

COURT OF APPEAL SITTING
TERRITORY OF THE VIRGIN ISLANDS
18th – 22nd July 2016

APPLICATIONS AND APPEALS

Case Name: **Betty Lou Bailey (nee Chalwell)**
v
Mark Bailey
[BVIHCVAP2015/0012]

Date: **Monday, 18th July 2016**

Before: **The Hon. Dame Janice M. Pereira, DBE, Chief Justice**
The Hon. Mr. Paul Webster, QC, Justice of Appeal [Ag.]
The Hon. Mr. Douglas Mendes, SC, Justice of Appeal [Ag.]

Appearances:

Applicant / Appellant / Respondent:	Ms. Dancia Penn-Sallah, QC
Respondent / Applicant:	Ms. Mishka Jacobs

Issues: **Application for review of decision of single judge –
Application to strike out notice of appeal – Appellant’s
failure to obtain leave to appeal before filing notice of
appeal on 24th July 2015 – Failure by Appellant to take
any steps to serve and prosecute its appeal and/or file
the record of appeal and its skeleton arguments – CPR
64**

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

Result / Order: **It is hereby ordered, by consent, that the matter is**

adjourned to 9:00 a.m. on Wednesday, 20th July 2016 to facilitate settlement discussions, failing which the matter will be fixed for a date and time later in the sitting.

Reasons: Counsel for the appellant sought an adjournment until a later date in the sitting to enable the parties to conclude settlement negotiations.

Case Name: Yates Associates Construction Company Ltd.
V
Blue Sand Investments Limited
[BVIHCVAP2012/0028]

Date: Monday, 18th July 2016

Before: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Paul Webster, QC, Justice of Appeal [Ag.]
The Hon. Mr. Douglas Mendes, SC, Justice of Appeal [Ag.]

Appearances:

Appellant / Respondent:	Ms. Elizabeth Ryan
Respondent / Applicant:	Ms. Corine George

Issues: Application for leave to appeal to Her Majesty in Council – Building contract – Defective construction of house – Appeal against trial judge’s findings of fact – Approach of appellate court to trial judge’s findings of fact – Expert evidence – Expert’s duty to the court – Part 32 of the Civil Procedure Rules 2000

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

Result/Order	It is hereby ordered, by consent, that: 1. The application to withdraw the motion for leave to appeal to Her Majesty in Council, is granted. 2. The application stands dismissed.	
Reason:	Counsel for the respondent/applicant sought leave to withdraw the application on the basis that the parties had arrived at an agreement. The application was granted in the terms sought with no consequential orders.	
Case Name:	Petra Cooper (nee Klvacova) v Peter Cooper [BVIHCVAP2012/0010]	
Date:	Monday, 18th July 2016	
Coram:	The Hon. Dame Janice M. Pereira, DBE, Chief Justice The Hon. Mr. Paul Webster, QC, Justice of Appeal [Ag.] The Hon. Mr. Douglas Mendes, SC, Justice of Appeal [Ag.]	
Appearances:	Appellant / Applicant: Respondent:	No appearance No appearance
Issues:	Application for stay of execution – Application for leave to appeal to Her Majesty in Council – Whether learned trial judge erred in holding that sum of £50,000.00 amounted to money loaned to appellant by respondent which ought to be repaid – Challenge to findings of fact made by learned trial judge	
Type of Oral Result/Order	Directions	

Delivered:

Result /Order:

It is hereby ordered that:

- 1. The application is adjourned as requested by the applicant until the next sitting of the Court in the Territory of the Virgin Islands in the week commencing 21st November 2016.**
- 2. In the event that there is no appearance at the 21st November 2016 sitting of the Court, the application will be struck out.**
- 3. The order of the Court shall be served on the parties by email to the email addresses provided so that they are informed of the Court's decision.**

Reasons:

The Court took note of the fact that the applicant had sent correspondence to the Court indicating that she was unwell.

In the circumstances, notwithstanding the fact that the Court had determined at its last hearing of the matter in April 2016 in the Territory of the Virgin Islands that no further adjournments would be granted and that the matter would be struck out should the applicant fail to attend, the Court was minded to grant the adjournment requested by the applicant to its next sitting in the Territory.

Case Name:

Stephen Fossi

v

The Queen

[BVIHC RAP2016/0003]

The Queen

v

Stephen Fossi

[BVIHC RAP2016/0002]

Date:

Monday, 18th July 2016

Before: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Paul Webster, QC, Justice of Appeal [Ag.]
The Hon. Mr. Douglas Mendes, SC, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Patrick Thompson, with him, Ms. Corine George

Respondent: Mr. Valston Graham, Senior Crown Counsel, with him, Ms. Leslie-Ann Faulkner, Senior Crown Counsel and Mr. O'Neil Simpson, Crown Counsel

Issues: BVIHCRA2016/0003
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

BVIHCRA2016/0002
Appeal against sentence – Manslaughter – Non-custodial 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: Oral Judgment or Decision

Result / Order: It is hereby ordered that:

1. The application to set aside the leave granted by a single judge of the Court on 27th May 2016, is hereby dismissed.
2. Appeals BVIHCRA2016/0002 and BVIHCRA2016/0003 be consolidated.
3. The substantive appeal shall be BVIHCRA2016/0003.
4. A single record of appeal shall be filed.

5. All submissions shall be filed substantively in BVIHCRA2016/0003. The notice of appeal in BVIHCRA2016/0002 shall be treated as the cross appeal.
6. Submissions shall be filed in accordance with the rules of Court.

Reasons:

In the civil jurisdiction the Court has determined that an application for leave to appeal is made ex parte which, on the pleadings, engenders the question as to whether the Civil Procedures Rules 2000 will also apply in a case for leave to appeal against a decision from the criminal jurisdiction of the High Court.

When the Rules were amended in 2011 there was a lacuna in the law. The Court has held on more than one occasion that in relation to leave it is a filtering process that does not engage the appeal at that point. It is merely to determine whether there are good grounds existing for bringing an appeal.

It is normally a procedure that is heard ex parte unless the Court is minded to refuse leave. The Court may then decide to deal with the matter inter partes before the full Court. Indeed the West Indies Associated States Supreme Court (Virgin Islands) Act (Cap. 80, Revised Laws of the Virgin Islands 1991) contains a similar provision that where a single judge refuses leave to appeal, in such circumstances, even in criminal appeals, that person who has gotten that refusal can renew that application before the full Court.

Taken in context, the interpretation points to the position that where the Court grants leave, unless one can show that the Court was misled as to the basis on which it granted leave, then the real contest would arise on the appeal. But that threshold has not been met in this case to set aside the grant of leave.

The Court would not simply cause an application for leave to come on inter partes unless the Court in the first instance is minded to refuse leave. Therefore, no basis having been shown why the leave granted should be set aside, the application was therefore dismissed.

Case Name:

Basab Inc.
v
[1] Accufit Investment Inc.
[2] Double Key International Limited

[BVIHCMAP2014/0020]

Date:

Monday, 18th July 2016

Before:

The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Paul Webster, QC, Justice of Appeal [Ag.]
The Hon. Mr. Douglas Mendes, SC, Justice of Appeal [Ag.]

Appearances:

**Appellant /
Applicant:**

Mr. John MacDonald

Respondents:

No appearance (the 1st respondent has never been represented in the proceedings and the 2nd respondent has not participated)

Issues:

Application to vary order of single judge – Variation of Court's order pursuant to rule 64.4 of the Civil Procedure Rules 2000 – Whether applicant can be permitted to apply remaining funds paid into Court as security for costs

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

Oral Judgment or Decision

Result/Order:

It is hereby ordered that:

- 1. The application to vary the previous order of the Court is dismissed.**
- 2. The funds paid into Court as security for costs is not to be applied to any other purpose.**

Reasons: On strict application, the remainder of funds paid into Court as security for costs should be returned to the party who paid them in as the funds have fulfilled the purpose for which they were paid.

The applicant was asking the Court to re-open the order it made previously in this matter, which was final.

The Court will only re-open an order in exceptional circumstances where justice requires it to do so. In this instance, an alternative is available to the applicant to pursue a remedy in the High Court.

STATUS HEARING

Case Name:

**[1] Eric Lake
[2] Glen Flanders
v
Commissioner of Police
[BVIMCRAP2014/0010]**

Date: Monday, 18th July 2016

Before: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Paul Webster, QC, Justice of Appeal [Ag.]
The Hon. Mr. Douglas Mendes, SC, Justice of Appeal [Ag.]

Appearances:

Appellants: Ms. Ruthilia Maximea

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

Issue: Status of matter – Forfeiture – 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 and directed that:

1. The Registrar of the Court shall request from the Senior Magistrate that the transcript of the magisterial proceedings in respect of this appeal be expedited and submitted to the Court by 17th October 2016.
2. The hearing of the appeal is adjourned to the sitting of the Court in the Territory of the Virgin Islands scheduled for the week commencing 30th January 2017.

APPLICATIONS AND APPEALS

Case Name:

The Attorney General of the Virgin Islands
v
Global Water Associates Limited

[BVIHCMAP2016/0007]

Date:

Monday, 18th July 2016

Before:

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 /

Ms. Giselle Jackman-Lumy, with her, Ms. Maya Barry of

Applicant: the Attorney General's Chambers

Respondent: Mr. Benjamin Strong, QC

Issue: Application for extension of time to appeal/apply for leave to appeal decision of learned judge pursuant to rule 62.1 of the Civil Procedure Rules 2000 – Application for leave to 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: Oral Judgment or Decision

Result / Order: It is hereby ordered that:

1. The time for applying for leave, under part 62.2 of the CPR 2000 (as amended), to appeal the decision of the Hon. Mr. Justice Barry Leon dated 1st February 2016 be extended to the 12th day of April 2016 pursuant to rules 62.14(1) and 26.1(2)(k) of the CPR 2000 (as amended).
2. In relation to the application for leave to appeal the decision of the Hon. Mr. Justice Barry Leon in claim no. BVIHCV(COM) 115 of 2014 dated 1st February 2016, leave to appeal is granted pursuant to part 62.2 of the CPR 2000 as amended as the court finds that the required threshold has been met.
3. Costs of the application to extend time awarded to the respondent to be assessed if not agreed within 21 days.
4. Costs on the application for leave to appeal to be costs in the appeal.

Reason: There were two applications before the Court: an application to extend time to apply for leave to appeal

and an application for leave to appeal.

In relation to the application to extend time for leave to appeal, the Court considered the four factors set out in the case of *C.O. Williams Construction (St. Lucia) Limited v Inter Island Dredging Co. Ltd.* (SLUHCVP2011/0017 (delivered 19th March 2012, unreported)).

The delay of 8 weeks in this case was not inordinate. The Court considered that the degree of prejudice that would occur if the application was granted, in the context of this matter, was not of such a degree that the extension of time ought not to be granted.

Although the Court found that the reasons advanced for the delay were unconvincing, it took the view that the omission of a good reason for the delay in this case, by itself would not require the Court to automatically deny the application for an extension of time.

In considering the chances of the appeal succeeding, the Court was satisfied that these were sufficiently satisfactory. The applicant demonstrated that it had more than an arguable case.

Case name:

[1] Magnum Investment Trading Corporation
[2] Niteroi Limited

v

[1] The Attorney General of the British Virgin Islands

[2] Magistrate Ayanna Baptiste-Dabreo

[BVIHCVAP2016/0004]

Date:

Monday, 18th July 2016

Before:

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:

**Appellants /
Applicants:**

Mr. Paul Dennis, QC, with him, Dr. Alecia Johns

Respondent:

**Ms. Jo-Ann Williams-Roberts, Solicitor-General, with
her, Ms. Kaidia Edwards-Alister**

Issue:

**Leave to appeal decision of learned judge at para. 1 of
order dated 5th May 2016 in matter BVIHC2016/0035 –
Application for leave to apply for judicial review on
ground of failure to make full and frank disclosure/non-
disclosure pursuant to CPR 62.2A(3) – Whether claim
for judicial review on ground 2 can be consolidated
with substantive claim for judicial review for which
leave granted on 5th May 2016**

Type of Oral Result / Order Delivered:

Oral Judgment or Decision

Result / Order:

- 1. Leave to appeal is granted.**
- 2. Appellants are granted leave to apply for judicial
review on the ground for failure to make full and
frank disclosure/ non-compliance with the duty of
candour pursuant to CPR 62.2A(3).**
- 3. The claim for judicial review should be consolidated
with the substantive claim for judicial review
application filed on 20th May 2016 for which leave
was granted on 5th May 2016.**

Reason:

**The Court was satisfied, having heard counsel on both
sides and read the arguments, that the applicants had
satisfied the threshold for grant of leave to apply for
judicial review.**

Case Name:

[1] Rustam Yusufovich Gilfanov

[2] Sergey Aleksandrovich Tokarev
v
[1] Maxim Valeriovich Polyakov
[2] Valeriy Oleksandrovich Polyakov
[3] Phoenix Holdings Ltd

[BVIHCMAP2016/0009]

Date: Tuesday, 19th July 2016

Before: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Paul Webster, QC, Justice of Appeal [Ag.]
The Hon. Mr. Douglas Mendes, SC, Justice of Appeal [Ag.]

Appearances:

Appellants: Mr. Matthew Hardwick, QC, with him, Mr. David Welford

Respondents: Mr. Paul Chaisty, QC, with him, Mr. Richard Evans

Issue: Interlocutory Appeal – Whether learned judge erred in discharging worldwide freezing order – Dissipation

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

Result / Order:

1. A full written decision is reserved.
2. The parties will be notified of the date of delivery.
3. In the interim, the worldwide freezing order is to be replaced by a domestic freezing order, the full terms of which are to be included in an appropriate order to be agreed by counsel and submitted for the approval of the Court by the conclusion of its current sitting on Friday, 22nd July 2016.

Reason: The Court determined that the terms of the worldwide freezing order were much too broad and that the order should be discharged in favour of a domestic freezing order, pending delivery of the full decision of the Court.

Case Name:

André Penn

v

The Queen

The Queen

v

Andre Penn

[BVIHCRAP2014/0006]

[BVIHCRAP2015/0002]

Date:

Tuesday, 19th July 2016

Before:

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. Jerome Lynch, QC, with him, Ms. Valerie Gordon
(for Andre Penn)**

Respondent:

**Mr. Wayne Rajbansie, Director of Public Prosecutions
(for the Crown)**

Issues:

Appeal against conviction – Appeal (by Crown) against sentence imposed on appellant – Indecent assault – Unlawful sexual intercourse with girl under age of 13 – Buggery – s. 13 of Evidence Act, 2006 (Act No. 15 of 2006, Laws of the Virgin Islands) – Good character direction – Whether learned trial judge failed to put or to put adequately defence to jury in summing up – Lurking doubt as to safety of conviction – Sentence of 15 years imposed with total discount of 5 years for delay giving final sentence of 10 years imprisonment – Whether sentence in totality unduly lenient – Whether learned trial judge erred in law as to his powers of sentencing

**Type of Oral
Result/Order**

N/A

Delivered:

Result / Order:

Judgment reserved.

APPLICATIONS AND APPEALS

Case Name:

Betty Lou Bailey (nee Chalwell)

v

Mark Bailey

[BVIHCVAP2015/0012]

Date:

Wednesday, 20th July 2016

Before:

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

Appearances:

**Applicant /
Appellant /
Respondent:**

Ms. Dancia Penn-Sallah, QC

**Respondent /
Applicant:**

Ms. Mishka Jacobs

Issues:

**Application for review of decision of single judge –
Application to strike out notice of appeal – Appellant’s
failure to obtain leave to appeal before filing notice of
appeal on 24th July 2015 – Failure by appellant to take
any steps to serve and prosecute its appeal and/or file
the record of appeal and its skeleton arguments – CPR
64**

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

Oral Judgment or Decision

Result / Order:	It is hereby ordered, by consent, that: 1. The notice of appeal filed on 24th July 2015 by the appellant is withdrawn and is accordingly dismissed. 2. All pending applications by the parties are as a consequence dismissed. 3. Each party shall bear his or her own costs.
Reasons:	Counsel for the appellant indicated that the parties had decided to settle their dispute through mediation.
Case name:	[1] Kandy & Kandy Limited [2] Al Dobowi Investments Limited [3] Kays Group Limited v Harjeev Singh Kandhari [BVIHCMAP2016/0021]
Date:	Wednesday, 20 th July 2016
Before:	The Hon. Dame Janice M. Pereira, DBE, Chief Justice The Hon. Mr. Paul Webster, QC, Justice of Appeal [Ag.] The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]
Appearances:	
Applicants:	Mr. Ian Mill, QC, with him, Ms. Colleen Farrington
Respondent:	Mr. Matthew Hardwick, QC
Issues:	Application for leave to appeal against para. 4 of order of learned judge (Costs Order) made on 17 th March 2015 – Stay of costs order pending determination of appeal
Type of Oral	Oral Judgment or Decision

**Result/Order
Delivered:**

Result / Order:

The Court hereby:

- 1. Grants the application for leave to appeal the Costs Order.**
- 2. Orders the stay of the execution of the Costs Order pending determination of the appeal.**
- 3. Orders that costs for the instant applications and in the court below should be costs in the appeal.**
- 4. The appellants are to file the notice of appeal within 21 days of the date of this order.**

Case Name:

**[1] Zorin Sachak Khan
[2] Afaque Ahmed Khan
[3] Sasheen Anwar
v
[1] Gany Holdings (PTC) SA
[2] Asif Rangoonwala

[BVIHCMAP2014/0018]**

Date:

Wednesday, 20th July 2016

Coram:

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

Appearances:

**Appellants /
Respondents /
Applicants:**

Mr. Richard Nilon, QC, with him, Mr. Nicholas Brookes

**Respondents /
Applicants:**

**Mr. Christopher Tidmarsh, QC, with him, Ms. Arabella di Iorio (for the 1st respondent)
Ms. Sue Prevezer, QC (for 2nd respondent)
Mr. Tim Marshall for the respondent**

Issues:

Application to construe order of Court of Appeal made

on 14th March 2016 – Application for conditional leave to appeal to Her Majesty in Council – Application for stay of execution of order of Court of Appeal pending appeal to Her Majesty in Council

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

Oral Judgment or Decision

The Court declared that:

- 1. The language of the order of the Court of Appeal made on 14th March 2016 is clear.**
- 2. The appeal brought by the appellant was allowed in its entirety, the consequence of which was the setting aside of the entire order of the court below.**

Reasons:

The Court considered carefully the application to construe the order made on 14th March 2016. It did not wish to run the risk of reopening the merits of the arguments which were made before the Court of Appeal; there seemed to be an inherent risk in doing so.

It appeared to the Court that notwithstanding the passages in the judgment of the Court to which it was referred, the language of the Court's order was clear and the appeal brought by the appellant was allowed in its entirety, and the consequence of this was that the entire order made by the court below was set aside.

The Court took note of the submission by counsel for the second respondent that she would be applying for a stay of the Court's decision in the matter following the adjournment later that day.

Case Name:

**[1] Zorin Sachak Khan
[2] Afaque Ahmed Khan
[3] Sasheen Anwar
v
[1] Gany Holdings (PTC) SA**

[2] Asif Rangoonwala

[BVIHCMAP2014/0018]

Date: Wednesday, 20th July 2016

Before: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Paul Webster, QC, Justice of Appeal [Ag.]
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]

Appearances:

Appellants / Respondents / Applicants:	Mr. Richard Nilon, QC, with him, Mr. Nicholas Brookes
Respondents/ Applicants:	Mr. Christopher Tidmarsh, QC, with him, Ms. Arabella di Iorio (for the 1 st respondent) Ms. Sue Prevezer, QC (for 2 nd respondent) Mr. Tim Marshall for the respondent

Issues: Application for conditional leave to appeal to Her Majesty in Council – Application for stay of execution of order of Court of Appeal pending appeal to Her Majesty in Council

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

Result / Order: It is hereby ordered that:

1. A stay of paragraph 4 of the order of the Court of Appeal is granted.
2. The second respondent/second applicant's application for a stay of the order made by this Court on 20th July 2016, is granted.
3. The sums held on account of costs now held by the solicitors for the second respondent shall continue to be held by the solicitors pending the outcome of the appeal to the Privy Council.
4. The appellants/applicants are invited to make submissions as to the method for providing secured undertakings for the appointment and performance of the duties of the new trustee, such details to be

provided to the solicitors for the first respondent by 9th August 2016.

5. The first respondent shall have until 30th August 2016 to respond to the appellants/applicant's proposals.
6. The proposals shall be filed by 6th September 2016.
7. The Court will thereafter make its order on the first respondent's application for a stay.
8. In the interim the appellants/applicants shall not take any steps to enforce the judgment of the Court of Appeal against the first respondent.
9. The costs for the second respondent's application for a stay of paragraph four of the Court's judgment shall be costs in the appeal.
10. The costs of the second respondent's application for a stay of the order made of the Court earlier on 20th July 2016 shall be costs in the appeal.
11. Costs for the first respondent's application for a stay is reserved pending the final decision of the Court.
12. The second respondent shall have carriage of the order made herein.

Reasons:

There were three applications for stay before the Court.

The first was by the second respondent/second applicant for a stay of paragraph four of the order of the Court of Appeal ordering him to account for assets received by him as a result of the 1998 appointment.

The second was an application for a stay by the second respondent/second applicant of the order made by the Court earlier on 20th July 2016 which had the effect of setting aside in its entirety the order of the court below in which it was ordered that the appellants pay the second respondents' costs.

The third application was by the first respondent/first applicant for a stay of the order of the Court of Appeal dated 14th March 2016.

Concerning the first application, to the extent that the second respondent/second applicant had accounted in his affidavit filed on 5th July 2016, and further, the Court having been of the view that he had a strong likelihood

of succeeding on his appeal to the Privy Council, a stay of paragraph 4 of the order of the Court of Appeal was granted.

Concerning the third application by the first respondent/first applicant, the general principle that a claimant is entitled to the benefit of his judgment applies to this case on the first respondent's concern about the recovery of payment, the costs and expenses, if the order of the Court of Appeal is carried into effect and the first respondent's appeal to the Privy Council is successful. The Court invited submissions from the claimants as to the method for providing secured undertakings for the appointment and performance of the duties of the new trustee.

Case name:

**Dmitry Vladimirovich Garkusha
v
[1] Ashot Yegiazaryan
[2] Vitaly Gogokhiya
[3] Hackham Invest and Trade Inc.
[4] Limerick Business Holding Limited**

[BVIHCMAP2015/0010]

Date:

Wednesday, 20th July 2016

Before:

**The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Douglas Mendes, SC, Justice of Appeal
[Ag.]**

Appearances:

Appellant: Mr. Matthew Collings, QC, with him, Mr. Andrew Wanambwa

Respondent: Mr. Brian Doctor, QC

Issue:

Motion for leave to appeal to Her Majesty in Council

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

N/A

Result / Order:

Judgment reserved.

Case Name:

**Delta Petroleum (Caribbean) Limited
v
British Virgin Islands Electricity Corporation
[BVIHCVAP2016/0003]**

Date:

Wednesday, 20th July 2016

Before:

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

Appearances:

Appellant:

Mr. Terrance Neale, with him, Ms. Elizabeth Ryan

Respondent:

**Mr. Paul Dennis, QC, with him, Ms. Willa Tavernier and
Ms. Nadine Whyte**

Issue:

Matter adjourned from last sitting – 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:

N/A

Result / Order:

Judgment reserved.

Case Name:

[1] Pico Amal Petroleum Corporation
[2] Greystone Petroleum Egypt Limited
v
Shalakany Law Office
[BVIHCMAP2016/0006]

Date:

Thursday, 21st July 2016

Before:

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:

Appellants: Mr. David Welford

Respondent: Mr. Robert Nader

Issue:

Interlocutory Appeal – Applicants’ 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

Type of Oral
Result/Order
Delivered:

Oral Judgment or Decision

Result / Order:

It is hereby ordered that:

1. The appeal is allowed.
2. The claim is stayed and the respondents are ordered to pay the appellants' costs of the appeal and of the stay application in the court below to be assessed if not agreed within 21 days.
3. The respondents to have the costs on the application to adduce further evidence to be set-off against the applicant's costs.

Reason:

The Court held that the learned judge failed to take any account of the fact that the BVI court was ill-equipped to assess the reasonable remuneration which the appellant claimed. The Court noted that according to the statement of claim, the respondent was entitled to a sum not exceeding 20 percent but not less than 5 percent of the value gained by the appellant in the arbitration which was settled. The Court stated that in assessing the appropriate fee to be paid, a BVI a court will need to have regard to the significance of the case handled, the effort exerted, the result achieved and the adequacy of seniority of the attorney concerned. All of this will be the subject of expert evidence or otherwise of witnesses who hail from or are connected with Egypt.

Of significance, is that there will always be the need to adduce expert evidence on what will amount to a reasonable fee in the context of the established criteria, a matter which can only depend on the level of fees ordinarily payable in Egypt for a matter of this sort.

A BVI court is expected to know what a reasonable fee would amount to in BVI but is not expected to have any knowledge of what might pertain in Egypt, a matter which will depend upon things such as, but not limited to, the standard of living in Egypt and what the market for legal fees will bear. While these matters no doubt can be established by expert evidence adduced in the BVI, the inevitable result will be that the crucial element of the respondent's case in the appellant's defence will all be determined effectively by experts. That will reduce the role of a BVI court to determining which of the expert evidence presented for assessment is more reliable.

In the end, therefore, justice as we have come to know it will not have been done by either party since the case will not have been determined in the ordinary manner by a judicial officer either in the BVI or in Egypt, but by the expert that the parties are permitted to call.

For this and for other reasons which will be developed further if necessary, the Court held that the learned judge attached too much weight to the fact that the applicants were incorporated in the BVI and too little weight to all of the other factors which point to Egypt as the appropriate forum to resolve this dispute.

Case Name:

Anjie Investments Limited
Appellant/First Defendant
Tian Li Holdings Limited
Second Defendant
v
[1] Cheng Nga Yee
[2] Cheng Nga Ming Vincent
Respondents/Claimants

[BVIHCMAP2016/0003]

Date: Thursday, 21st July 2016

Before: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Paul Webster, QC, Justice of Appeal [Ag.]
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Matthew Hardwick, QC, with him, Mr. Richard Evans

Respondent: Mr. Matthew Collings, QC, with him, Mr. Mark Rowlands

Issues: Commercial appeal – Forum non conveniens –
Fraudulent misrepresentation – Ownership of shares –
Whether learned judge erred in holding that BVI was
appropriate forum for trial of claim

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

Oral Judgment or Decision

Result / Order:

Judgment Reserved.

Case Name:

Royden Sebastian

v

The Queen

[BVIHCRAP2013/0002]

Date:

Thursday, 21st July 2016

Before:

**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:

Mr. Dave Marshall

Respondent:

**Mr. Herbert Potter, Crown Counsel, for the Director of
Public Prosecutions**

Issue:

**Appeal against sentence – Robbery – Whether
applicant's sentence can be varied – Whether totality of
sentence imposed on appellant was unduly severe
having regard to all the circumstances of the case**

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

Oral Judgment or Decision

Result / Order:

It is hereby ordered:

- 1. The appeal against sentence is allowed.**
- 2. A sentence of 10 years is substituted in place of 20
years and time spent on remand of 8 months is to
be deducted from the sentence of 10 years.**

Reason:

The Court heard the submissions of counsel for the appellant and the Crown. Both sides agreed that the learned judge erred in imposing a sentence of 20 years and that the notional sentence, having regard to the circumstances of this case, would have been 15 years. The appellant in this case pleaded guilty at his arraignment and both sides agreed that a discount of 1/3 should be granted in this case. It was also agreed that the appellant spent 8 months on remand prior to his conviction and this trial of imprisonment must be taken into account in the computation of the sentence.

The Court had regard to the various authorities provided and to the concession made by both sides, and it also had regard to the fact that the discount of 1/3 of the sentence was 5 years. It accordingly took the view that the appeal ought to be allowed and a term of imprisonment of 10 years ought to be substituted, with the time of 8 months spent on remand to be taken into account and deducted from that period.

Case Name:

Ng Man Sun
V
[1] Peckson Limited
[2] Chen Mei Huan
[BVIHCMAP2013/0026]

Date:

Friday, 22nd July 2016

Before:

The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Paul Webster, QC, Justice of Appeal [Ag.]
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag.]

Appearances:

Appellant:

Mr. Christopher Parker, QC, with him, Mr. Peter Tyers-Smith and Mr. Ian Mann

Respondent: Mr. John McDonnell, QC, with him, Ms. Arabella di Iorio
(for the 2nd respondent)

Issues: Ownership of shares – Claim for rectification of share register of 1st respondent company under s. 43 of the BVI Business Companies Act, 2004 (Act No. 16 of 2004, Laws of the Virgin Islands) – Declaration that order of Court of Appeal entered on 23rd October 2015 is final and binding – Application for final leave to appeal to Her Majesty in Council – Whether order of Court of Appeal entered on 23rd October 2015 can be declared legal and binding upon all parties – Whether the sum of US\$2 million held by Harney Westwood & Riegels LLP can be released to applicant forthwith – Whether sum of US\$1 million held by the Registrar of the High Court, being interim payment on account of costs paid by the 2nd respondent, can be released to applicant forthwith – Application for costs

**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 save that the consideration of whether a stay of the Court of Appeal's order on terms ought to be granted to the applicant Madam Chen shall be heard during the week of the sitting of the Court in the State of St. Lucia beginning 19th September 2016.
2. The time for the filing of the notice of appeal to the Privy Council is hereby abridged and Madam Chen shall file her notice of appeal to the Privy Council no later than Monday, 15th August 2016 and in default the appeal to the Privy Council shall stand dismissed.

Directions

1. Any further evidence in relation to the stay must be filed and served by Madame Chen on or before the 29th July 2016.
2. Any evidence on the part of Mr. Ng ought to be

served on or before 19th August 2016.

3. Any evidence in reply on the part on Madame Chen is to be served on or before 2nd September 2016.
4. There shall be no further affidavit evidence after that date without the Court's permission.
5. Written submissions by the parties to be filed and exchanged on or before Friday, 9th September 2016.
6. Costs of the issuance of the declaration application are awarded to Mr. Ng up to the 27th June 2016 when the application for final leave to appeal was issued on behalf of Madame Chen.
7. Costs are not ordered on an indemnity basis.
8. The cost of today's hearing as with the incidences of costs will be Mr. Ng's.
9. The costs shall be assessed if not agreed within 21 days.

Reason

The Court was of the view that having regard to all the background circumstances of this matter it was reasonable to issue the application for dismissal or to have the Court of Appeal's order declared final on 4th May 2016. Accordingly, the Court considered that Mr. Ng was entitled to the costs of the issuance of that application but only costs up to 27th June 2016 when the application for final leave to appeal was issued on behalf of Madam Chen. Those costs were not ordered on an indemnity basis.

Case Name:

The Commissioner of Police

v

[1] Antonio Jason Caines

[2] Osrick DaSilva

[BVIMCRAP2014/0017]

Date:

Friday, 22nd July 2016

Before:

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

Appeal [Ag.]

Appearances:

Appellant: Ms. Marie-Lou Creque

Respondents: Mr. Herbert Potter, Crown Counsel, Office of the Director of Public Prosecutions

Issue: Appeal against decision of learned magistrate to acquit respondents – Failure to declare money to Her Majesty's Customs – Whether decision of learned magistrate unreasonable and cannot be supported having regard to evidence

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

Result / Order: The appeal by the Commissioner of Police is dismissed.

Reason: The Court held that no basis had been shown for disturbing the findings arrived at by the magistrate based on the evidence which was before him in relation to the complaint. He was clearly entitled and it was reasonable for him to have concluded as he did.

Case Name: Treston Brown
v
Commissioner of Police
[BVIMCRAP2014/0014]

Date: Friday, 22nd July 2016

Before: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Paul Webster, Justice of Appeal [Ag]
The Hon. Mr. Anthony Gonsalves, QC, Justice of Appeal [Ag]

Appearances:

Appellant: Mr. Patrick Thompson

Respondent: Mr. Herbert Potter, Crown Counsel, Office of the Director of Public Prosecutions

Issue: Appeal against conviction – Unlawful possession of cannabis

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

Result / Order: It is hereby ordered that:

1. The appeal against sentence is allowed.
2. The sentence of \$45,000.00 to be paid within five (5) months or in default 18 months imprisonment, is set aside.
3. The sentence of the Court is that the appellant will pay a fine of \$5,000.00 by 30th October 2016 in default of which he shall serve a sentence of two (2) months imprisonment.

Reason: The Court, having heard the submissions of both counsel, having noted the prosecution's concession that the sentence was excessive, and having had regard to the precedent presented to the Court, held that in all the circumstances a fine of \$5,000.00 would be appropriate.

Case Name: Steadroy Matthews
v
Garna O'Neal

[BVIHCVAP2015/0019]

Date: Friday, 22nd July 2016

Before: The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Douglas Mendes, SC, Justice of Appeal
[Ag.]

Appearances:
Appellant: Ms. Elizabeth Ryan
Respondent: Ms. Akilah Anderson

Issues: Damages – Whether learned master improperly exercised her discretion in assessment of general damages for pain and suffering and loss of amenities – Whether learned master erred in awarding special damages to respondent which were not specifically pleaded and proven – Whether learned master erred in awarding pre-judgment interest on general damages in circumstances where court has no jurisdiction to do so

Type of Oral Result/Order Delivered: N/A

Result / Order: Hearing of the appeal is adjourned to the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 21st November 2016.

Reason: Counsel sought an adjournment by consent.

Case Name: Simeon Power
v
The Commissioner of Police
[BVIMCRAP2014/0012]

Date: Friday, 22nd July 2016

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

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant: Ms. Ayodeji Bernard, with her, Mr. Andrew Morrison

Respondent: Mr. Garcia Kirt Kelly, Senior Crown Counsel

Issue:

Appeal against conviction – Unlawful wounding – Criminal damage – Whether conviction unreasonable and cannot be supported having regard to the evidence – Whether leave would need to be sought to amend grounds of appeal when appellant is sentenced and the transcripts of the proceedings are made available

Type of Oral Result/Order Delivered:

Oral Judgment or Decision

Result / Order:

The matter is remitted to Magistrates' Court for sentencing.

Reason:

The Court of Appeal cannot conduct an appeal on a matter that has not been completed.

Case Name:

The Commissioner of Police

v

[1] Lester Terrence DeCastro

[2] Isaac Bellony Caena

[BVIMCRAP2013/0016]

Date:

Friday, 22nd July 2016

Before:

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

Appearances:

Appellant: Mr. Valston Graham, Senior Crown Counsel

Respondent: Mr. Lester DeCastro in person
Mr. Caena had left the jurisdiction.

Issue: Appeal against decision of learned senior magistrate to uphold no case submission in favour of respondents – Possession of cocaine – Conspiracy to import heroin – Unlawful possession of heroin with intent to supply – Unlawful possession of heroin

Type of Oral Result/Order Delivered: Directions

Result / Order: Order for directions:

1. Any application by the appellant to amend his grounds of appeal shall be filed and served within 14 days .
2. The appellant shall file and serve submissions in support of the appeal within 28 days of 22nd July 2016.
3. Leave to the respondent to file and serve submissions in response within 6 weeks being of being served with the submissions of the appellant.
4. Hearing of the appeal is adjourned to the next sitting in the Territory of the Virgin Islands during the week commencing 21st November 2016.

Case Name: Edmond Colaire
v
Commissioner of Police
[BVIMCRAP2014/0021]

Date: Friday, 22nd July 2016

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

Appearances:

Appellant: Mr. Edmond Colaire in person
Respondent: Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel

Issue: Appeal against conviction and sentence – Keeping unlicensed firearm – Early guilty plea – Appellant unrepresented in court below – Definition of firearm – Whether learned magistrate erred by failing to establish that instrument in appellant’s possession was one which met definition of firearm – Whether appellant appreciated that in order for instrument to be determined a firearm it must be one which can discharge some type of missile – Instrument in appellant’s possession very old and no test done on it to determine whether it could discharge any type of missile

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

Result / Order: The appeal is dismissed.

Reason: Appellant having requested that his appeal be withdrawn, the appeal is accordingly dismissed.

Case Name: Nealon Francis
v
Alice Morancie

[BVIMCVAP2015/0002]

Date: Friday, 22nd July 2016

Before: 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. Jamal Smith (Appellant Nealon Francis also present)

Respondent: Ms. Alice Morancie in person

Issues: Child maintenance – Whether order of learned magistrate can be supported having regard to uncontroverted evidence before the court – Whether learned magistrate erred in making child maintenance order

Type of Oral Result/Order Delivered: N/A

Result / Order: The matter is adjourned until the next sitting of the Court during the week commencing 21st November 2016.

Reason: The Court was unable to accommodate respondent's request to move the matter forward due to short notice.

Case Name: JSC VTB Bank
Claimant / Respondent
v

[1] Alexander Katunin
First Defendant / Appellant

[2] Sergey Taruta
Second Defendant

[BVIHCMAP2015/0004]
[BVIHCMAP2015/0007]

Date: Friday, 22nd July 2016

Before: 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. Richard Millett, QC (by video-link), with him, Mr. Mark Forte

Respondent: Mr. Stephen Rubin, QC (by video-link), with him, Ms. Sara-Jane Knock

Issues: Application for leave to appeal to Her Majesty in Council – Application for interim stay pending application for leave to appeal to Her Majesty in Council

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

Result / Order:

1. The application for leave to appeal to Her Majesty in Council is denied.
2. The application for interim stay pending application for leave to appeal to Her Majesty in Council is granted.
3. Counsel are to seek agreement on the terms of the order and to submit the agreed order to this Court by 1 p.m. today. Failing agreement the Court will have no choice but to set the terms but it is expected that Counsel will be able to agree on the terms of the temporary to stay order.
4. Costs of the stay to be costs in the appeal.
5. Costs of the application for leave to appeal to be paid to the respondent in an amount to be agreed by the parties within 21 days failing which they will be assessed.

Reason: The application for leave to appeal to Her Majesty in Council being out of time and this Court having no jurisdiction to extend the time for the making of the application, the application was denied.

The application for interim stay pending application for leave to appeal to Her Majesty in Council was granted upon terms to be agreed.

The Court took into consideration the skeleton argument of the appellant at paragraph 20 which indicated that the applicant was seeking only to appeal whether there was a submission to the jurisdiction and not whether the court was wrong to set aside the order for alternative service. The stay order was to be specific to that only so that what was being stayed was only that part of the order of the Court of Appeal addressing the question of whether there was a submission to the jurisdiction.

With respect to costs, the costs in relation to a stay application are usually in the cause and the Court so ordered that costs in respect of the stay application be costs in the appeal. In respect to the costs for the application for leave before this Court, costs would be paid to the respondent in the application to be agreed by the parties within 21 days failing which costs will be assessed.