentenced to 24 months imprisonment for offence – Possession of Explosives in contravention of section 6 of the Explosives Ordinance – Appellant sentenced to 4 months for offence – Possession of a Prohibited Weapon contrary to Section 16A (2)(a) of the Firearms Act – Appellant sentenced to 66 months for offence – Appellant pleaded guilty at first opportunity

Result:

It is hereby ordered that:

The sentences are ordered not to run consecutively but

shall run concurrently from the date that the appellant was on remand.

Type of Oral
Result/Order
Delivered:

Oral Judgment or Decision

Reason:

This is an appeal against the sentences imposed by the learned magistrate on the appellant in respect of guilty pleas proffered by him for firearm offences which also involved ammunition (or explosives as they are also termed). The appellant had also been convicted for possession of prohibited firearms. The learned magistrate imposed the following sentences under those charges: on the complaint of keeping an unlicensed firearm contrary to section 11(2) of the Firearms Act, 24 months' imprisonment; on the complaint of possession of explosives contrary to section 6 the Explosives Ordinance, a term of 4 months; and on the last complaint of possession of a prohibited weapon contrary to section 16A(2)(a) of the Firearms Act, a term of 5 ½ years or 66 months' imprisonment.

The learned magistrate then ordered that the sentences are to run consecutively from the date that the appellant was first remanded. It is common ground and I think we all agree that in ordering the sentences to run consecutively the magistrate erred, as doing so was contrary to principle and well established cases within the jurisdiction of the Eastern Caribbean and indeed across the Caribbean region where the offences charged arise out of one and the same transaction so to speak. Therefore, there was no good basis for ordering that the sentences run consecutively.

That brings us to the question of the longest sentence imposed, in relation to the prohibited firearm offence, where the appellant was sentenced to 5 ½ years. The learned magistrate, in her reasons, set out the sentencing principles out of *Desmond Baptiste v The Queen* SVGHCRA2003/0008 (delivered 6th December 2004, unreported) and *Other Appeals*), and specifically, she referred to this particular and specific offence in relation to what would be considered to be aggravating and mitigating factors.

In *Desmond Baptiste* the Court of Appeal had accepted as the goals of sentencing that the Court must consider whether the sentence is sufficient to punish

the offender to an extent and in a manner which is just; the principle of deterrence, that is, personal deterrence as well as general deterrence of an offender as well as other persons to deter them from committing the same offence or offences of similar nature; also, importantly, that sentences are to reflect the society's denunciation of the type of conduct based on the seriousness of the offence with which the offender is charged; and also to protect the community from the offender and of course to consider any questions of rehabilitation of the offender. It is clear here that the mitigating factors to be considered would have been the fact that the appellant admitted to ownership of the items at the first opportunity and he pleaded guilty at the first opportunity.

The well-established principle is that an early guilty plea would normally entitle an accused to a discount of about 1/3 off the notional sentence, that is, the sentence that the Court considers in all the circumstances generally would fit the type of offence of which the person is convicted. There is also the consideration that the appellant has no prior convictions; we do not consider that the conviction of the traffic offence is one that really bears on the Court's consideration in relation to this matter. We have also taken into account the personal characteristics and those matters put forward in terms of prospects for rehabilitation.

On the other side of the coin, however, there are considerations of the very nature of this offence, the very nature of the type of weapon. This is a very serious assault weapon with many rounds found of ammunition some 61 rounds in total and guns found in a state of readiness. And so when the Court looks at these matters, the Court must consider starting at a notional sentence of 7 years in relation to these types of offences for prohibited weapons and we slide the scale to take account of the mitigating factors and we slide the scale in the other direction to take account of the aggravating factors.

We are in fact in agreement with the counsel for the prosecution that that would take us up to 6 years in relation to the sentence which ordinarily should be imposed. The Magistrate ought to have indicated her notional starting point in relation to the sentence but we have conducted that evaluation exercise ourselves as we are entitled to do and we are of the view that the

sentence of 5 ½ years is not outside of the ambit within which one should impose 6 years instead of 5 ½ years and so there is no basis for disturbing the sentence that was arrived at albeit not on an analysis from the notional sentence as one would require and would wish to see.

Therefore, the Court's order would be that the sentence of 5 ½ years on the prohibited weapon is affirmed but the sentences on the other offences are all to run concurrently so that the overall term of 5 ½ years is left undisturbed. So the appeal is only allowed to the extent that the sentences are ordered not to run consecutively but shall run concurrently from the date that the appellant was on remand. That is the decision of the Court.

Case Name:

Commissioner of Police

v

Carlton Herbert

[BVIMCRAP2014/0011]

Date:

Friday, 3rd February 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:

Appellants:

Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel

Respondents:

Ms. Marie-Lou Creque

Issues:

Status of matter – Appeal against decision of learned senior magistrate to acquit respondent – Procuring acts of indecency – Wrongful confinement

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

Directions

Result / Order:

It is hereby ordered that:

1. The appellant shall file and serve written submissions together with authorities by Friday, 31st March 2017.
2. The respondent shall file and serve written submissions in response by Friday 28th April 2017.
3. Any reply shall be filed by Tuesday 16th May 2017.
4. The hearing of this appeal shall take place at the next sitting of the Court in the Virgin Islands during the week commencing 10th July 2017.

Reason: Counsel for the respondent had been unable to attend the case management conference.

Case Name: Jerome Allen
V
The Commissioner of Police
[BVIMCRAP2014/0001]

Date: Friday, 3rd February 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:

Appellants:	Mr. Andrew Morrison
Respondents:	Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel

Issues: Appeal against conviction and sentence – Unlawful importation of firearms – Unlawful importation of explosives – Unlawful possession of explosives – Possession of prohibited firearm – Whether learned magistrate failed to adequately and properly direct herself in line with accomplice unreliability warning in respect of evidence of witness – Whether summing up was balanced and fair – Whether conviction unsafe and unsatisfactory in all circumstances of the case – Whether sentence imposed was excessive having regard to sentences imposed for similar offences in courts of equal jurisdiction

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

Oral Judgment or Decision

Result / Order:

It is hereby ordered:

- 1. The appeal against conviction is dismissed.**
- 2. The appeal against sentence is allowed only to the extent that the sentence imposed on the appellant for the offence of unlawful possession of explosives is set aside, varied to the extent that the sentence of 6 years is varied to 3 ½ years.**

Reason:

This is an appeal against the conviction and sentence of the appellant for the offences of unlawful importation of firearms, unlawful importation of explosives, unlawful possession of explosives and possession of a prohibited firearm. After a trial which commenced on 29th May 2013 and concluded with the sentencing of the appellant on 6th December 2013, the appellant was found guilty of all 4 offences and was sentenced to 7 years' imprisonment on the charge of unlawful importation of firearm, 6 years for unlawful importation of explosives, 6 months for unlawful possession of explosives and 6 years for possession of a prohibited weapon. The appellant appeal against his conviction and sentence on 5 grounds as per Amended Notice of Appeal which he filed on 12th October 2016. The grounds of appeal were as follows:

- 1. The learned magistrate erred in law by failing to accede to a submission of no case to answer on the appellant's behalf at the close of the case for the Crown. There was no evidence led by the Crown to establish that the appellant possessed the items in question and particularly that he had the requisite knowledge and intention in relation to the items in question.**
- 2. The learned magistrate fell into error in that she failed to adequately and properly direct herself in line with an accomplice unreliability warning in respect of the witness Davin Thaxter.**
- 3. The summing up was unbalanced and/or unfair as the learned magistrate overlooked inconsistencies and weaknesses in the prosecution's case, disregarding evidence favourable to the defence and rejected the appellant's defence for reasons which are**

inadequate and/or unsupportable in law. This deprived the appellant of a fair trial and consequently the appellant's conviction is unsafe and unsatisfactory.

4. The conviction is unsafe and unsatisfactory in all the circumstances of the case
5. The sentence is excessive, having regard to the sentence for similar offences in courts of equal jurisdiction.

On ground 1 the appellant submits that the learned magistrate erred by failing to accede to the submission of no case to answer. The appellant cited the *locus classicus R v Galbraith* [1981] 1 WLR 1039 and a number of other cases in order to advance the proposition that the evidence led by the Crown was not sufficient for him to have been called to answer the charge against him. Counsel for the appellant however all but conceded that there was in fact sufficient evidence on the basis of which it was open to the learned magistrate to call the appellant to answer the case against him. This Court is satisfied that based on the evidence led by the Crown and looked at on the basis of the judicial authorities referred to by both counsel, the learned magistrate was fully justified in rejecting the no case submission and calling on the appellant to answer the case against him. Ground 1 of the appellant's grounds of appeal is accordingly dismissed.

On ground 2, the appellant submitted that the learned magistrate fell into error in that she failed to adequately and properly direct herself in line with an accomplice reliability warning in respect of the witness Davin Thaxter. In making this submission, counsel relied on the fact that Davin Thaxter, was arrested and charged for possession of the prohibited items and turned up as the Crown's principal witness. Although that particular fact did not form part of the record before the Court, it was so indicated by counsel for the appellant and not controverted by counsel for the respondent and the Court is prepared to acknowledge that that may have well been the case. Counsel for the appellant, however, conceded that the witness could not properly have been described as an accomplice, and in any event, there was other evidence based on which the learned magistrate could have arrived at the conclusion that she did. Counsel accordingly presented this ground of appeal as not a stand-alone ground but converted it into one which, when linked

with other factors, deprived the appellant of a fair trial and rendered his conviction unsafe and unsatisfactory. However, the appellant having, as indicated, effectively conceded the ground of appeal, this ground is also dismissed.

The appellant's third ground of appeal is that the summing up was unbalanced and/or unfair as the magistrate overlooked inconsistencies and weaknesses in the prosecution's case, disregarding evidence favourable to the defence, and rejected the appellant's defence for reasons which are inadequate and/or unsupported in law. This, he submitted, deprived the appellant of a fair trial and consequently the appellant's conviction is unsafe and unsatisfactory. Having regard to the several bits of evidence, both direct and circumstantial, all pointing to the appellant's possession by virtue of his effective control of the box containing the offensive items and his imputed knowledge of its contents, even if there had been some weaknesses in the magistrate's presentation of her reasons for her decision, we find that based on the evidence of the appellant's possession and knowledge of the contents of the Home Depot box sealed with black tape, his conviction was neither unsafe nor unsatisfactory. We accordingly find that the third ground of appeal is not made out as indeed is the fourth ground which is a virtual restatement of the third ground, the fourth ground being that the conviction is unsafe or unsatisfactory in all of the circumstances. There was nothing really to distinguish ground 3 from ground 4 and both grounds of appeal are dismissed.

The appellant's fifth ground of appeal is that the sentence is excessive. The appellant concedes that in the light of the governing authorities, particularly the reasoning of Sir Dennis Byron in *Kenrick Marksman v Commissioner of Police* (SVGMCRAP2003/0041) (see *Desmond Baptiste v The Queen* SVGHCRA2003/0008 (delivered 6th December 2004, unreported) and *Other Appeals*), it would be rare for a magistrate not to impose a custodial sentence for an offence involving a firearm and therefore, the appellant having been found guilty of such indubitably serious firearm offences, a custodial sentence is in order. Nevertheless, counsel for the appellant submitted that the custodial sentences imposed by the learned magistrate were unduly excessive and an unjustified departure from the Magistrates' Court's range of sentencing for similar offences. We do not, however, consider that the cases

referred to in the appellant's skeleton arguments are comparable to the case at hand. The present case involves importation of firearms and explosives and possession of a prohibited weapon including 250 rounds of lethal ammunition. This appears to be sufficient to equip a small army and in our view fully justified all but one of the sentences imposed. The respondent conceded that the sentence imposed by the learned magistrate for the offence of unlawful importation of explosives was in error because the maximum sentence at the time of the sentencing was 5 years so a sentence of 6 years is accordingly unlawful. In the case of that sentence we would allow the appeal in respect of that only and vary the sentence to 3½ years. All of the appellant's 4 grounds of appeal against conviction having been dismissed, the appellant's appeal against his conviction is accordingly dismissed. With respect to the appeal against sentence, the appeal is allowed to the extent only that the sentence imposed on the appellant for the offence of unlawful possession of explosives is set aside, and the sentence of 6 years is varied to 3 ½ years. The other sentences imposed by the magistrate are affirmed and the judgment of the magistrate in respect of all the other matters appealed is upheld. This is the unanimous judgment of the Court in relation to this case.

JUDGMENTS

Case Name:

[1] John Shrimpton

[2] Pitcairn Limited

v

Dragon Capital Group Limited

[BVIHCMAP2016/0031]

Date:

Friday, 3rd February 2017

Coram:

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

The Hon. Mde. Gertel Thom, Justice of Appeal

The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]

Appearances:

Appellants: Mr. James Collins, QC, with him, Ms. Marcia McFarlane

Respondent: Mr. Stephen Atherton, QC

Issues:

Commercial appeal – Whether fees of foreign lawyers not registered on Roll of attorneys recoverable as disbursement in BVI – Whether common law right of recoverability abrogated by section 2 and 18 of Legal Profession Act – Whether Court of Appeal decision in *Garkusha v Ashot Yegiazaryan & Ors* BVIHCMAP2015/0010 decided per incuriam – Whether learned judge bound by *Garkusha* decision

**Result &
Reason:**

Held : dismissing the appeal and awarding costs to the respondent to be assessed if not agreed within 21 days, that:

1. The per incuriam principle is relevant only to the right of an appellate court to decline to follow one of its own previous decisions, or a decision of a court of coordinate jurisdiction. It does not relate to its right to disregard a decision of a higher appellate court or (more relevant to this case) the right of a judge of the High Court to disregard a decision of the Court of Appeal, as such a right does not exist. The Court of Appeal decision in *Garkusha* was binding on the High Court and the learned judge was therefore correct in holding that he was so bound.

Cassell & Co Ltd v Broome and Another [1972] AC 1027, per Lord Diplock applied; *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 applied.

2. The standard rule is that this Court is bound to follow its own decisions. However, if the judgment of this Court in *Garkusha* was rendered per incuriam, the strict rules of stare decisis cease to apply and this Court would be at liberty to depart from its earlier decision. For the decision in *Garkusha* to be properly regarded as having been rendered per incuriam, it would have to be shown that, had this Court been aware that section 2(2) was not in force, it would have been compelled to reach a different conclusion. Thus, it must be shown that the Court would have been compelled to conclude that the common law right had not been

abrogated and that the fees of the foreign firm were recoverable as disbursements of the BVI lawyers to the extent that they were reasonable.

Young v Bristol Aeroplane Company Limited [1944] 1 KB 718 applied; *Duke v Reliance Systems Ltd* [1988] QB 108 applied.

3. In determining whether Garkusha had been decided per incuriam this Court would be bound by the findings in Garkusha that were not in any way dependent on section 2(2). This Court determined in Garkusha that by assisting the appellant with his defence the foreign lawyers were performing the functions of a legal practitioner and must be regarded, as a matter of BVI law, as practising BVI law. That determination was not dependent on section 2(2) and this Court would be bound by that determination in its consideration of whether Garkusha was decided per incuriam.
4. Section 18 (3) of the LPA on its own provided a basis for supporting the Court's decision in Garkusha and could have led the Court to the same conclusion that is, that the fees of a foreign lawyer (whose name is not on the Roll) can no longer be recovered as a disbursement of the local lawyer. Such recovery is prohibited under section 18 (3). In order to trigger this statutory prohibition against recovery contained in section 18(3) all that is required is that the act in question is done by a person whose name is not registered on the Roll and that person must have been acting as if he were a legal practitioner. Thus, the conclusion in Garkusha would not have been affected by the inoperability of section 2(2). As such, Garkusha was not decided per incuriam.

Garkusha v Ashot Yegiazaryan & Ors BVIHCMAP2015/0010 (delivered 6th June 2016, unreported) followed.

APPLICATIONS AND APPEALS

Case Name:

The Estate of Cesar Carlos Civetta Retundo

**(Deceased) Represented by Aldo Civetta and
Gustavo Civetta**

v

[1] Arabia Gladys Giubetich Cerino

[2] Walter Guillermo Nieto Aemilius

[BVIHCMAP2016/0035]

Date: Friday, 3rd February 2017

Coram: The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Anthony Gonsalves QC, Justice of Appeal
[Ag.]

Appearances:

Appellants: Mr. Andrew Willins

Respondents: No appearance

Issues: Interlocutory appeal

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

**Result / Order
& Reason:** It is ordered by consent that:

1. The appeal scheduled for hearing on 3 February 2017 is adjourned for hearing in the week of 10 July 2017.
2. The respondents/claimants are granted an extension of time for the filing of any counter notice of appeal to 10 March 2017.
3. The respondents/claimants are granted an extension of time for the filing of written submissions to 11 April 2017.
4. The directions in respect of the respondents'/claimants' claim against the third defendant by order made 23 November 2016 in the court below be varied by consent pending the hearing of this appeal in July 2017 in accordance with a consent order agreed in those proceedings by the parties on 2 February 2017.
5. Costs in the appeal.

Case Name:

The Commissioner of Police

v

Sasha Hodge

[BVIMCRAP2013/0010]

Date:

Friday, 3rd February 2017

Coram:

**The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. Garcia Kirt Kelly, Senior Crown Counsel

Respondent: Mr. Patrick Thompson

Issues:

Appeal against decision of learned senior magistrate to acquit respondent – Acquisition, possession or use of proceeds of criminal conduct

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

Oral Judgment or Decision

Result / Order:

It is hereby ordered that:

- 1. The appeal is allowed.**
- 2. The matter is remitted for retrial before another magistrate.**

Reason:

Based on a review of the learned Senior Magistrate's judgment, the notice of appeal and the submissions of learned counsel on both sides, we have no doubt that the learned Senior Magistrate committed an error of principle by failing to take into account the relevant factor on which the Crown relied, in seeking to prove the offence against the respondent.

The learned Senior Magistrate having rejected the respondent's defence as evidence in the interview that was given to the police, quite surprisingly relied on this same evidence as the basis for acquitting the respondent. Additionally, the learned Senior

Magistrate having failed to take into account all of the circumstantial evidence as adduced by the Crown, fell into error in paragraphs 183 and 184 of the judgment, and accordingly, her decision is quashed, the appeal is allowed and it is hereby ordered that the matter be retried before a different magistrate.

Case Name:	Frankly Malone V Commissioner of Police [BVIMCRAP2014/0013]
Date:	Friday, 3rd February 2017
Coram:	The Hon. Mde. Louise E. Blenman, Justice of Appeal The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Mr. David Penn
Respondent:	Mr. Garcia Kirt Kelly, Senior Crown Counsel
Issues:	Possession of firearm – Right of election – Offence of possession of firearm contrary to s. 11 of Firearms and Air Guns Act (Cap. 126, Revised Laws of the Virgin Islands 1991) as amended by s. 2 of Firearms (Amendment) Act, 1993 (Act No. 6 of 1993, Laws of the Virgin Islands) triable either way – Whether learned magistrate erred in not allowing appellant to elect mode of trial – Whether learned magistrate erred in determining that prosecution could determine mode of trial for offence triable either way – Whether learned magistrate erred in interpreting s. 2 of Firearms (Amendment) Act, 1993 which interpretation led to conclusion that said section gave prosecution election as to mode of trial as opposed to court or appellant
Type of Oral Result/Order Delivered:	Oral Judgment or Decision

Result / Order:

It is hereby ordered that:

Leave is granted to withdraw the appeal. Learned Crown Counsel undertakes to file as a matter of urgency a case stated in order to obtain guidance in relation to the right of election in relation to matters which are triable on indictment or summarily so that the learned magistrates can be guided accordingly.

Reason:

Based on the interactions between the Bench and counsel on both sides, and the Court being cognizant of s. 30(2)(a) of the West Indies Associated States Supreme Court Act (Cap. 80 of the Revised Laws of the Virgin Islands 1991) which prohibits the filing of an appeal in a criminal matter, which section has been recognised in the appeal *Michael Glasford and Others v The Commissioner of Police and Another* [1995] ECSCJ No. 6 (Saint Christopher and Nevis), learned Counsel for the appellant sought permission to withdraw the appeal.

Case Name:

Saniel Durant

v

Kharid Frett

[BVIMCVAP2014/0001]

Date:

Friday, 3rd February 2017

Coram:

**The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. Saniel Durant (in person)

Respondent:

Ms. Kharid Frett (in person)

Issues:

Whether learned magistrate erred in ordering that appellant pay respondent sum of \$2,350.00 plus \$600.00 costs – Whether decision of learned magistrate unreasonable or cannot be supported having regard to

evidence

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

Oral Judgment or Decision

Result / Order:

It is hereby ordered by consent that:

- 1. The appellant will pay the respondent the sum of \$900.00.**
- 2. The order of the learned Magistrate is set aside.**
- 3. No order as to costs.**

Reason:

The parties indicated to the Court that they had agreed that the appellant would pay to the respondent the sum \$900.00, without any finding of liability.