

COURT OF APPEAL SITTING

ANTIGUA AND BARBUDA

7th – 11th December 2015

JUDGMENT

Case Name: **Jinpeng Group Limited**
v
Peak Hotels and Resorts Limited

[BVIHCMAP2014/0025]
[BVIHCMAP2015/0003]
(Territory of the Virgin Islands)

Date: **Tuesday, 8th December 2015**

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

Appearances:

Appellant:	Ms. Andrea Smithen holding for Mr. Antony Zacaroli, QC
Respondent:	Ms. Kamilah Roberts holding for Mr. John Brisby, QC

Issues: **Interlocutory appeal – Commercial appeal – Loan agreement between appellant and respondent – Interpretation of clauses of Memorandum of Understanding – Conversion of loan into equity – Appointment of liquidators – Winding up – Whether appellant became shareholder of respondent by implied agreement to convert loan to equity in respondent or whether appellant continued to be creditor of respondent and was entitled to appoint liquidators of respondent – Whether learned judge erred in striking out appellant’s application to wind up respondent on just and equitable ground – Whether learned judge applied wrong test in determining nature of dispute between the parties –**

Whether learned judge erred in finding that dispute between the parties was sufficient to remove appellant's standing as creditor given that further agreement was necessary to convert shares to equity and respondent failed to discharge evidentiary burden of proving such agreement – Whether learned judge erred in exercise of his discretion – Arbitration – Effect of arbitration clauses in agreements and s. 18 of Arbitration Act, 2013 on dispute between the parties and proceedings before the court

Result /
Reason:

The First Appeal – BVIHCMAP2014/0025

Held: allowing the First Appeal and setting aside the order of the learned judge dated 17th October 2014 striking out the appellant's Originating Application and setting aside the appointment of the joint provisional liquidators; reappointing the three joint provisional liquidators of the respondent; restoring the Originating Application for further hearing by the Commercial Court; and awarding costs of the appeal and the proceedings in the court below to the appellant, that:

1. While the learned judge was correct to observe that the winding up court should not be used to resolve disputes about debts or to decide issues of fact on a summary basis, the court has a duty to carry out a preliminary investigation of the facts to determine whether a dispute that a debtor company raises in relation to a debt in winding up proceedings is one which has been raised on genuine and substantial grounds. The learned judge erred in failing to apply the correct legal test in the circumstances, which was whether the dispute raised by the respondent was one that was raised on genuine and substantial grounds.

Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corporation
BVIHCVAP2002/0010 (delivered 18th June 2003, unreported) followed.

2. The learned judge erred when he decided that the dispute between the parties as to the appellant's

status as creditor of the respondent was, in effect, a genuine and substantial dispute that should not be tried in winding up proceedings. There was no evidence to support a finding that any agreement had been reached by the parties for the conversion of the loan into shares and accordingly, the appellant never became a shareholder of the respondent. Furthermore, the learned judge failed to identify any evidentiary basis for his conclusion that he should not determine the nature and quality of the dispute between the parties. He erred by not conducting a proper examination of the evidence to determine if it reached the threshold of raising a dispute on genuine and substantial grounds.

Re Claybridge Shipping Co SA [1997] 1 BCLC 572 applied.

3. The learned judge not having applied the ‘genuine and substantial dispute’ test properly, nor having considered evidence that was relevant to the dispute whether the appellant was a creditor or shareholder of the respondent, his decision to strike out the winding up application was outside the generous ambit within which reasonable disagreement is possible and was therefore liable to be set aside.

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

4. Notwithstanding that the Originating Application was presented by the appellant as creditor on the just and equitable ground alleging misconduct, it is still a creditor’s application and therefore, the applying creditor is seeking a collective remedy on behalf of itself and all the other creditors of the respondent. It is not a claim by the appellant to recover its debt from the respondent company.

C-Mobile Services Limited v Huawei Technologies Co. Limited BVIHCMAP2014/0017 (delivered 15th September 2015, unreported) followed.

5. While the arbitration clauses in this case are designed to resolve disputes between the contracting parties, once the appellant submitted this dispute to the court as the basis of a creditor's winding up application it became an issue between the respondent and its creditors over the company's ability to pay its debts as they fall due. This form of proceeding is not covered by the arbitration clauses in the agreements or section 18(1) of the Arbitration Act. Therefore the court should not grant an automatic stay of the application under section 18(1) just because the respondent has raised a dispute over the appellant's status to apply for a winding up order. Furthermore, a creditor does not have to prove exceptional circumstances to invite the court to exercise its discretion to make a winding up order. The statutory jurisdiction under section 162(1)(b) of the Insolvency Act, 2003 is satisfied once the creditor is applying on the basis of a debt that is not disputed on genuine and substantial grounds.

Salford Estates (No 2) Ltd v Altomart Ltd (No 2) [2015] 3 WLR 491 applied.

The Second Appeal – BVIHCMAP2015/0003

Held: allowing the Second Appeal, confirming the reappointment of the joint provisional liquidators; confirming the freezing injunction and disclosure orders contained in the order dated 2nd February 2015; and awarding costs of the appeal and in the court below to the appellant, that:

1. The fact that the order striking out the Originating Application has been set aside, the Court can order the re-appointment of the joint provisional liquidators and it is no longer necessary to decide the other main issue in the Second Appeal, which is whether the judge was correct in finding that he did not have jurisdiction to appoint a receiver under the Arbitration Act, 2013.

STATUS HEARING

Case Name: Haynes Browne
v
Lena Carr, deceased by her personal
representative Buell Carr

[ANUHCVAP2014/0007]

Date: Monday, 7th December 2015

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

Appearances:
Appellant: Mrs C. Debra Burnette
Respondent: No appearance

Issue: Status of the matter

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

Result / Order: [Oral delivery]

1. The Registrar of the High Court shall cause the transcript of the assessment of damages to be prepared and notify the parties on completion.
2. In the event that the transcript is not available the Registrar shall notify the parties in accordance with Rule 62.9(ii) of the CPR.
3. Upon service of the notice of availability of the transcript, or notice pursuant to Rule 62.9(ii), the matter shall be set down for status hearing at the next sitting of the Court of Appeal in the State of Antigua and Barbuda commencing on the 14th March 2016.

Reason: The transcript of the assessment of damages is not yet prepared.

Case Name: Simon Davis
v
The Queen

[ANUHCRA2012/0007]

Date: Monday, 7th December 2015

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

Appearances:

Appellant: No appearance

Respondent: Mrs. Shannon Jones-Gittens holding papers for Mr. Anthony Armstrong, Director of Public Prosecutions

Issue: Status of the matter

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

**Result / Order
/ Reason:** [Oral delivery]
The matter is adjourned to the next sitting of the Court of Appeal as the transcripts are in the process of preparation.

Case Name: Troy Robinson

v
The Commissioner of Police

[ANUMCRAP2012/0001]

Date: Monday, 7th December 2015

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

Appearances:

Appellant: No appearance

Respondent: Mrs. Shannon Jones-Gittens holding papers for Mr. Anthony Armstrong, Director of Public Prosecutions

Issue: Status of the matter

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

Result / Order:

[Oral delivery]

1. Hearing of the appeal is fixed for the next sitting of the Court of Appeal in Antigua and Barbuda commencing on the 14th March 2016.
2. The appellant shall file and serve written submissions on or before the 20th January 2016.
3. The respondent shall file and serve written submissions in reply within twenty-eight (28) days of receipt of the submissions of the appellant.

Reason: The matter is ready to be heard by the Court.

Case Name: Robert Anthony Browne

v

The Commissioner of Police

[ANUMCRAP2012/005A]

Date: Monday, 7th December 2015

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

Appearances:

Appellant: Mr. Damien Benjamin

Respondent: Mrs. Shannon Jones-Gittens holding papers for Mr. Anthony Armstrong, Director of Public Prosecutions

Issue: Status of the matter

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

Result / Order: [Oral delivery]

1. Hearing of the appeal is fixed for the next sitting of the Court of Appeal in Antigua and Barbuda commencing on the 14th March 2016.
2. The appellant shall file and serve written submissions on or before the 20th January 2016.
3. The respondent shall file and serve written submissions in reply within twenty-eight (28) days of receipt of the submissions of the appellant.

Reason: The matter is ready to be heard by the Court.

Case Name:

Romar Graham

v

The Commissioner of Police

[ANUMCRAP2012/0006]

Date: Monday, 7th December 2015

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

Appearances:

Appellant: No appearance

Respondent: Ms. Bridgette Nelson

Issues: Status of the matter – Immigration status – Right to protection of law – Access to the Court – Articles 3 and 9 of the United Nations Convention on the Rights of the Child

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

Directions

Result / Order:

[Oral delivery]

1. The appellant shall file and serve written submissions on or before the 20th January 2016.
2. The respondent shall file and serve written submissions in response within twenty-eight (28) days of receipt of the appellant's submissions.
3. Hearing of the appeal is fixed for the next sitting of the Court of Appeal in Antigua and Barbuda commencing on the 14th March 2016.

Reason: The matter is ready to be heard by the Court.

Case Name:

**Mandella Victor Spencer
v
The Commissioner of Police**

[ANUMCRAP2011/0002]

Date: Monday, 7th December 2015

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

Appearances:

Appellant: Mr. Damien Benjamin

Respondent: Mrs. Shannon Jones-Gittens holding papers for Mr. Anthony Armstrong, Director of Public Prosecutions

Issue: Status of the matter

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

Result / Order:

[Oral delivery]

1. The appellant shall file and serve written submissions on or before the 20th January 2016.
2. The respondent shall file and serve written submissions in response within twenty-eight (28) days of receipt of the appellant's submissions.
3. Hearing of the appeal is fixed for the next sitting of the Court of Appeal in Antigua and Barbuda commencing on the 14th March 2016.

Reason: The matter is ready to be heard by the Court.

Case Name:

**[1] Garfield Morrison
v
[1] Chief Magistrate
[2] Ivan Walters
[3] The Commissioner of Police**

[ANUMCRAP2010/0002]

Date: Monday, 7th December 2015

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

Appearances:

Appellant:	Mrs. C. Debra Burnette holding papers for Dr. David Dorsett
Respondent:	Ms. Shannon Jones-Gittens holding papers for Mr. Anthony Armstrong, Director of Public Prosecutions

Issues: Status of the matter – Uncorroborated evidence of co-accused – Credibility of witnesses – Chain of custody of drugs

Type of Oral Result / Order Delivered: N/A

Result / Order: [Oral delivery]
Matter is adjourned for further status hearing at the next sitting of the Court of Appeal in Antigua and Barbuda commencing on the 14th March 2016.

Reason: The Court noted that the transcript has not been prepared as the notes of the Magistrate were not available to the court office. The Court also noted that the Director of Public Prosecution's office is in possession of notes of evidence of the proceedings which were received from the Prosecutor in the Magistrates Court. That office will provide a copy to the Attorney for the appellant with a view to having the record of appeal prepared.

Case Name: **Errol Cleofoster Barnes**
v
The Commissioner of Police
[ANUMCRAP2013/0001]

Date: **Monday, 7th December 2015**

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

Appearances:

Appellant: **Mr. Damien Benjamin**

Respondent: **Ms. Shannon Jones-Gittens holding papers for Mr. Anthony Armstrong, Director of Public Prosecutions**

Issue: **Status of the matter**

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

Result / Order:

[Oral delivery]

- 1. The Registrar shall serve a copy of the record of appeal on the Attorney for the appellant, Mr. Damien Benjamin, within seven (7) days.**
- 2. The appellant shall file and serve written submissions on or before the 20th January 2016.**
- 3. The respondent shall file and serve written submissions in reply within twenty-eight (28) days of receipt of the appellant's submissions.**
- 4. The hearing of the matter is set for the next sitting of the Court of Appeal in Antigua and Barbuda commencing on the 14th March 2016.**

Case Name: **Christan Devon Hinds**

v
The Commissioner of Police

[ANUMCRAP2013/0003]

Date: Monday, 7th December 2015

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

Appearances:

Appellant: No appearance

Respondent: Ms. Bridgette Nelson

Issues: Status of the matter – Articles 3 and 9 of the United Nations Convention on the Rights of the Child – Right to the Protection of family life

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

Result / Order: [Oral delivery]

1. The appellant shall file and serve written submissions on or before the 20th January 2016.
2. The respondent shall file and serve written submissions in reply within twenty-eight (28) days of receipt of the appellant's submissions.
3. The hearing of the appeal is set for the next sitting of the Court of Appeal in Antigua and Barbuda commencing on the 14th March 2016.

Reason: The Court noted that the record of appeal was filed and the affidavit of service on behalf of the appellant was filed on 14th July 2015 which indicated that the Attorney General's Chambers was served with the records on the 10th July 2015.

Case Name:

[1] Vere Bird Jr.
[2] Lester Bryant Bird
[3] Gaston Browne
[4] Mary Claire Hurst
[5] Molywn Joseph
[6] Sharon Kentish
[7] Jim Galloway

v

[1] The Commissioner of Police

[ANUMCRAP2010/0015]

Date:

Monday, 7th December 2015

Before:

The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant:

Mr. Damien Benjamin

Respondent:

Ms. Shannon Jones-Gittens holding papers for Mr. Anthony Armstrong, Director of Public Prosecutions

Issues:

Status of the matter – Addressing a public meeting without the permission of the Commissioner of Police – Membership of the Antigua and Barbuda Labour Union – Police Powers

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

Directions

Result / Order:

[Oral delivery]

1. The Registrar shall take the necessary steps to have the record completed and made available to the parties.
2. The matter is adjourned for further status hearing at the next sitting of the Court of Appeal in

Antigua and Barbuda commencing on the 14th
March 2016.

APPLICATIONS AND APPEALS

Case Name: [1] Deidre Pigott Edgecombe
[2] Nordell Edgecombe
v
[1] Antigua Flight Training Centre

[ANUHCVP2015/0005]

Date: Monday, 7th December 2015

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

Appearances:

Appellant: Dr. David Dorsett

Respondent: In person

Issue: Application for leave to appeal to Her Majesty in Council

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

Result / Order: [Oral delivery]
1. The application for leave to appeal to Her Majesty in Council is refused.
2. Costs to the respondent fixed in the sum of \$1,000.00.

Reason:

This is an application for leave to appeal to her Majesty in Council which is an application from an interlocutory position and it is therefore one from which an appeal does not lie as of right. Accordingly, the applicant would be required to show that the appeal raises a question of great general or public importance under section 122 (2)(a) of the Constitution of Antigua and Barbuda. What constitutes a question of great general or public importance has been addressed in various decisions of this court. For example, the case of *The Attorney General v Martinus Francois* (SLUHCVP2003/0037, delivered 29th March 2004, unreported). It is a judgment of Justice of Appeal Saunders as he then was, which sets out precisely what is meant by a question of great general or public importance. There is also the decision in *Pentium (BVI) Ltd v The Bank of Bermuda* (BVIHCVP2003/0014, delivered 23rd March 2007, unreported) a decision written by Alleyne, JA as he then was. Therefore, having heard counsel and having regard to Part 22 of the Civil Procedure Rules the test under section 122(2) of the Constitution of Antigua and Barbuda has not been met.

Case Name:

[1] Arthur George
[2] Leston Jacobs
[3] Cerene Richards
[4] Leroy Jimmy
[5] Otis Matthew
v
[1] Maynard Williams

[ANUHCVP2015/0028]

Date:

Monday, 7th December 2015

Coram:

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

**The Hon. Mr. Paul Webster, Justice of Appel [Ag.]
The Hon. Mr. John Carrington, Justice of Appeal
[Ag.]**

Appearances:

**Applicant / Mr. Sherfield Bowen
Intended
Appellant:**

Respondent: No appearance

Issue: Application for leave to appeal

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

**Result / Order: [Oral delivery]
The application for leave to appeal is dismissed.**

**Reason: There was no application properly before the Court
for leave to appeal. The application was made
outside of the time granted by the CPR for the
making of the application for leave to appeal, which
is 14 days. There was also no application before the
Court for an extension of time.**

**Case Name: [1] Washington Emanuel Bramble
v
[1] Vere Browne
[2] Jo'Anne Walsh**

[ANUMCRAP2013/0002]

Date: Monday, 7th December 2015

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

Appearances:

Appellant:	In person
Respondent:	Ms. Shannon Jones-Gittens holding papers for Mr. Anthony Armstrong, Director of Public Prosecutions

Issue: Application to strike out charge

Type of Oral Result / Order Delivered: Directions

Result / Order: [Oral delivery]

1. The appellant shall file and serve written submissions no later than Friday, 29th January 2016.
2. The respondent shall file written submissions in response by Monday, 22nd February 2016.
3. A copy of the last page of the record of appeal and the transcript from the court below shall be served on the appellant today by 3:00 p.m.
4. The appeal is adjourned to the next sitting of the Court of Appeal on the 14th March 2016.

Reason: The Court was of the opinion that the appeal could now proceed to be heard on its merits.

Case Name:

[1] Michael Lewis Junior
[2] Michael Lewis Senior
v
[1] Tashena James

[ANUHCVP2015/0022]

Date: Monday, 7th December 2015

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

Appearances:

Appellant:	Mr. Ralph A. Francis
Respondent:	Ms. Andrea Smithen

Issue: Application for leave to appeal

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

Result / Order: [Oral delivery]
1. The appeal is dismissed.
2. Costs in the cause in the court below.

Reason: The application for leave to appeal was treated as the appeal in relation to the point. The Court expressed its view on the interpretation within the context in which CPR 18.12(2)(a) is designed to operate, and took into context that it contemplates an ancillary claim against a third party so to speak and basically a true ancillary defendant, a person other than the Claimant, on that basis, the deeming provision which is contemplated under subparagraph A was not relevant to the circumstances of this case which related to a counterclaim being made by the defendant against the claimant but not another party. The Court considered that the master's discretion to extend time was nowhere fettered in respect of this

deeming provision which the Court did not consider to be applicable in the circumstances of the case.

Case Name: Jay Marie Chin
v
The Queen

[ANUHCRA2012/0005]

Date: Monday, 7th December 2015

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

Appearances:

Appellant:	Mr. Ralph Francis holding papers for Mr. Cosbert Cumberbatch
Respondent:	Mr. Anthony Armstrong, Director of Public Prosecutions

Issue: Application to be removed as counsel

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

Result / Order: [Oral delivery]

1. Cumberbatch & Associates granted leave to withdraw as counsel for the appellant.
2. A sealed copy of this order is to be served personally on the appellant within fourteen (14) days of this order.
3. The hearing of this appeal is adjourned to the next sitting of the Court of Appeal in Antigua and

Barbuda during the week commencing 14th March 2016.

Case Name: **Mervin Nanton**
v
The Queen

[ANUHCRA2015/0006]

Date: **Tuesday, 8th December 2015**

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

Appearances:

Appellant: **Mr. Sherfield Bowen**

Respondent: **Mr. Anthony Armstrong, Director of Public Prosecutions**

Issues: **Criminal appeal against sentence – Receiving**

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

Result / Order: **[Oral delivery]**
1. The appeal is allowed.
2. The sentence is varied to two (2) years.

Reason: **The appellant being a pro se litigant was not aware of the additional peril created by the amendment to the indictment. The Court considered that the notional sentence in the circumstances under that**

section would be three years. The Court stated that allowing for the appellant's guilty plea which would entitle him to basically a one-third reduction and having regard to all of the other circumstances of the case, it did not consider that it ought to take the fact that there was another pending offense giving the time that conviction took place and treat that as an aggravating factor. Therefore all other matters being equal, the Court was of the opinion that a sentence of two years in all the circumstances was an appropriate sentence.

Case Name:	Paradise Boat Sales Ltd. v Cutine Maynard [ANUHCVP2014/0019]
Date:	Monday, 7th December 2015
Coram:	The Hon. Dame Janice M. Pereira, DBE, Chief Justice The Hon. Mr. Paul Webster, Justice of Appeal [Ag.] The Hon. Mr. John Carrington, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Mr. Loy Weste with him Mrs. Lisa John-Weste
Respondent:	Mr. Lawrence Daniels
Issues:	Civil appeal – Vicarious liability – Agency
Type of Oral Result / Order Delivered:	Oral Judgment or Decision
Result / Order:	[Oral delivery]

1. The appeal is allowed.
2. Costs are fixed pursuant to Part 65.13 of the CPR at two-thirds of the costs that would have been allowed on the judgment below.

Reason:

This was an appeal from the decision of Mr. Justice Cottle dated the 24th of April 2014. Justice Cottle held that the first defendant, Paradise Boat Sales Limited, was vicariously liable for the negligence of the second defendant, Dane Mellanson, that led to the death of four year old, Deshamaria Gabriell. The appeal was brought by the first defendant only against the finding of vicarious liability. There has been no appeal against the finding of negligence by the second defendant.

The learned judge dealt with the issue of vicarious liability at paragraphs 12 to 14 of his judgment. He concluded that the first defendant was aware that the second defendant used the vehicle in question for private purposes and at the critical paragraph 14 he addressed the issue of vicarious liability:

"The question that remains is whether at the time of the accident if the vehicle was being used wholly or partly on the owner's business or for the owner's purposes. I have arrived at the conclusion that it was. The Second Defendant was a friend of the First Defendant's Managing [Director] and employee of the First Defendant. It is for the benefit of the First Defendant and its Managing Director that employees are made as content as possible. This improves productivity. Allowing the employee and friend liberal use of the company vehicle as a perquisite is consistent with being seen as for the purposes of the company. I find that the First Defendant is vicariously liable for the negligent driving of the Second Defendant because his use of the vehicle was permitted and benefitted the First Defendant by keeping its employee and friend of the Managing Director content. It is also found as a fact that the Second Defendant used the vehicle to pick up the children of Mr. Ryan as well."

The appellant submitted that the judge applied the incorrect test for vicarious liability and in so doing, he relied on a passage from Halsbury's Laws of England 4th Edition, Volume 45 to paragraph 21 which is quoted at paragraph 12 of the judgment:

"...If at any time when the injury took place the employee was engaged, not on his employer's business but on his own, the relation of employer and employee does not exist, and the employer is not therefore liable to third persons for the manner in which it is performed, since he is in the position of a stranger. In this case it is immaterial whether the employee is using his employer's property with his employer's permission..."

The appellant at the invitation of the Court also relied on the decisions of the House of Lords in *Lister and Others v Hesley Hall Limited* 2002 1 AC 215 where the House of Lords explained the test for vicarious liability as whether there is sufficient connection between the torts of the employee and his employment. At paragraph 20 of the decision, Lord Steyn stated:

"It becomes possible to consider the question of vicarious liability on the basis that the employer undertook to care for the boys through the services of the warden and that there is a very close connection between the torts of the warden and his employment. After all, they were committed in the time and on the premises of the employers while the warden was also busy caring for children."

This case involved allegation of sexual abuse of children at a home that was run by the defendant who employed a warden for the purpose of looking after the boys while they were at the home.

At paragraph 39 of the judgment, Lord Clyde indicated:

“This area of the law is one where Scotland and England have each drawn on the other's jurisprudence and the importance of the existence of a sufficient connection has also been noticed in Scot's law. In Kirby and National Coal Board 1958 SC 514, 532-533, the Lord President (Clyde) in a passage part of which was quoted in this House of Lord by Lord Pearce in Williams v A & W Hemphill Ltd 1966 SC (HL) 31, 44 observed that from the decisions

“four different types of situations have been envisaged as guides to the solution of this problem. In the first place, if the master actually authorized a particular act, he is clearly liable for it. Secondly, where the workman does some work which he is appointed to do, but does it in a manner which his master has not authorized and would not have authorized had he known of it, the master is nevertheless still responsible, for the servant's act is still within the scope of his employment. On the other hand, in the third place, if the servant is employed only to do a particular work or a particular task of work, and he does something outside the scope of that work, the master is not responsible for any mischief the servant may do to a third party. Lastly, if the servant uses his master's time or his master's place or his master's tools for his own purposes, the master is not responsible.”

The other passage to which reference was made was paragraph 44.

“Secondly, while consideration of the time at which and the place at which the actings occurred will always be relevant, they may not be conclusive. That an act was committed outside the hours of employment may well point to it being outside the scope of the employment. But that the act was done during the hours of the employment does not necessarily mean that it was done within the scope of the employment. So

also the fact that the act in question occurred during the time of the employment and in the place of the employment is not enough by itself. There can be cases where the place where the wrongful act was committed can be said to have been one where the employee was no longer to be treated as within the scope of his employment, such as *Kirby v National Coal Board* 1958 SC 514, where the mine worker retired from the working face to the waste and was no longer acting in the scope of his employment, or the various cases on travel, such as *Williams v A & W Hemphill Ltd* 1966 SC (HL) 31, where a deviation from an intended route may or may not take the employee outwith the scope of his employment. The acting may be so unconnected with the employment as to fall outside any vicarious liability. Where the employer's vehicle is used solely for a purpose unconnected with the employer's business, when, to use the language of Parke B in *Joel v Morison* (1834) 6 C & P 501, 503, the driver is "going on a frolic of his own", the employer will not be liable."

The evidence as indicated by counsel for the respondent was that the second defendant left the work compound to collect his children from school and just as he was collecting them the accident occurred. When taxed by the court, counsel for the respondent could not point to any circumstance other than the fact that the act occurred during working hour and with a vehicle owned by the employer as the connecting factors to the employment. He helpfully pointed the Court to the contract of employment and that was at page 284 of the record, and counsel stressed the wording of the contract:

"Your probation period is three months and you are entitled to vacation after your first initial year. Your working hours shall take into consideration that we are a service oriented company and flexibility will have to be exercised. This will entail arrangements for technical work, sales or deliveries after regular working hours."

Counsel's submission was that this meant that there was a possibility that the employee, the second defendant was about the employer's business at the time of the accident. However, he could not show that any technical work, sales or deliveries were taking place at the relevant time. Counsel informed the Court that there was no evidence that the second defendant was in the course of doing any of these matters at the time of commission of the negligent act. The Court stated that the only conclusion that it could draw was that there was no sufficient connection between the act causing the injury and the second defendant's employment with the first defendant.

In those circumstances, the Court was unable to agree with the judge's conclusion at paragraph 14 that the appellant was vicariously liable for the acts of the second defendant at the relevant time. The lower court went on in the same paragraph 14 of judgment to find that the vehicle was being used for the benefit of the appellant at the relevant time. This involved an implied finding that the second defendant was acting as agent for the first defendant at this time. The test for agency was stated by the Court of Appeal in England in *Ormrod v Crosville Motor Services Limited*, [1953] 1 WLR 1120. At page 1122, Lord Denning said:

"It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. But that is not correct. The owner is also liable if the driver is his agent, that is to say, if the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes."

Counsel for the respondent conceded, however, that this alternative course of action based on agency was not in fact pleaded by the claimant in the court below. In such circumstances, the Court was of the view that it was not open to the judge to make a finding of agency. In the light of the foregoing, the

Court held that neither of the findings of the judge could be sustained.

Case Name: **Antigua Real Estates Limited**
v
Rupert Kenlock

[ANUHCVP2010/0046]

Date: **Tuesday, 8th December 2015**

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

Appearances:
Appellant: **Ms. Andrea-Roberts-Nicholas**
Respondent: **Mr. John Fuller**

Issues: **Civil appeal – Share Purchase Agreement – Commission Agreement – Implied terms of contract – Prevention of complete performance of contract – Impossibility – Co-operation**

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

Result / Order / Reason: **[Oral delivery]**
1. The hearing of this appeal is adjourned to the next sitting of the Court of Appeal in Antigua and Barbuda during the week commencing 14th March 2016 so as to allow for service of the record of appeal and all other documents on Mr. John Fuller as counsel for the respondent.

2. The respondent shall file and serve written submission in this appeal by Friday, 29th January 2016.
3. The appellant shall be at liberty to file and serve submissions in reply by the 12th February 2016.
4. The record of appeal and all other documents shall be served on Mr. Fuller together with submissions filed, by Tuesday, 15th December 2015.

Case Name:

**[1] Norris Scholar
v
[1] Fountain of Love Ministries
[2] Raymond Prosper
[3] Ira Archibald
[4] Consuela Joseph (formerly Consuela Akbar)**

[ANUHCVP2014/0025]

Date:

Tuesday, 8th December 2015

Coram:

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

Appearances:

Appellant: Ms. Kamilah Roberts with her Mrs. Andrea Roberts-Nicholas

Respondent: Mr. Lawrence Daniels for the 1st and 2nd respondents

Mr. Kendrickson Kentish with him Ms. Amaya Athill for the 3rd respondent

Ms. Samantha May for the 4th respondent (watching brief)

Issues:

Civil appeal – Bona fide purchaser for value without notice – Specific performance – Sale agreement for purchase of land – Fraud – Rectification of the land register

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

Oral Judgment or Decision

Result / Order:

[Oral delivery]

- 1. The application to extend the time for the filing of submissions is granted and the submissions filed by the 1st and 2nd on 3rd December 2015 are deemed to be duly filed.**
- 2. The appeal is allowed in part in that the order for rectification of the Land Register relating to Parcel 173, Block 151988B is set aside.**
- 3. It is declared that the appellant holds the legal title to Parcel 173 as Trustee for the 2nd respondent.**
- 4. The 4th respondent is directed to repay the appellant the sum of \$125,000.00 which he paid for the purchase of Parcel 173.**
- 5. The appellant shall apply this sum firstly towards satisfaction of the existing charge on the property.**
- 6. Upon the last payment by the 4th respondent to the appellant under paragraph 3 above and the discharge of the charge and the payment by the 2nd respondent to the 4th respondent of the sum of \$18,836.00, being the balance due under the sale agreement, the appellant shall transfer the title to Parcel 173 to the 2nd respondent or to their order.**
- 7. Costs order made by the court below is varied so that such costs shall be borne as to one-third by the appellant and two-thirds by the 3rd respondent.**
- 8. The 3rd respondent shall pay one-half of the costs of the appellant and the costs of the 2nd and 3rd respondents on this appeal.**
- 9. The 4th respondent shall bear her own costs of the appeal.**

Reason:

The Court found that there was no basis for interfering with the findings of the court below as to the reasons for the delay of the second respondent in the payment under the sale agreement dated the 28th April 2001 between Raymond and Nora Prosper and Consuela Akbar now Joseph. The Court found that there was no basis on which a finding of fraud could have been made by the court below as fraud was not pleaded or proven. The appellant acquired the title to Parcel 173 subject to the overriding interests of Raymond and Nora Prosper as the persons in occupation of the parcel at the time of his purchase of the property under the sale agreement. This interest comprised the right to an order for specific performance of the sale agreement against Consuela Joseph formally Akbar by virtue of which the entire beneficial interest in Parcel 173 had been acquired by the Prosper. The Court therefore declared that the appellant held the legal title to Parcel 173 as trustee for Raymond and Nora Prosper as Consuela Joseph would not have had the right to dispose of the beneficial interest in Parcel 173 at the time of the sale by auction to the appellant in 2008. Consequently Consuela was directed to repay to the appellant the sum of the \$125,000 which he paid for the purchase of Parcel 173.

The Court also directed the appellant to apply this sum firstly towards the satisfaction of the existing charge on the property and ordered that upon the last of the payment by Mrs. Joseph to the appellant and discharge of the charge and the payment by Raymond and Nora Prosper to Consuela Joseph of the sum of \$18,836.00 being the balance due under the sale agreement, the appellant shall transfer the title to Parcel 173 to Raymond and Nora Prosper or to their order.

In respect of cost, the Court was satisfied that the 3rd respondent, Mr. Archibald, was properly made a party to the proceedings. As the learned judge rightly found Mr. Archibald bore much blame for the resulting debacle which brought the parties to court.

Case Name:

**[1] Sylvia O'Mard
v
[1] ABI Bank Ltd
[2] The Eastern Caribbean Central Bank
[3] Dwight Venner**

[ANUHCVP2015/0001]

Date:

Tuesday, 8th December 2015

Coram:

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

Appearances:

Appellant:

Mr. Gerald Watts, QC with him Dr. David Dorsett

Respondent:

**Mr. Justin Simon, QC with him Mrs. Nicolette Doherty
for the 1st respondent**

**Mr. Emile Ferdinand with him Ms. E. Ann Henry, QC
and Mrs. C. Debra Burnette for the 2nd respondent**

No appearance for the 3rd respondent

Issues:

Civil appeal – Demand for payment of monies--Whether the bank holds the depositor's monies on trust – Whether monies deposited in a bank are the depositor's monies or the bank's monies – Was application by way of originating motion a claim subject to Article 5(c) of the Eastern Caribbean Central Bank Act Amendment of Schedule Order 2013

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

Directions

Result / Order:

[Oral delivery]

- 1. The Court remits the issue of the constitutionality of the said Statutory Instrument to the court below with a direction that the Attorney General be joined as a party to these proceedings.**
- 2. The Court also directs that the judge of the court below fixes a timetable for filing and service of submissions by the Attorney General and for any further submissions which may be required to be filed therein.**
- 3. The Court also directs that such a timetable be fixed in order to expedite the hearing of the issue with the full participation of all relevant parties to the said proceedings.**
- 4. The Registrar shall fix the date when the parties may be heard on the timetable.**

Reason:

The Court expressed its concerns as to the absence of the Attorney General and the lack of any input in respect of these proceedings which challenge the constitutionality of an enactment namely Statutory Instrument No. 56 of 2013 entitled the Eastern Caribbean Central Bank Act Amendment of Schedule Order 2013. The Court considered that it would be inappropriate to proceed to a determination of this important question without the Attorney General being a party to the proceedings.

Case Name:

[1] Milton Pringle

v

[1] Hon. Molwyn Joseph

[2] The Attorney General

[ANUHCVP2015/0008]

Date:

Monday, 7th December 2015

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

Appearances:
Appellant: Mr. Justin Simon, QC with him Mr. Kwame L. Simon
Respondent: Ms. Alicia Aska holding papers for Mr. Anthony Astaphan, SC

Issues: Civil appeal – Intention to resign – Necessity of Instrument of Resignation – Resignation of Board of Directors

Type of Oral Result / Order Delivered: N/A

Result / Order: [Oral delivery]
At the request of the respondent and by consent the hearing of this appeal is adjourned to the next sitting of the Court of Appeal in Antigua and Barbuda during the week commencing Monday, 14th March 2016.

Reason: Counsel for the respondents was not present.

Case Name: [1] Caribbean Developments (Antigua) Ltd.
[2] Geert Duizenstraal
[3] Gaye Hechme
v
[1] Stuart Lockhart
[ANUHCVP2014/0034]

Date: Monday, 7th December 2015

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

Appearances:

Applicant: Mr. Dane Hamilton, QC with him Mr. John Fuller

Respondent: Mr. Andrew Young with him Mrs. Sharon Cort-Thibou

Issues: Interlocutory Appeal – Striking out of statement of case – Compromise Agreement – Conflict of Interest – Illegality – Relief from sanctions

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

Result / Order: [Oral delivery]

1. The judge's order refusing the appellant's application for relief from sanctions is confirmed.
2. The order striking out the defence and entering judgement against the appellants is set aside.
3. The case is remitted to the High Court for continuation in accordance with the Civil Procedure Rules.
4. Each party to bear his own costs.

Reason: In 2012, the respondent filed a claim against the appellants for a declaration that he is a director of the first appellant and also its sole shareholder, damages and an order for the delivery of the bearer shares of Jolly Harbour AG. Pleadings were exchanged on 15th January 2014. Master Actie issued directions for the parties to file witness statements by 5th February 2014. The respondent complied with this order. The appellants did not. By the time of the pre-trial review on 19th June 2014, the appellants had still not filed witness statements. The

respondent made an oral application at the pre-trial review for judgment on the ground that rule 29.11 of the Civil Procedure Rules 2000 ("CPR") applies and the appellant would not be allowed to call witnesses. Rule 29.11(1) and (2) of the CPR reads:

"If a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court, the witness may not be called unless the court permits.

The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under 26.8."

The learned judge did not consider the oral application made by the respondent. He advised, firstly, the respondent to make a written application and, secondly, he advised the appellants that it would be a good idea to apply for an extension of time to file the witness statements, and apply for relief from sanctions. The appellants did not heed this advice and on 15th July 2014, the respondent applied in writing to strike out the defence and for judgment to be entered on account of the appellants' failure to file their witness statements. The respondent's strike out application was heard on 18th September 2014. The learned judge reserved his decision; even then, there was no application by the appellants to get their witness statements filed.

On 26th September 2014, the appellants filed the submissions opposing the respondent's application to strike out of the defence and for judgment and also an application for relief from sanctions. The relief sought in the application by the appellants is relief from sanctions for having failed to file their witness statements within the time ordered by the court and for an order that they be at liberty to file their witness statements notwithstanding their failure to file as ordered. It is significant that this application does not contain any expressed application for an extension of time to file their witness statements which is essential when an

applicant has missed the deadline for filing the witness statements. The learned judge granted the respondent's application. His decision is summarized in paragraphs 7 and 8 of the judgment as follows:

"Counsel also cited the case of *Treasure Island Company Ltd. v Audubon Holdings Ltd.* Civil Appeal No. 22 of 2003, (British Virgin Islands) where the court refused an application to strike out a statement of case for the late filing of a witness statement. The applicants "had conducted themselves as though they were intent on proceeding with the trial." The application has come as a surprise on the first day of trial. The present defendants were not surprised. They had been forewarned. At the hearing I decided that I would grant the claimant's application because the defendants had simply acted far too late despite repeated warnings. I promise to produce the reasons for my ruling to writing. I have now done so. I also allowed the defendant's leave to appeal this ruling if they so desire."

There was no order on the file or in the record of appeal following the judge's decision setting out the details of what the judge ordered but the details can be gleaned from the first paragraph of the notice of appeal. The appellants complained against (a) that the appellant's/defendant's statement of case is struck out; (b) the appellant/defendants are refused relief from sanctions for failure to file their witness statement; (c) that judgment was given in favour of the claimants/respondent for damages to be assessed.

The appellants appealed against this decision with the leave of the learned judge. To succeed on the appeal, the appellants must show that the learned judge in exercising his discretion to dismiss their application for relief from sanctions erred in principle either by taking into account considerations that are (a) irrelevant or (b) not considering or giving sufficient weight to relevant factors, and as a result, "exceed the generous ambit

within which reasonable disagreement is possible." That is a quotation from former Chief Justice Sir Vincent Floissac in the Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188.

This Court cannot substitute its own discretion simply because it disagrees with the learned judge's exercise of his discretion. Turning to the application for relief from sanctions, the application was made under Part 26.8 of the Civil Procedure Rules:

"An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be (a) made promptly (b) supported by evidence on affidavit. The court may grant relief only if it is satisfied that (a) the failure to comply was not intentional (b) there is a good explanation for the failure; and (c) the party in default has generally complied with all relevant rules, practice directions, orders and directions."

Taking these in turn, the application was made some 9 months after the deadline directed by the master. The Court was of the opinion that this was an inordinate delay. The reasons for the delay were (1) One client could not be found, that is the second appellant; (2) the third appellant was no longer within the company and was not co-operating; and (3) the prolonged illness of the instructing legal practitioner.

The learned judge did not find these reasons to be a good explanation for the delay; the Court agreed and held that there was no basis to disturb that finding. The Court also found that there was inordinate delay and that the second appellant did not show any interest in the application; the evidence showed that he was in agreement with a settlement proposal which is the subject of the claim.

There was no evidence that he was actively pursuing the application. The third appellant also showed little interest in pursuing the matter and she was described as not co-operating with the legal practitioners. In the circumstances, the Court found that the non-compliance with the requirements to file

the witness statement promptly was intentional in the sense that the appellants did not show any real interest in filing the witness statements. To date, the witness statements have not been shown to the Court.

The Court went to on state that it follows from the previous findings on delay and intention that there was no good explanation for the delay and that there was insufficient material in the record of appeal for it to make a proper finding on the requirement in relation to compliance with other rules and practice directions.

In summary, the Court found that the appellants did not satisfy the requirements for relief from sanctions and held that there was no basis to interfere with the trial judge's decision to refuse to grant relief from sanctions.

Further, there was no proper application for an extension of time to file the witness statements. The result was that the learned trial judge's refusal to grant relief from sanctions was confirmed. As a consequence, the appellants cannot file witness statements and must defend the claim on the basis of cross-examination of the respondent's witnesses and legal submissions.

On the strike out application, this remedy has been described as a nuclear weapon. It is a sanction of last resort. The sanction provided by the rules for not filing witness statements is that the witnesses cannot be called and the defaulting party has to rely on cross-examination of the witnesses and legal submissions. The learned trial judge therefore went too far in striking out the case and entering judgment.