

COURT OF APPEAL SITTING
TERRITORY OF THE VIRGIN ISLANDS
4th – 8th APRIL 2016

JUDGMENTS

Case Name: [1] Marinor Enterprises Limited
[2] Michael Astaphan
v
First Caribbean International Bank
(Barbados) Ltd.
formerly known as Barclays Bank Plc

[DOMHCVAP2013/0003]

Date: Monday, 4th April 2016

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Paul Webster, QC, Justice of Appeal [Ag.]

Appearances:

Appellants / Applicants:	Ms. Mishka Jacobs holding papers for counsel for the appellants/applicants
Respondent:	Mr. James Morrin holding papers for counsel for the respondent

Issues: Application to vary or discharge order of a single judge of the Court of Appeal – Application to further amend notice of appeal refused by single judge – Principles relating to amendments – Approach of appellate court to exercise of case management discretion of lower court judge – Powers of the Court of Appeal – Section 32(3) of the Eastern Caribbean Supreme Court (Dominica) Act

Result and Reason: Held: dismissing the application to vary or set aside the order of a single judge and ordering costs to First Caribbean, such costs to be assessed within 21 days of

this order, that:

1. The grant or refusal of an application to amend involves the exercise of the court's discretion. In exercising that discretion, the overriding objective, with its emphasis on enabling the court to deal with cases justly, is of the utmost importance, but the just disposal of a case is not reserved only for the party seeking amendment. The court must consider all parties and has to perform a balancing act as it seeks to strike a fair balance. The factors relevant to doing so depend on the facts of the case and as such cannot be exhaustively listed. However, they are likely to include the history as regards the amendment and an explanation as to why it is being made late; the prejudice which will be caused to the applicant if the amendment is refused; the prejudice which will be caused to the opposing party if the amendment is allowed; and whether the text of the amendment is satisfactory in terms of clarity and particularity.

Brown and others v Innovatorone PLC [2011] EWHC 3221 (Comm) at para. 14 applied.

2. There is a heavy burden on a party making a very late application to amend. An explanation for the lateness is called for and the court must consider the consequences for the opposing party. Where an amendment imperils a trial date which has been fixed, this is a significant factor to put into the scale. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to weigh heavily against the grant of permission. In the present case, the application to amend the amended notice of appeal was filed late – approximately 5 weeks before the date set for the hearing of the appeal – and the lateness of the application jeopardised the hearing date of the appeal. In the circumstances, it was incumbent on the applicants to provide a good explanation for the delay and they failed to do so.

Brown and others v Innovatorone PLC [2011] EWHC 3221 (Comm) at para. 14 applied; *Swain-Mason and others v Mills & Reeve LLP* [2011] EWCA Civ 14

applied; *Rahan Ali v Abu Bakar Siddique* [2015] EWCA Civ 1258 at para. 45 and 46 referred; *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) referred; *John Lawrence Monks v National Westminster Bank PLC* [2015] EWHC 1172 (Ch) referred.

3. When considering the competing arguments of prejudice to parties to an application for amendment, the prejudice to the amending party in not being able to advance its amended case is a relevant factor, but is only one of the factors to be taken into account by the court in reaching a conclusion. Moreover, when, as in the case at bar, the prejudice is as a result of the amending party's own making, such a consideration is much less important in the court's balancing exercise. In this case, the proposed amendments would have resulted in a completely new defence compared to the pleaded defence on which the case was tried. The effect would be a new trial with the attendant costs and delay resulting in prejudice to First Caribbean. These important factors, coupled with the unexplained lateness of the application, acted against the Court exercising its discretion in favour of granting the application to amend.

CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd [2015] 1345 (TCC) at para. 19 applied; *Swain-Mason and others v Mills & Reeve LLP* [2011] EWCA Civ 14 applied; *Archlane Limited and Johnson Controls Limited and Another* [2012] EWHC B12 (TCC) applied; *Wani LLP v Royal Bank of Scotland plc and another* [2015] EWHC 1181 (Ch) at para. 65 applied.

4. The law in relation to compensation in costs to a prejudiced party is clear. The court will not discount prejudice to a party on the basis that the party could be compensated in costs. The court is enjoined to consider the holistic effect of the disruption. This assessment includes the impact of the disruption on the parties, as well as on efficient case management and the administration of justice. Accordingly, in this case, the applicants' position that any prejudice to First Caribbean caused by an amendment could

be compensated in costs was not sustainable.

CIP Properties (AIP) Ltd v Galliford Try Infrastructure Ltd [2015] 1345 (TCC) at para. 15 applied; *Worldwide Corporation Ltd v GPT Ltd* [1998] All ER (D) 667 applied; *Savings and Investment Bank Ltd v Fincken* [2003] EWCA Civ. 1630 at para. 79 applied.

5. The wording of section 32(3) of the Supreme Court Act is clear. Section 32(3) does not confer any power on the Court separate and apart from the powers conferred by section 32(1). It does not provide any free standing ground for amending a notice of appeal. It merely ensures that the Court, in exercising the plenitude of powers granted under section 32(1), is not restricted in any order it considers making by virtue of any interlocutory orders made therein. This is quite sensible, as in determining an appeal, it may be necessary for the Court to examine interlocutory orders made. This however is not synonymous with an appellant praying in aid that section for the purpose of amending a notice of appeal so as to appeal interim orders where the time for so doing has already expired and thus circumvent the rules of court governing such appeals.

The Attorney General of Grenada v Charles David Peter (2008) 72 WIR 155 considered.

6. An appeal court should not interfere with a case management decision of a judge who has applied the correct principles and taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge. In the present case, section 32(3) of the Supreme Court Act cannot be interpreted in a manner inconsistent with the well-established jurisprudence and has to be read in accordance with that jurisprudence. Further, the Court was not dealing with an appeal from any order of the High Court but rather an application to vary or set aside

the order of a single judge of the Court of Appeal. Accordingly, in the circumstances of this case, section 32(3) could not be relied on, or invoked as authority in support of the application and could not avail the applicants.

HRH Prince Abdulaziz v Apex Global Management Ltd. and another [2014] EWCA Civ 1106 at para. 21 applied; *Walbrook Trustee (Jersey) Limited and others v Fattal and others* [2008] EWCA Civ 427 at paragraph 33 applied.

Case Name: **The Attorney General**
v
[1] Peter Hippolyte
[2] Michael Augustin
[3] Martinus Alexander
[SLUHCVAP2015/0019]

Date: **Monday, 4th April 2016**

Coram: **The Hon. Mr. Davidson K. Baptiste, Justice of Appeal**
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Paul Webster, QC, Justice of Appeal [Ag.]

Appearances:

Appellant: **Ms. Giselle Jackman-Lumy, Senior Crown Counsel, holding papers for the Attorney General**

Respondents: **Ms. Dancia Penn-Sallah, QC holding papers for counsel for the respondents**

Issues: **Civil appeal – Section 441 of the Criminal Code of Saint Lucia – Whether section 441 of the Criminal Code is inconsistent with sections 8(1), 8(2) and 8(7) of the Constitution of Saint Lucia –Whether section 441 of the Criminal Code interferes with the requirement of reasonable doubt – Whether section 8(12) of the Constitution is applicable to section 441 of the Criminal**

Code

Result and Reason:

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

1. Section 441 of the Criminal Code creates three elements: (1) the possession or conveying of the property by the defendant; (2) the reasonable suspicion that the property has been stolen or unlawfully obtained; and (3) the inability of the defendant to give a satisfactory account of how the property came into his possession. The third element is the most important ingredient of the offence. It places the onus on the defendant, in order to avoid a finding of guilt, to establish that he or she is able to give an explanation as to his or her innocent possession of the property. It reduces the burden on the prosecution to proving possession by the defendant and facts from which a reasonable suspicion can be inferred that the property was stolen or unlawfully obtained. It therefore contravenes the presumption of innocence in section 8(2)(a) of the Constitution of Saint Lucia. Accordingly, in this case, the learned trial judge was correct in making this finding.

Attorney-General of Hong Kong v Lee Kwong-Kut; Attorney-General of Hong Kong v Lo Chak-Man and another [1993] AC 951 applied.

2. A provision such as section 8(2)(a) of the Constitution of Saint Lucia which embodies the presumption of innocence, has to be given a generous and purposive construction. Section 8(12)(a) of the Constitution which imposes upon a person charged with an offence, the burden of proving particular facts, should not be construed in a manner which emasculates the provision of the presumption of innocence embodied in section 8(2)(a) of the Constitution. Further, section 8(12)(a) of the Constitution is not intended to apply to the essential ingredient of an offence. In the circumstances of this case, the learned judge was right in concluding that section 8(12)(a) would not be

applicable to section 441 of the Criminal Code and correctly held that section 441(1) of the Criminal Code contravened the presumption of innocence embodied in section 8(2)(a) of the Constitution. Consequently, in the present case, the judge quite properly severed the offending part of section 441(1) and to the extent that the offending part of section 441(1) was inextricably linked to section 441(2), he was also correct in striking down section 441(2) in its entirety.

Attorney-General of Hong Kong v Lee Kwong-Kut; Attorney-General of Hong Kong v Lo Chak-Man and another [1993] AC 951 applied; *The Attorney General of The Gambia v Momodou Jobe* [1984] AC 689 at p. 100 applied; *Beezadhur v The Independent Commission against Corruption and another* [2014] UKPC 27 distinguished.

Case Name:

Stuart MacKellar
(as liquidator of Smart Plus International
(Holdings) Limited)
v
[1] Khoo Kin Yong (aka “Alice”)
[2] Pengiran Hajid Mohd Ayub
[3] The Authorised Legal Representative
Appointed in the Estate of Pengiran Anak Hajah
Damit (Deceased)

[BVIHCMAP2013/0008]

Date:

Monday, 4th April 2016

Coram:

The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Paul Webster, QC, Justice of Appeal [Ag.]

Appearances:

Appellant:

Ms. Mishka Jacobs holding papers for counsel for the appellant

Respondents: Mr. James Morrin holding papers for the respondents

Issues: Civil appeal – Insolvency proceedings – Sections 254 and 256 of the Insolvency Act, 2003 – Mifeasance – Whether learned trial judge erred in holding that company never suffered a loss – Whether learned trial judge erred in refusing to hold the respondents personally liable for breach of agreement

Result and Reason: Held: dismissing the appeal, that:

1. Section 254 of the Insolvency Act, 2003 provides a summary procedure to make persons, including directors, liable to compensate the company for misfeasance, breach of fiduciary duty or other duty to the company. To hold a director accountable under this section it must be shown that he was guilty of misfeasance or breach of his fiduciary duty or other duty in relation to the company or that he has misapplied or retained or become accountable for any money or other assets of the company.

Section 254(1)(b) of the Insolvency Act, 2003 applied.

2. Loss to the company is a requisite element of misfeasance and or breach of other duty within the meaning of section 254. In order to establish loss, it is imperative that there must have been a misapplication of assets, whether that loss consists of a depletion of the company's previously held assets or a diversion of profits or property which would otherwise have been available. It is not enough to simply show breach of duty. Loss must be to the funds and assets of the company. Smart Plus never had any assets at any point, before or after they entered into the Investment Agreement with CBTL. A judgment for damages was awarded against Smart Plus. This was in the form of a liability caused as a result of Smart Plus' failure to perform its obligations under the Investment Agreement. Accordingly, the learned trial judge was correct to hold that the respondents cannot be fixed with personal liability as envisioned under section 254.

The Right Hon. G. A. F. Cavendish Bentinck M.P. v Thomas Fenn (1887) 12 App Cas 652 applied; *Re Canadian Land Reclaiming and Colonizing Company Coventry and Dixon's Case* (1880) 14 Ch D 660 applied; *QEB Metallica Limited (by its Joint Liquidators, David Ingram and Kevin Murphy v Aslam Peerzada et al* [2009] EWHC 3348 distinguished; *In Liquidator of West Mercia Safetywear Ltd. v Dodd & Anor* (1988) 4 BCC 30 distinguished; *Malcolm Cohen et al v Gerald Selby et al* [2002] BCC 82 applied.

3. To proceed under section 254 the position would have to be the same as it would be if the company had brought an action in its own name. In this case, there was no credit that was incurred by the respondents in the name of the company. As Smart Plus never had in its balance sheet the sum awarded in the judgment and which sum had been depleted and or misapplied by the respondents and or the respondents were guilty of misfeasance or breach of other duty, it could not have brought an action in its own name against the respondents. Further, there was no evidence that the respondents performed their duties to the company in a manner that was not honest, not in good faith and not in what they believed to be in the best interests of Smart Plus. They also did not retain or become accountable for any money or other assets of the company.

Section 254(1) of the Insolvency Act, 2003 applied; *Malcolm Cohen et al v Gerald Selby et al* [2002] BCC 82 applied; *The Right Hon. G. A. F. Cavendish Bentinck M.P. v Thomas Fenn* (1887) 12 App Cas 652 applied.

4. Section 256 is designed to cause directors who incur credit during a period when they ought to have realised there was no chance that the company would avoid going into insolvent liquidation make a contribution to the assets. An insolvent company is one where either the value of the company's liabilities exceeds its assets or the company is unable to pay its debts as they fall due. Smart Plus had no assets and no liabilities. It went into liquidation as it was unable to pay the judgment

awarded against it. Smart Plus could not have been an insolvent company before that period. Further, there is no evidence which showed that liquidation proceedings were contemplated or could occur as a result of some action or inaction on the part of the respondents. The respondents could not have reasonably taken steps to minimise loss to Smart Plus' creditors as they never existed until judgment was awarded against Smart Plus for breach of the Investment Agreement. Accordingly, the learned judge was correct in refusing to award relief under section 256 of the Insolvency Act, 2003.

Malcolm Cohen et al v Gerald Selby et al [2002] BCC 82 applied; *Re Hawkes Hill Publishing Co Ltd (in liq)* [2007] BCC 937 applied; *Re Produce Marketing Consortium Ltd* (1989) 5 BCC 569 distinguished.

APPLICATIONS AND APPEALS

Case Name:

E. M. Watts Development Company Ltd

v

The Government of the Virgin Islands

[BVIHCVAP2015/0003]

Date:

Monday, 4th April 2016

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:

**Applicant /
Appellant:**

Mr. James Morrin

Respondent:

**Ms. Giselle Jackman-Lumy, Senior Crown Counsel,
holding papers for Ms. Maya Barry, Crown Counsel**

Issues: Compulsory acquisition of land – Appeal against award of Board of Assessment (exercising jurisdiction provided by section 12 of Land Acquisition Act (Cap. 222, Revised Laws of the Virgin Islands 1991)) – Whether value given by Board of Assessment to land and rights compulsorily acquired was wrong and contrary to evidence – Whether Board of Assessment erred in refusing to award interest – Whether Board of Assessment erred in refusing to award sum of \$6,725.58 in respect of travel and associated costs – Application for final leave to appeal to Her Majesty in Council

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 against that part of the decision made by the Court of Appeal on 28th September 2015 whereby the Court agreed with the adjustments made by the Board of Assessment of the CBRE Valuation of the applicant's mooring rights and disallowed this aspect of the applicant's appeals, is granted; and
2. The costs of and occasioned by this application be costs in the appeal to Her Majesty in Council.

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

Date: Monday, 4th April 2016

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:

**Applicant /
Respondent:**

**Ms. Dancia Penn-Sallah, QC, holding papers for Ms.
Jennifer Jarvis (absent due to illness)**

**Respondent /
Applicant:**

Ms. Mishka Jacobs

Issues:

**Application for review of decision of single judge –
Application to strike out notice of appeal**

Result / Order:

It is hereby ordered:

- 1. By consent, the applications herein are adjourned to
the next sitting of the Court of Appeal in the Territory
of the Virgin Islands during the week commencing
18th July 2016.**
- 2. There be no order as to costs.**

Reason:

**The appellant and the respondent were both overseas,
the appellant for the reason that one of the children of
the union was ill and required medical attention
overseas.**

Case Name:

**Petra Cooper (nee Klvacova)
v
Peter Cooper**

[BVIHCVAP2012/0010]

Date:

Monday, 4th April 2016

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:

**Applicant /
Appellant:**

No appearance

Respondent:

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 Delivered: Oral Judgment or Decision

Result / Order: It is hereby ordered that:

1. The application is adjourned to the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 18th July 2016.
2. In the event that the applicant fails to attend on the adjourned hearing date, either in person or by a legal representative, the application herein shall be struck out.
3. Similarly, the application for a stay of the proceedings in the Court below is adjourned to the next sitting, subject to the same sanctions as contained in paragraph 2 of this order.
4. The Registrar of the Court is hereby directed to serve a copy of the order on the parties by way of electronic mail to be sent to their respective addresses as furnished to the Court in the respective parties' documents.

Reason: The Court determined that the matter should be adjourned given the non-attendance of the parties since the case was not a straightforward one and the Court would benefit from representations made to it by the parties.

Case Name: Melvin Rymer
v

Clearlie Todman-Brown

[BVIHCVAP2011/0028]

Date: Monday, 4th April 2016

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:

Appellant / Respondent:	Ms. Mishka Jacobs
Respondent / Applicant:	Mr. Jamal Smith

Issues: Breach of contract – Building contract between appellant and respondent – Whether learned trial judge erred in finding that appellant was in breach of contract – Whether learned judge erred in finding that building contract was entire contract – Whether learned judge erred in finding that appellant had repudiated building contract by leaving worksite in December 2008 – Whether learned judge erred in not finding that respondent had rendered it impossible for contract to continue by her inability to finance building project and her refusal to consider appellant’s offer to meet with bank officials in January 2009 – Whether learned judge erred in failing to find that it was respondent who had repudiated contract by her refusal to meet with appellant at bank and that appellant had accepted such repudiation by not returning to worksite after January 2009 – Whether learned judge erred in determination of quantum of damages for breach of contract – Whether learned judge erred in calculation of damages for residential and business rent – Leave to appeal to Her Majesty in Council – Application for stay of execution

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

Result / Order: It is hereby ordered that:

- 1) Conditional leave is granted to the applicant, Clearlie Todman-Brown, to appeal to Her Majesty in Council in respect of the order made by the Court of Appeal on 14th January 2016, whereby the appellant's appeal against the order of Madam Justice Indra Hariprashad-Charles dated 11th May 2011 was dismissed, on condition that:
 - i. The applicant shall within 90 days lodge with the Court the US dollar equivalent of £500 Sterling as security for the prosecution of the appeal to Her Majesty in Council and the payment of all such costs as may become payable by the applicant in the event of the applicant not obtaining an order granting it final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee of the Privy Council ordering the applicant to pay the costs of the appeal, as the case may be.
 - ii. The record shall be prepared in accordance with Rules 18 to 20 of the Judicial Committee (Appellate Jurisdiction) Rules Order, 2009 and its Practice Directions 4.2.1 to 4.3.2 and Practice Direction 5; the same to be transmitted to the Registrar of the Judicial Committee of the Privy Council without delay where final permission to appeal has been granted.
 - iii. The applicant shall make an application to the Court for final leave to appeal to Her Majesty in Council, supported by the certificate of the Registrar that the security for costs and prosecution of the appeal hereby ordered has been given by the time prescribed by this order to the satisfaction of the Registrar.
- 2) The application for a stay of execution of the decision of the Court of Appeal pending the appeal to Her Majesty in Council, is refused.
- 3) The costs occasioned by this application shall be costs in the appeal to Her Majesty in Council.
- 4) Counsel for the respondent/applicant is to prepare and lodge with the Registrar of the Court the necessary order setting out the conditions by

Wednesday, 6th April 2016.

Reasons:

The Court decided to deal with a deficiency in the application for leave to appeal to Her Majesty in Council by treating the application as a motion for the grant of leave, having regard to the content of the affidavit in support, and the exhibits filed therewith satisfying the requirements for the grant of leave to appeal to Her Majesty in Council.

The respondent/applicant not having provided cogent evidence in support of a stay, which evidence must go to the extent of the risk of injustice which withholding the stay would engage, the Court held that the appellant did not meet the requisite threshold for the grant of a stay.

Case Name:

**James Anthony
(as Personal Representative of the Estates of
Abraham, deceased and Clarita Anthony,
deceased)
v
[1] Eileen Papone
[2] Lourie Anthony
(claiming on their own behalf and also as
Personal Representatives of the Estates of
Abraham Anthony, deceased and Clarita
Anthony)**

[BVIHCVAP2011/0038]

Date:

Monday, 4th April 2016

Before:

**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:

Appellant:

Ms. Chairmaine Rosan-Bunbury

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

Issues: Res judicata – Abuse of process – Estoppel – Whether learned trial judge erred in failing to find that respondents’ claim was abuse of process and that respondents were accordingly estopped from bringing claim – Whether respondents’ claim was time barred under Limitation Act (Cap. 43, Revised Laws of the Virgin Islands 1991) – Whether learned trial judge erred in making findings that appellant had acted in breach of trust and dishonestly – Whether procedure adopted on trial of claim enabled learned judge to arrive at findings of breach of trust and dishonesty on part of appellant

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

Result / Order: It is hereby ordered that:

1. The appeal is allowed in part.
2. The issue as to whether the administrator has failed in his duties of administering the estate is remitted to the court below for trial.
3. The costs on this appeal and in the court below shall be borne by the estates.

Reason: The appellant and the respondents are siblings and beneficiaries of the estates of their deceased parents. The appellant was appointed as administrator of both estates. Issues arose as to the appellant’s administration thereof and the respondents issued a claim, which was the first of two claims, seeking his removal and their appointment in his place. That claim did not go to trial because the parties, following a consensual mediation, agreed that the respondents would join the appellant as co-administrators.

This course did not resolve the matters as the respondents complained that the appellant was refusing to discuss the steps he had taken in respect of the administration of the estates. Crucially, the

respondents complained that portions of their deceased mother's estate had been transferred out of the estate, as shown by a series of transfers for valuable consideration, but that the appellant had failed to account for the proceeds of sale.

The respondents therefore issued the second claim from which this appeal arises in which they also sought removal of the appellant, and additionally, declarations as to the trusteeship of the estate and orders that he make good the loss alleged to have been occasioned to the estates as a result of the transfers.

Res Judicata / Abuse of Process

In relation to the first issue, that is the issue identified as Res Judicata / Abuse of Process, the learned trial judge considered in detail this issue raised by the appellant on the basis that the second claim was a re-litigation of the first claim and thus was an abuse of process or gave rise to an estoppel.

The Court was satisfied, based on paragraphs 28 to 42 (inclusive) of the learned judge's judgment, that the learned judge's basis for rejecting the plea of res judicata / abuse of process was unassailable, which basis the Court adopted without repeating those passages in her judgment. The complaint on this ground accordingly failed.

Limitation

In respect of the question of limitation and the claim being statute and time barred, the appellant did not advance before this Court a challenge to the judges' finding that the claim was not statute barred by virtue of the Limitation Act (Cap. 43, Revised Laws of the Virgin Islands 1991).

The Court opined that this was a wise course as this challenge was also unsustainable. The learned judge rightly encapsulated the issue of law related to limitation as it concerns a claim brought against a trustee as between the beneficiaries of a trust as set out in paragraphs 67 to 76 of her judgment. Again, the Court indicated that it would not repeat those

paragraphs of the learned judge, but would adopt them.

Breach of Trust and Dishonesty

In relation to the third issue identified, the findings of breach of trust and dishonesty, firstly, it was in no part of the pleaded case that the appellant had breached his duty of trust. The respondents, in essence, sought a declaration that the appellant was a trustee of the estate and therefore held the proceeds of sale of the various transfers on trust for the beneficiaries. It was left to be implied that the respondents were alleging a breach of trust but this was not expressly pleaded. Further, there was no pleading or allegation that the appellant had acted for his own gain or that he had been dishonest.

The Court stated that the trial of the matter had proceeded in a most unsatisfactory way as there were clear issues of fact on which the parties were in conflict. One such critical issue involved the question which was central to the appellant's defence – that he had acted with the concurrence of the beneficiaries, whereas the respondents were stating that the appellant, as administrator, had no such consent.

The parties agreed at trial not to cross-examine each other's witnesses with the result that the learned judge was left to make critical findings of fact on conflicting affidavits of the parties. Indeed she lamented this dilemma in which she found herself, at paragraph 54 of her judgment. She referred to certain admissions which she gleaned from the affidavit of the appellant and on that basis, she concluded that the appellant had acted in breach of trust, that the estates had suffered loss and that the loss was due to a breach of duty for personal gain and dishonesty. That was at paragraph 64 of her judgment.

The Court opined that these statements were particularly troubling where, as was stated above, neither a breach of trust nor any acts of dishonesty were pleaded or alleged.

The Court further opined that none of the admissions referred to in paragraph 54 of her judgment was sufficient to lead to the conclusion which she arrived at

– that there was a breach of trust and dishonesty – where the evidence of the parties was on equal footing. There was no cross-examination to test either party’s credibility. Therefore, it was not open to her to make these findings on the contest of facts as they stood and on the pleaded case.

The Court stated that this was a case which required cross-examination on the critical issue as to whether the parties had reached a consensus on the manner in which the estate was to be administered, the resolution of which called for the judge to determine that critical question by assessing the evidence for and against each party. This could not be done in these circumstances and this Court is in no better position to determine this issue. The appropriate recourse is to remit the issue arising herein on the question whether or not the appellant failed in his duties as administrator of the estate to the court below.

The Court stated that the issues of Res Judicata / Abuse of Process and limitation would not be remitted to the court below since they had already been determined by it.

STATUS HEARING

Case Name:

Julian Christopher

v

The Queen

[BVIHCRAP2012/0009]

Date:

Monday, 4th April 2016

Before:

The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant:

Mr. Stephen Daniels holding papers for Mr. Patrick Thompson

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

Issues: Status of matter – Appeal against conviction and
sentence – Indecent assault – Rape

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

Result / Order:

1. The Registrar shall finalise the transcript as prepared, including the morning session where the transcript is prepared from the judge's notebook and serve same on both sides on or before 15th April 2016.
2. The appellant is to file and serve skeleton arguments along with authorities within 6 weeks of receipt of the transcript.
3. The respondent is to file and serve the skeleton arguments along with authorities in reply with 6 weeks of the appellant's skeleton arguments.
4. The appeal is fixed for the sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 21st November 2016.

Case Name: Raymond Harrison
v
The Queen

[BVIHCRA2014/0003]

Date: Monday, 4th April 2016

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

Appearances:

Appellant: Mr. Stephen Daniels holding papers for Mr. Patrick Thompson

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

Issues: Status of matter – Appeal against conviction – Rape – Unlawful sexual intercourse with girl under age of 16 – Possession of child pornography – Whether learned trial judge erred in discharging jury foreman after trial had commenced – Whether effect of learned trial judge’s decision to discharge jury foreman ‘deprived appellant of voice in jury room’ which may have been material to jury deliberations and renders appellant’s conviction unsafe

Type of Oral Result/Order Delivered: Directions

Result / Order:

1. The Registrar shall notify the parties of the availability of the transcript within 21 days.
2. The appellant is to file and serve skeleton arguments along with authorities within 6 weeks of the notification of the availability of the transcript.
3. The respondent is to file and serve the skeleton arguments along with authorities in reply with 6 weeks of the appellant’s skeleton arguments.
4. The appeal is fixed for the sitting of the Court of Appeal in the territory of the Virgin Islands during the week commencing 21st November 2016.

Case Name:

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

Date: Monday, 4th April 2016

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

Appearances:

Appellants: No appearance

Respondent: Ms. Jo-Ann Williams-Roberts, Solicitor General

Issues: Status of matter – Ownership of land – Prescriptive title

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

Directions

Result / Order:

1. The respondent shall file with the court, within 7 days, the documents which were filed on 22nd July 2009, these documents and the statement filed pursuant to section 147 of the Registered Land Act Cap. 229. These documents shall form the transcript.
2. The Registrar of the High Court shall notify the parties of the availability of the documents within 14 days.
3. Thereafter, the appeal shall proceed in accordance with the CPR 2000 Part 62.
4. The appeal is fixed for the sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 21st November 2016.

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, 4th April, 2016

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

Appearances:

Appellants: No appearance

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: Directions

Result / Order:

1. The matter is adjourned to the sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 21st November 2016.
2. The Registrar is to give notice of the status hearing to the parties.

Case Name:

The Commissioner of Police
v
[1] Hugh Erickson
[2] Gerry Freeman
[3] Jomo Jack
[4] James Telford John
[5] Leon King

[BVIMCRAP2014/0015]

Date: Monday, 4th April 2016

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

Appearances:

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

Respondents: Ms. Valerie Gordon holding papers for Mr. Hugh Wildman (for the 1st, 2nd and 3rd respondents)
Mr. Stephen Daniels (for the 4th respondent)
Mr. Leon King (5th respondent, in person)

Issues: Status of matter – Appeal against decision of learned magistrate to offer respondents bail and sever trial of respondents – Possession of proceeds of criminal conduct – Importation of cocaine – Being concerned in supply of controlled drug – Whether learned magistrate erred in rejecting legal evidence which substantially affected merits of case – Whether learned magistrate’s decision is unreasonable or cannot be supported having regard to evidence

Type of Oral Result/Order Delivered: Directions

Result / Order:

1. The Registrar of the High Court shall notify the parties of the availability of the transcript on or before 4th May 2016.
2. The appellant is to file and serve skeleton arguments along with authorities on or before 20th June 2016.
3. The respondent shall file and serve skeleton arguments along with authorities on or before 4th August 2016.
4. The matter is adjourned to the sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 21st November 2016.

Case Name:

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

Date: Monday, 4th April 2016

Before:	The Hon. Mde. Gertel Thom, Justice of Appeal
Appearances:	
Appellants:	Ms. Ruthilia Maximea
Respondent:	Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel, Office of the Director of Public Prosecutions
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:	1. Counsel for the appellant is to notify the appellant of the date of hearing and the appellant is to attend the hearing. 2. The matter is adjourned for status hearing at the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 18th July 2016.
Case Name:	Frankly Malone v Commissioner of Police [BVIMCRAP2014/0013]
Date:	Monday, 4th April 2016
Before:	The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant: Mr. David Penn

Respondent: Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel, Office of the Director of Public Prosecutions, holding papers for Mr. Garcia Kelly, Senior Crown Counsel

Issues:

Status of matter – 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:**

Directions

Result / Order:

1. The Senior Magistrate shall serve notice of the availability of the transcript on the parties on or before 11th July 2016.
2. The appellant shall file and serve skeleton arguments with authorities on or before 29th August 2016.
3. The respondent shall file and serve skeleton arguments with authorities on or before 10th October 2016.
4. The matter is adjourned to the sitting of the Court of Appeal 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: Monday, 4th April 2016

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

Appearances:

Appellant: Ms. Marie-Lou Creque holding papers for Ms. Valerie Gordon

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

Issues: Status of matter – Appeal against conviction and sentence – 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: Directions

Result / Order:

1. The Senior Magistrate shall serve notice of the availability of the transcript on the parties and on the appellant personally.
2. The matter is adjourned to the next status hearing of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 18th July 2016.

Case Name: Shaun Williams

V
The Commissioner of Police
[BVIMCRAP2014/0020]

Date: Monday, 4th April 2016

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

Appearances:

Appellant: Ms. Tiffany Scatliffe-Esprit, Principal Crown Counsel,
holding papers for Mr. Herbert Potter, Crown Counsel

Respondent: Mr. Stephen Daniels holding papers for Mr. Patrick
Thompson

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

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

Result / Order:

1. The Senior Magistrate shall notify the parties of the availability of the transcript on or before 11th July 2016.
2. The appellant shall file and serve skeleton submissions with authorities on or before 29th August 2016.
3. The respondent shall file and serve skeleton submissions with authorities on or before 10th October 2016.
4. The matter is adjourned to the sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 21st November 2016.

Case Name:

**[1] Kevin Greaves
[2] Nigel Registe
v
The Commissioner of Police
[BVIMCRAP2014/0022]**

Date:

Monday, 4th April 2016

Before:

The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellants:

Mr. Stephen Daniels

Respondent:

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

Issues:

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

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

Directions

Result / Order:

- 1. The Senior Magistrate shall notify the parties of the availability of the transcript on or before 3rd June 2016.**
- 2. The appellant shall file and serve skeleton submissions with authorities on or before 18th July 2016.**
- 3. The respondent shall file and serve skeleton submissions with authorities on or before 5th September 2016.**
- 4. The appeal is fixed for the sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 21st November 2016.**

Case Name:

Saniel Durant

v

Kharid Frett

[BVIMCVAP2014/0001]

Date:

Monday, 4th April 2016

Before:

The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant:

Mr. Stephen Daniels (amicus curiae)

Respondent:

Ms. Kharid Frett, in person

Issues:

Status of matter – 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:**

Directions

Result / Order:

- 1. The Senior Magistrate shall notify the parties of the availability of the transcript on or before 11th April 2016.**
- 2. The appellant shall file and serve skeleton submissions with authorities on or before 23rd May 2016.**
- 3. The respondent shall file and serve skeleton submissions with authorities on or before 4th July 2016.**
- 4. The appeal is fixed for the sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 21st November 2016.**

APPLICATIONS AND APPEALS

Case Name:

Olive Group Capital Limited

v

Mr Gavin Mark Mayhew

[BVIHCMAP2016/0002]

Date:

Tuesday, 5th April 2016

Before:

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

Appearances:

Appellant:

Mr. Vernon Flynn, QC, with him, Ms. Victoria Ann Lord

Respondent:

Mr. Richard Millett, QC, with him, Mr. Mark Forte and 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

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

N/A

Result / Order:

- 1. The decision is reserved.**
- 2. Notice will be given to the parties as to the date of**

delivery.

JUDGMENTS

Case Name:

Danny Benjamin

v

The Queen

[BVIHCRA2013/0001]

Date:

Wednesday, 6th April 2016

Before:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

Appellant:

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

Respondent:

**Mr. Michael Maduro holding papers for Mr. Patrick
Thompson**

Issues:

**Criminal Appeal – Unlawful and malicious wounding –
Whether learned trial judge erred in directing jury on the
issue of transferred malice – Whether learned trial judge
erred in failing to give good character direction –
Whether learned trial judge erred in failing to advise
jurors on lesser alternative offence – Whether learned
trial judge materially misdirected jurors on self-defence
– Court of Appeal Act Section 43 – Application of
proviso**

**Result and
Reason:**

**Held: allowing the appeal and remitting the matter to
the court below for retrial, that:**

- 1. The well-known principle of transferred malice
essentially dictates that where the defendant**

does an act intending to injure person B, he is guilty of having committed the offence against person B and the defendant's criminality is precisely the same whether it is person A or person B who is injured. Once the actus reus and the mens rea of the same crime coincide, the offence is committed. In order to be able to rely on this principle, the Crown must provide the evidential basis for so doing and cannot abdicate its responsibility by simply relying on a theory that is put forward by the defence. In the present case, the Crown quite erroneously relied on the principle of transferred malice in order to establish the offence in relation to Mr. Pond as the evidence that it adduced did not give rise to any basis for prosecution on this principle. Furthermore, it is clear that the learned judge misdirected the jury in summing up the case in relation to Mr. Pond on the basis of transferred malice as no evidence was led by the Crown in support of this principle. However, given the cogency of the evidence led by the Crown in relation to the ingredients of the offence of unlawful and maliciously wounding with intent, more specifically the overwhelming evidence that may have enabled the jury to infer that Mr. Benjamin had the requisite intention, the learned trial judge's misdirection was not fatal so as to vitiate Mr. Benjamin's conviction.

Latimer v R (1886) 17 QBD 359 applied; *DPP v Frederick Daley and Another* [2002] 2 WLR 1 applied; *R v Mitchell* [1983] QB 741 applied.

2. It is settled that the question of whether or not to leave an alternative verdict for a lesser offence to the jury involves the exercise of the judge's discretion. It is the law that an appellate court will not lightly interfere with the exercise of the trial judge's discretion. To do so the appeal court must be satisfied that the failure to leave the alternative verdict to the jury in the circumstances of the particular case has affected the safety of the conviction. The judge in making that decision must take a number of factors into account: (a) the judge must examine all of the evidence, disputed and undisputed and the issues of law and fact to which it has given rise; (b) in considering this matter, the

judge is obliged to take into account the question of fairness to the defendant, on the one hand, and proportionality, that is to say, whether the alternative verdict would do justice to the facts of the case; and (c) the decision whether to leave an alternative verdict is one for the judge's discretion, based on the evidence in the case.

Sections 163 and 164 of the British Virgin Islands Criminal Code applied; *R v Foster and other Appeals* [2008] 2 All ER 597, 61 applied; *Patrick Facey et al v The Queen* BVIHCRA2013/0009 (delivered 18th May 2015, unreported) applied.

3. It is plain that the difference between sections 163 and 164 of the Criminal Code is that an offence under section 163 requires proof that the defendant intended to wound or cause grievous bodily harm to the victim or to prevent the lawful apprehension while an offence under section 164 may be committed without any such intention. Section 163 is obviously the more serious of the two offences. The overwhelming evidence that was adduced by the Crown pointed to the intention to cause the greater offence. To have left the alternative verdict to the jury may have been unfair to the Crown since that verdict would not have done justice to the facts of the case. Accordingly, the learned trial judge's decision to direct the jury only on the greater offence and his refusal to leave the alternative verdict resulted in no unfairness to Mr. Benjamin and does not undermine the safety of the conviction.

Sections 163 and 164 of the British Virgin Islands Criminal Code applied; *R v Foster and other Appeals* [2008] 2 All ER 597, 61 applied; *Patrick Facey et al v The Queen* BVIHCRA2013/0009 (delivered 18th May 2015, unreported) applied.

4. It is the law that where a plea of self-defence arises, if the defendant may have been honestly mistaken as to the facts, he must be judged according to his mistaken belief of the facts, whether the mistake was on an objective view a reasonable mistake or not. The law also allows such force to be used as is reasonable in the circumstances as the accused

believed them to be. Based on the foregoing principles, it was incumbent on the learned trial judge to direct the jury on both elements of Mr. Benjamin's plea of self-defence, namely Mr Benjamin's honest belief and, taking the circumstances and the danger as Mr Benjamin honestly believed them to be, whether the amount of force which he used was reasonable. It was the learned trial judge's duty to bring home to the jury that they were to judge Mr. Benjamin based on the facts as he, Mr. Benjamin, saw them. There is no indication that this was done and these omissions amounted to misdirections or errors of law which rendered the conviction of Mr. Benjamin unsafe.

Solomon Beckford v R [1988] AC 130 applied; *Shonovia Thomas v R* BVIHCRAP2010/0006 (delivered 27th August 2012, unreported) applied; *R v Gladstone Williams* (1984) 78 Cr. App. R. 276 applied; *Shaw v R* [2001] UKPC 26 applied; *Balroop v R* [1999] All E R 916 considered.

5. A defendant's good character must be distinctly raised by direct evidence from him or given on his behalf, or by eliciting it during the cross-examination of prosecution witnesses. It is trite law that it is the duty of counsel for the defendant to raise the issue of the defendant's character so that a good character direction could be given and he could have the benefit of it. As the judge is under no duty to raise it himself, there could therefore be no basis for saying that there was a misdirection by the learned judge in omitting to direct the jury on Mr Benjamin's good character.

Barrow v The State [1998] AC 846 applied; *Teeluck and John v The State of Trinidad and Tobago* [2005] 1 WLR 2421 applied.

6. A defendant who has no prior convictions would be considered as being of good character and would therefore be entitled to a good character direction. In the case at bar, Mr Benjamin was so entitled in that he had no prior convictions. However, in light of the sheer force of the evidence against him, the utility in giving the good character direction given

the totality of the circumstances of this case is brought into question. Any potential assistance to Mr Benjamin from a good character direction may have been wholly outweighed by the nature and cogency of the evidence against him.

Mark France and Rupert Vassell v the Queen [2012] UKPC 28 applied; *Brown v R* [2005] UKPC 18 applied.

7. It is trite law as to when the application of the proviso is suitable. Given the absence of an adequate direction on the central issue in the present case, that is, Mr Benjamin's contention that he acted in self-defence, this Court cannot definitively conclude that no miscarriage of justice has occurred. A proper direction could, even if improbably, have led to a different outcome. Therefore, it is not suitable for this Court to apply the proviso that was stated in section 43 of the Court of Appeal Act in this appeal on the ground that no substantial miscarriage of justice has actually occurred.

Shaw v R [2001] UKPC 26 applied.

8. A retrial order depends upon whether the interest of justice could be served by such an order. The main consideration is whether in the interest of the community and the victim, a person who is convicted of a serious crime should be brought to justice and not escape merely due to some technical shortcoming in the conduct of the trial or in the directions to the jury. A critical factor is the seriousness of the crime and a countervailing consideration is fairness to the accused. The strength of the prosecution's case at the previous trial is always a consideration. However, the weight to be attached to this factor may vary widely according to the nature of the crime, the particular circumstances in which it was committed and the current state of public opinion. In the present case, a retrial would serve the interests of justice, the public, as well as interest of the victims. Even though Mr Benjamin had no previous convictions, the injuries sustained by the victims were very grave. The strength of the prosecution's case was

overwhelming. In the circumstances the accused would not be treated unfairly if a retrial were to be ordered. There is a significant public interest in ordering a retrial and the factors present in this case justify the Court's granting leave to the Director of Public Prosecutions to proceed with a new trial of Mr. Benjamin on both counts.

Sherfield Bowen v The Queen ANUHCRA2005/0004 (delivered 20th June 2007, unreported) applied; *Dennis Reid v The Queen* [1980] AC 343 applied.

Case Name:

Honourable Guy Joseph (in his personal capacity and in his capacity as Parliamentary Representative for Castries South East

V

**[1] The Constituency Boundaries Commission
[2] The Honourable Prime Minister
[3] The Attorney General (acting in her capacity as the legal representative of Her Excellency, the Governor General)**

**[SLUHCVP2015/0013]
Territory of the Virgin Islands**

Date:

Wednesday, 6th April 2016

Before:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

Appellant:

Mr. Michael Maduro holding papers Mr. Thomas Theobalds

Respondents:

**Mr. Sydney Bennett, QC (for the 2nd respondent)
Mr. Hakim Creque, Crown Counsel, holding papers for counsel of the Attorney General's Chambers in Saint Lucia**

Issues:

Interlocutory appeal – Constituency boundaries – Recommendations made by first respondent affecting boundaries of various constituencies including constituency represented by appellant – Counsel’s professional duty to court and client – Inherent jurisdiction of court to restrain counsel from representing litigant – Application by appellant for order restraining first respondent from continuing to retain particular counsel – Whether there was any conflict with duty of said counsel to advise first respondent independently, impartially and objectively – Appellant’s application for order dismissed by learned judge – Whether learned judge erred in exercise of his discretion

Result and Reason:

Held: dismissing the appeal and ordering that the appellant pay the Commission its costs in this Court and in the court below, such costs to be assessed if not agreed within 28 days, that:

1. The court always has an inherent jurisdiction to restrain solicitors from acting in a particular case, as an incident of its inherent jurisdiction over its officers and to control its process in aid of the administration of justice. If there are circumstances which are likely to imperil the discharge of these duties to a court by a legal practitioner acting in a cause, whether because of some prior association with one or more of the parties against whom the practitioner is then to act, or because of some conduct by the practitioner, whether arising from associations with the client or a close interest which gives rise to the fair and reasonable perception that the practitioner may not exercise the necessary independent judgment, a court may conclude that the lawyer should be restrained from acting, even for a client who desires to continue his service.

Holborow and Others v MacDonald Rudder [2002] WASC 265 applied; *Kallinicos and Another v Hunt and Others* [2005] NSWSC 1181 applied.

2. The test to be applied in this inherent jurisdiction is whether a fair-minded, reasonably informed member of the public would conclude that the proper

administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice. The jurisdiction is to be regarded as exceptional and is to be exercised with caution. Due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause. The learned judge did apply the correct test in making a determination on whether Mr. Astaphan, SC was suitable to represent the Commission. There was no material difference between the test as outlined by the learned judge in his judgment, and that set out in the case of *Kallinicos v Hunt* and adopted in *Viscariello v Legal Profession Conduct Commissioner*.

Kallinicos and Another v Hunt and Others [2005] NSWSC 1181 applied.

3. The learned judge applied the correct standard of proof – the civil standard of proof – in considering the evidence in the case. The jurisdiction of the court to restrain an attorney from representing a litigant is an exceptional one and ought to be exercised with caution. Compelling evidence would be required for the court to make a determination that the counsel should be restrained from continuing to represent his client. Accordingly, the application of a lower standard of proof would not have been proper.

Dechant v Coulter 2000 ABCA 86 distinguished; *Kallinicos and Another v Hunt and Others* [2005] NSWSC 1181 applied; *Black v Taylor* [1993] 3 NZLR 403 applied.

4. The learned judge's findings of fact and his exercise of discretion cannot be faulted. The learned judge identified the correct applicable principles and in applying those principles he did not misdirect himself. He took into account all relevant matters. He attributed the relevant knowledge to the fair-minded and reasonably informed member of the public and, having adequately assessed the

evidence, concluded that there was no basis to exercise the discretion to restrain the Commission from continuing to retain Mr. Astaphan, SC from representing it in the underlying claim. There is no basis to interfere with his findings.

Beacon Insurance Company Limited v Maharaj Bookstore Limited [2014] UKPC 21 cited.

APPLICATIONS AND APPEALS

**Oliver Jude Lewis
v
The Commissioner of Police**

[BVIMCRAP2015/0010]

Date:	Wednesday, 6th April 2016
Before:	The Hon. Mr. Davidson K. Baptiste, Justice of Appeal The Hon. Mde. Louise E. Blenman, Justice of Appeal The Hon. Mde. Gertel Thom, Justice of Appeal
Appearances:	
Applicant:	Mr. Stephen Daniels
Respondent:	Mr. Garcia Kelly, Senior Crown Counsel
Issues:	Application for bail pending appeal
Type of Oral Result/Order Delivered:	Oral Judgment or Decision
Result / Order:	The matter is remitted to the Magistrate's Court for disposal.

Reason: The Court stated that after hearing both counsel in relation to the application for bail pending appeal, it was of the view that the application should be refused insofar as the applicant did not meet the required threshold, as there was no appeal before the Court.

Case Name: Samuel James
v
The Queen

[BVIHCRA2012/0002]

Date: Wednesday, 6th April 2016

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

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

Issues: Appeal against sentence – Wounding with intent – Whether sentence of 12 years imposed by learned trial judge was excessive in all circumstances of the case

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

Result / Order: The appellant's sentence is varied to the extent that the sentence of 12 years imprisonment is to take effect from the date he was first remanded, that being 11th April 2011.

Reason: The Court was of the view that the learned trial judge did not err in the exercise of her discretion in

sentencing the appellant to 12 years imprisonment for the offence of wounding. She appropriately took into account all the circumstances of the offence as well as all the circumstances of the appellant.

As a result, the Court saw no reason to interfere with the sentence of the learned trial judge. However, the Court accepted the submissions of learned counsel Ms. Rosan-Bunbury that the judgment did not indicate (as it ought to have) that the one year that the appellant had spent on remand had been taken into consideration.

Case Name:

[1] Lucien Callwood
[2] Urman Callwood
[3] Gertrude Callwood-Coakley
[4] Wendell Callwood

v

[1] Registrar of Lands
[2] Sheila Callwood Shulterbrandt
[3] Beatrice Innis Orr
[4] Estate of Sheradina Callwood alias
Geraldine Callwood (deceased)
[5] Estate of Doris Kelly (deceased)
[6] Estate of Keturah Callwood (deceased)
[7] Estate of Theopholous Callwood
(deceased)

[BVIHCVAP2012/0008]

Date:

Wednesday, 6th April 2016

Coram:

The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant:

Ms. Patricia Archibald-Bowers

Respondent:

Ms. Jo-Ann Williams-Roberts, Solicitor General

Issue: Application for solicitor to be removed from the record

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

Result / Order: Application for Solicitor to be Removed from Record

1. J.S. Archibald & Co. is hereby removed from the record as solicitors for the appellants.
2. There is no order as to costs.

Further Directions

1. The appellants are granted leave to file further submissions in this appeal on or before 6th July 2016.
2. The respondents are granted leave to file further submissions on or before the 6th September 2016
3. The matter is adjourned for the final time during the Court's sitting in the week of the 21st November 2016; unless the appellants prosecute the appeal it shall stand dismissed.
4. The matter is adjourned to the sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 21st November 2016.

Case name:

[1] Ralph James
[2] Adrian Arthur
v
The Commissioner of Police

[BVIMCRAP2013/0008]
[BVIMCRAP2013/0009]

Date: Thursday, 7th April 2016

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

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

Appearances:

Appellants: Mr. Michael Maduro

Respondent: Mr. O’Neil Simpson, Crown Counsel

Issue:

Appeals against sentence – Possession of controlled drug with intent to supply – Possession of controlled drug – Importation of controlled drug – Offering to supply controlled drug – Whether sentences imposed by learned magistrate were unduly severe

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

Oral Judgment or Decision

Result / Order:

- 1. The appellants’ appeals against sentence are allowed.**
- 2. The sentences imposed by the learned magistrate are set aside.**
- 3. The appellant Ralph James is sentenced to 4 years and 2 months for intention to supply; 1 year for possession of a controlled drug; 4 years 2 months for importation of a controlled drug; 4 years 2 months for possession of cannabis with intent to supply.**
- 4. The appellant Adrian Arthur is sentenced to 4 years for intention to supply; 1 year for possession of a controlled drug; 4 years for importation of a controlled drug; 4 years for possession of cannabis with intent to supply; 6 months for illegal entry into the Virgin Islands.**
- 5. Both appellants’ sentences are to run concurrently from the date when they were first remanded into custody.**

Reason:

Ralph James and Adrian Arthur were arrested and charged for the following offences:

- 1. Supply or offering to supply a controlled drug contrary to section 6(2) of the Drugs (Prevention of Misuse) Act (Cap. 178, Revised Laws of the**

Virgin Islands) (as amended).

2. Possession of a controlled drug contrary to section 7(1) of the Drugs (Prevention of Misuse) Act (as amended).
3. Importation or being concerned in the importation of a controlled drug contrary to section 5(3) of the Drug (Prevention of Misuse) Act (as amended).
4. Unlawful possession of cannabis with intent to supply to another contrary section 7(2) of Drug (Prevention of Misuse) Act (as amended).
5. Illegal entry into the Virgin Islands contrary to section 23 of the Immigration and Passport Act (Cap. 130, Revised Laws of the Virgin Islands 1991).

At his first appearance at the Magistrates' Court on 2nd November 2012, Ralph James pleaded guilty to all the drugs charges. On 24th May 2013 he was sentenced as follows:

1. Supply or offering to supply a controlled drug – 7 ½ years.
2. Possession of a controlled drug – 2 ½ years.
3. Importation of a control drug – 7 ½ years.
4. Unlawful possession of cannabis with intent to supply to another – 7 ½ years.

These sentences were ordered to run concurrently from the date when he was first remanded into custody.

The charge of illegal entry into the Virgin Islands, for which he pleaded not guilty, was not pursued by the Crown.

Although admitting his involvement from the outset for the offences for which he was charged, Adrian Arthur pleaded not guilty to the charges when he first appeared at the Magistrates' Court on the 30th October 2012 and maintained his plea until 16th May 2013 when he changed his plea to guilty on all charges including the charge of illegal entry into the Virgin Islands.

On 14th June 2013 he was sentenced to:

1. Supply or offering to supply a controlled drug – 8 years

2. Possession of a controlled drug – 2 ½ years
3. Importation of a control drug – 8 years
4. Unlawful possession of cannabis with intent to supply to another – 8 years
5. Illegal entry in the Virgin Islands – 6 months

Ralph James' and Adrian Arthur's appeals were consolidated and they appealed their sentences on the following grounds:

1. On the totality of the evidence, the sentences imposed on the appellants by the learned magistrate were unduly severe having regard to all the circumstances of the case.
2. The learned magistrate failed to properly consider all the circumstances of the case, including the defendants' guilty pleas.

The thrust of the appellants' submissions was that the learned magistrate did not establish a benchmark or a notional sentence before applying any discount to which the appellants were entitled by virtue of the early guilty pleas and the lack of previous convictions and personal or family circumstances, or if she did establish a benchmark sentence, it was much too high.

The appellants submitted therefore that the sentences of both appellants were wrong in principle and unduly severe. The appellants also argued that the learned magistrate erred when she took into consideration the prevalence and seriousness of the offences.

The respondent opposed the appellants' submissions and argued that the magistrate had benchmarked and appropriately discounted the sentences although she did not specify the benchmark or how she applied any appropriate discount to the notional sentences (and she was not required to do so).

The respondent further submitted that the learned magistrate adequately considered and factored in the relevant mitigating and aggravating factors and rightly took into account, in sentencing the appellants, the prevalence and seriousness of the offences.

Having read and heard the submissions of both parties

and having considered the authorities to which it was referred, the Court took the view that learned magistrate erred in the application of the relevant sentencing principles with a result that the sentences imposed on the appellants were excessive.

In accordance with the guidelines contained in the binding authority of *Desmond Baptiste v The Queen* (Saint Vincent and the Grenadines High Court Criminal Appeal SVGHCRA2003/0008 (delivered 6th December 2004, unreported)), persuasive authority, the United Kingdom sentencing guidelines and the several cases in which these guidelines have been followed, the Court held that the learned magistrate ought to have established a notional sentence for each of the sentences and then applied the discount for each sentence, which discounts the appellants were clearly entitled to.

The Court stated that there were several cases which could be used to establish an appropriate benchmark for the drug offences for which the appellants were sentenced, but for the purposes of this appeal, the authority relied on by the Crown for the sentencing of persons for trafficking large quantities of cannabis was used.

In *R v Jonathan Ronchetti and Others* [1998] 2 Cr App R (S) 100 the English Court of Appeal established a notional sentence of 7 to 8 years following a trial of the importation of 100 kilograms of cannabis and 10 years for the importation of 500 kilograms or more, the maximum sentence under the United Kingdom Act being 14 years.

Applying this case to the facts of the present case with the quantity of cannabis involved being 561.78 kilograms and the maximum sentence under the Virgin Islands Act being 10 years for trafficking and 3 years for possession, this would yield a notional sentence of approximately 7 years in respect to the trafficking offences and approximately 2 years on the possession offences. The 7 year sentence for the trafficking offences was indeed the notional sentence recommended by counsel for the respondent.

With regard to the learned magistrate not discounting for the appellants' guilty pleas, there appeared to be no good reason for so doing and the magistrate advanced none. Why did Ralph James not get the full 1/3 discount for his guilty plea at the first available opportunity and why shouldn't Adrian Arthur, who pleaded pleading guilty at a later stage (after a trial date had been set) but before the trial commenced, get a 1/4 discount on the notional sentence, consistent with the recommendation of the United Kingdom Sentencing Guidelines Council on reduction in sentence for a guilty plea?

The facts were as the magistrate had stated: the appellants were caught red-handed and the evidence against them was overwhelming. It has been judicially determined in the case of *R v Lee Oosthuizen* [2005] EWCA Crim 1978, decided by the English Court of Appeal, that the fact that the evidence is overwhelming has no bearing on the entitlement of the defendant to the maximum discount for his early guilty plea.

The application of these discounts would reduce Ralph James's sentence from 7 ½ years to 4 years and 8 months for the trafficking offences and 1 year and 4 months for the possession offences; and would reduce Adrian Arthur's sentence to 5 years 3 months for the trafficking offence and 1 year and 6 months for the possession offences.

The further factors that both appellants were around the age of 50 and had no previous convictions (as far as was ascertained) were powerful mitigating factors suggesting that they had not been living a life of crime. This would have entitled the appellants to a significant discount had it not been for the fact that these were very serious offences. The Court, in *Desmond Baptiste v the Queen*, stated that the more serious the offence the less the discount will be for the lack of previous convictions.

The Court proposed a further discount, as was suggested by counsel for the respondent, of 6 months for the trafficking offences and 4 months for possession offences. This brought Ralph James' sentences down to 4 years 2 months for each of the trafficking offences and 1 year for the possession offence. Adrian Arthur's

sentences were brought down to 4 years and 9 months for the trafficking offences and 1 year and 2 months for the possession offence.

Counsel for the respondent submitted, and the Court accepted, that no discount should be given for personal issues like family and illness especially considering the gravity of the offences. The Court noted, however, that there was one other factor, contained in the sentencing guidelines submitted by the Crown, that entitled Adrian Arthur to a further discount on his sentences. This factor was that: 'from his [Adrian Arthur's] admissions and investigations police accepted that he played a minor role in the drug operation'.

The Court noted that in accordance with *R v Jonathan Ronchetti and Others* [1998] 2 Cr App R (S) 100 this is a significant factor because the benchmark sentence is set 'for persons playing more than a subordinate role' in the drug operation and a lesser role ought to attract a lesser sentence. Adrian Arthur's sentence was therefore further discounted by 9 months for the trafficking offences and 2 months for the possession offence.

The Court pointed out that the aggravating factors mentioned in the respondent's submissions and in the judgment had already been factored into the benchmark sentence. In respect of large quantities of drugs, it is this fact which determines the benchmark. The element of planning is inherent in the nature of drug trafficking offences and will not therefore be factored into the determination of a sentence, unless there was some elaborate planning process over and above what is necessary for any drug trafficking operation.

The Court also addressed the issue of the prevalence of the offences which the learned magistrate had indicated that she had factored into her sentencing. The judicial authorities have clearly stated that in order for this to be taken into consideration in sentencing an offender, there must be proper and sufficient evidence available to the court on the prevalence of the offence and the parties must be given an opportunity to address the court on this issue (*Michael Jeffery v The Queen* GDAHCRAP2004/0004 (delivered 10th October 2005,

unreported)) and *The Queen v Raymond Harrison* BVI High Court Criminal Case No. 2 of 2013 (delivered 11th July 2014, unreported)). The Court was of the view that in this case there was no proper or sufficient evidence or opportunity given to either of the parties to address the issue of the increase as it relates to prevalence of the offences for which the appellants were being sentenced; and the magistrate ought not to have attached this to sentencing.

Case name:	The Commissioner of Police V [1] Antonio Jason Caines [2] Osrick DaSilva [BVIMCRAP2014/0017]
Date:	Thursday, 7th April 2016
Coram:	The Hon. Mr. Mario Michel, Justice of Appeal The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mr. Paul Webster, QC, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Mr. Herbert Potter, Crown Counsel
Respondent:	Ms. Marie-Lou Creque
Issues:	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:	Directions
Result / Order:	1. The respondent shall file and serve submissions in

- response to the appeal on or before 15th April 2016.
2. Leave is granted to the appellant to file and serve submission in reply on or before 6th May 2016.
 3. The hearing of this appeal is adjourned to the sitting of the Court of Appeal in Territory of the Virgin Islands during the week commencing 18th July 2016.

Reason:

Counsel for the respondent requested an adjournment in order to be able to file and serve submissions in response to the appeal. The appellant did not object to the grant of an adjournment.

Case Name:

André Penn

v

The Queen

The Queen

v

Andre Penn

[BVIHCRA2014/0006]

[BVIHCRA2015/0002]

Date:

Friday, 8th April 2016

Coram:

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

Appearances:

Appellant:

Mr. Jerome Lynch, QC

Respondent:

Mr. Wayne Rajbansie, Director of Public Prosecutions

Issues:

Appeal against conviction – Appeal (by Crown) against sentence imposed on appellant – Indecent assault – Unlawful sexual intercourse with girl under age of 13 – Buggery – Widespread and sustained adverse publicity over extended period in relation to case – Whether

learned trial judge failed to ensure that measures were taken to guarantee that retrial of appellant was fair and not oppressive – Whether conviction unsafe as a result – Jury selection – Whether jury members were selected in accordance with laws of Virgin Islands – Fairness of retrial – Whether statements made by learned Director of Public Prosecutions during retrial impacted on fairness of retrial – s. 146(1)(c) of Evidence Act, 2006 (Act No. 15 of 2006, Laws of the Virgin Islands) – Whether learned trial judge failed to warn jury about how evidence of virtual complainant may have been affected by self interest – Whether learned trial judge failed to direct jury on fact that there was no corroboration of virtual complainant's account of events – Whether learned trial judge failed to put or to put adequately defence to jury in summing up – 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 – Application for bail pending appeal

Type of Oral
Result/Order
Delivered:

Oral Judgment or Decision

Result / Order:

Application for Bail

The application for bail is hereby dismissed.

Further Directions

1. The hearing of both appeals is adjourned to the sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 18th July 2016.
2. The appellant's counsel is granted leave to further amended grounds of appeal and further revised skeleton submissions on or before the 31st May, 2016.
3. The Director of Public Prosecutions is granted leave if he desires to file and serve revised skeleton submissions on or before the 24th June, 2016.
4. And if required the appellant's counsel is granted leave to file and serve submissions in response to the Director of Public Prosecutions submissions on or before the 30th June, 2016

5. There is no order as to costs.

Reason:

The appellant's application for bail was withdrawn and accordingly, dismissed. Counsel for the appellant had initially requested that the application be adjourned, but the Crown objected to this.