

COURT OF APPEAL SITTING

COMMONWEALTH OF DOMINICA

9th – 12th November 2015

JUDGMENT

Case Name: In The Matter Of Accufit Investments Inc.
and In The Matter of Section 184C of The
BVI Business Companies Act, 2004.

[1] Basab Inc.

V

[1] Accufit Investment Inc.

[2] Double Key International Limited

[BVIHCMAP2014/0020]

(Territory of the Virgin Islands)

Date: Monday, 9th November 2015

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

Appearances:

Appellant: Mrs. Gina Dyer-Munro holding for Mr. David Fisher

Respondent: Ms. Lisa Defreitas holding for Mr. Timothy Harry

Issues: Interlocutory appeal – Derivative proceedings – Whether shares in subsidiary company of 1st respondent sold at an undervalue – Application made by appellant in court below to bring proceedings on behalf of and in name of 1st respondent company – Whether learned judge erred in refusing application – Interpretation of s. 184C(2)(c) of BVI Business Companies Act, 2004 (as amended) – Meaning of ‘likely’ in wording ‘whether the proceedings are likely to succeed’ – Appeal against findings of fact made

by learned judge

Result /
Reason:

Held: dismissing the appeal and ordering that costs be awarded to the respondent in the court below, to be agreed within 21 days, and in default thereof to be assessed pursuant to CPR 65.12; and also, that costs be awarded to the respondent in this court, to be calculated at 50% of two-thirds of the costs in the court below, that:

1. The correct meaning of the phrase ‘whether the proceedings are likely to succeed’ in section 184C(2)(c) of the BCA is ‘whether it is more probable than not that the proceedings will succeed’. Accordingly, the applicant is not required to demonstrate that success is an absolute certainty, nor that the probability of success is very strong. The learned judge’s interpretation of the phrase ‘whether the claim is likely to succeed’ seemed to suggest a higher threshold – he appeared to be moving into the realm of requiring a strong likelihood, or almost requiring certainty that the proceedings would succeed for leave to be granted under section 184C(2)(c). This interpretation was incorrect, and the learned judge therefore erred in this regard.

Cream Holdings Limited and Others v Banjeree and Others [2004] UKHL 44 applied.

2. In any case, at an application stage, whether and to what extent an examination of the proposed case on the merits is required, must certainly depend on the applicable threshold, and the evidence before the court. With regard to the level of examination of the evidence required in the present case, the threshold for the grant of leave to bring derivative proceedings – ‘whether it is more probable than not that the proceedings will succeed’ – would require a full and proper examination of the evidence then before the court. The potential nature of derivative

claims, especially those that may be both complex and defended, do not predispose themselves to a cursory review and require the court to evaluate the evidence before it and the arguments advanced by both parties in order to determine 'whether the proceedings are likely to succeed'. Therefore, in the present case, the learned judge erred in stating that the court should not attempt to conduct an inquiry, or in implying that the court should not conduct an evaluation of the material currently before it (assuming that in relation to an applicant's proposed pleadings, a viable claim in law has first been disclosed). Furthermore, the learned judge did not, in fact, undertake an evaluation of the material before him, in coming to the conclusion that the evidence adduced by the appellant was no basis for the allegation that the Sale Shares were sold at an undervalue. It therefore falls to the appeal court to evaluate the material which was before the court below.

American Cyanamid Co. v Ethicon Ltd. [1975] AC 396 cited; Cameron v Coleman CIV-2010-485-2151 [2011] NZHC 724 (22nd June 2011, unreported) (High Court of New Zealand) cited.

3. It is insufficient that an expert merely supplies his/her conclusion on a matter in issue between the parties. It is necessary for him/her to also present the analytical process by which he/she reached the conclusion. In the present matter, the appellant's expert only gave his conclusion on the issue of whether KHL would have been able to satisfy the requirements to be listed on the Hong Kong stock exchange. He failed to present to the court the analytical process by which he had arrived at his conclusion.

Pacific Recreation Pte Ltd. V S Y Tecchnology Inc and Another Appeal [2008]

SGCA 1 applied.

4. The evidence adduced by the appellant to show that the true market value of the Sale Shares was higher than what they were sold for, provided no independent factual basis for it to be concluded on a balance of probability that, on the date that the shares were sold, KHL would have been able to maintain its listed status on the Hong Kong stock exchange. KHL not being listed would cause the value of the Sale Shares to be between HK\$113 million and HK\$130 million subject to the expectation of a discount, rather than between HK\$288 million and HK\$305 million, as was contended by the appellant. The burden was on the appellant to provide evidence to the court that the further discount would not have resulted in a reduction to bring the market price in line with the price that the Sale Shares were actually sold for. The appellant not having done this, it therefore failed to show that, on the evidence before the court, it was more probable than not that it would succeed in proving that the Sale Shares were sold at an undervalue.

APPLICATIONS AND APPEALS

Case Name:

[1] Arthurton Martin
[2] Dr. Clayton Shillingford
[3] Frederick Baron
[4] Severin McKenzie
[5] Floyd Capitoline
[6] Joan Ettienne

v

[1] Blaircourt Property Development Ltd.

[DOMHCVAP2015/0005]

Date: Monday, 9th November 2015

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

Appearances:

Applicant Appellant: Respondent:	/ Ms. Cara Shillingford for first, fourth and sixth appellants Mrs. Heather Felix-Evans
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Issues:

Application to vary, discharge or revoke order – Application for extension of time to apply for variation – Application of for extension of time to appeal – Application for stay of proceedings - Whether the applicant satisfied the requirements for applying for an extension of time to apply for a variation of an order of the court – Was the test in *Rose v Rose* satisfied as regards the factors that the Court must take into consideration in granting an extension of time i.e. length of the delay, the reason for the delay, the chances of success and prejudice to the other party – Whether the single judge erred in dismissing the application for leave and holding that no good reason had been shown for the delay – Whether the law had moved away from the principles laid down in *Norwich* as it relates to the factors the Court must consider particularly as to whether the impecunious circumstances of an applicant is a valid reason that can be advanced for the inability to file proceedings – Whether the learned judge erred in awarding exemplary damages – Whether the grounds on which the learned judge granted exemplary damages was in keeping with the principle in *Rookes v Barnard* which appears to consider only pecuniary gain – Whether the fact that one of the defendants in the matter had applied for and was granted leave to appeal, a point for consideration in this application – Whether the Court of Appeal could still grant

the sought for leave despite all the factors laid out in Rose v Rose not being properly satisfied

Type of Oral
Result / Order
Delivered:

Oral Judgment or Decision

Result / Order:

[Oral delivery]

1. The application for stay is refused.
2. The application for extension of time to challenge the single judge's order is granted.
3. The order of the single judge is set aside.
4. The appellants, Arthurton Martin, Severin McKenzie and Joan Ettienne, are granted an extension of time of 21 days from today's date to file a notice of appeal.
5. Cost of both applications to the respondent in the sum of \$1500.00.

Reason:

In considering the application, the Court did not find the delay inordinate. The Court held that there was no reason to upset the finding by the single judge that no good reason was proffered for the delay. The Court observed that the claim was based on trespass. The trial judge found that the second category in which exemplary damages can be obtained extends to obtaining some object and referred to the learning in *Rookes v Barnard* [1964] UKHL 1. The Court felt that it was not immediately clear how the learned trial judge's interpretation of "object" fits into "object" as meant by Lord Devlin in *Rookes v Barnard*.

Counsel for the respondent stated that the object that was to be gained in the instant case was gaining political advantage in an upcoming election. The Court reasoned that while this was a novel and intriguing argument that sought to expand the definition of the word "object" to include nonpecuniary gains, it does

not detract from the fact that there was a reasonable prospect of success. The Court noted that John Cecil Rose v Anne Marie Uralis Rose (SLUHCVP2003/0019, delivered 22nd September 2003) established that the Court should adopt a flexible approach.

Additionally, the Court was of the view that there would be no prejudice to the respondent particularly since the decision of Thomas J was already before the Court of Appeal by another defendant. The Court observed that in the pursuit of justice, procedure is a servant and not a master. The Court felt that despite the fact that it was not satisfied on one or two grounds, particularly as regards the reason for the delay, the overall justice of the case required that an extension of time be granted.

In relation to the other appellants

Mr. Clayton Shillingford and Mr. Floyd Capitoline settled in mediation and were not included in the application before the Court. Frederick Baron was granted an extension of time prior to this hearing.

Case Name:

[1] Clement Johnson also known as
Clem Johnson
v
[1] Peter Celaire
[2] Peter Celaire representative for Burns
Celaire
[3] Albert Celaire
[DOMHCVAP2015/0016]

Date:

Monday, 9th November 2015

Coram:

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

The Hon. Mr. Paul Webster, Justice of Appeal

Appearances:

Applicant / Intended Appellant: Mrs. Singoalla Bolmqvist-Williams

Respondent: Mr. Michael Bruney

Issue:

Application for leave to appeal

Type of Oral Result / Order Delivered:

Oral Judgment or Decision

Result / Order / Reason:

**[Oral delivery]
The application having been withdrawn, the application is accordingly dismissed.**

Case Name:

[1] Levi Maximea

[2] Lucy Maximea

v

[1] Dominica Agricultural Industrial and Development Bank

[DOMHCVAP2015/0017]

Date:

Monday, 9th November 2015

Coram:

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

The Hon. Mde. Gertel Thom, Justice of Appeal

The Hon. Mr. Paul Webster, Justice of Appeal

Appearances:

Applicant / Intended Appellant: In person

Respondent: Mrs. Colleen Felix-Grant

Issues:

Application for leave to appeal – Whether the learned trial judge erred in law when she struck out the applicant’s defense and counterclaim and made an order for the amount owed to be determined by the Court - Whether the learned trial judge erred in ruling that the defendant did not have a good defense against the Bank’s claim – Whether the termination of the appellant’s service of employment had any effect on his obligations under the mortgage agreement – Whether the Constitution provides any protection to the appellant and whether the Constitution prevents the claimant bank from taking action against the Appellant – Whether the applicant had satisfied the threshold for applying for leave to appeal

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

Oral Judgment or Decision

Result / Order:

[Oral delivery]
Application for leave to appeal is dismissed.

Reason:

The Court found that the appellant did not disclose any error with the reasoning of the learned trial judge. The appellant’s dispute with his former employee did not have any bearing on his contract with the bank. As such, the Court held that the respondent bank was well within its rights to seek to have the appellant honour the terms of the mortgage agreement he signed with the bank.

The Court further held that the appellant had not satisfied the threshold for applying for leave to appeal.

Case Name:	Jacqueline Theodore v Farah Jackie Theodore [DOMHCVAP2015/0018]
Date:	Monday, 9th November 2015
Coram:	The Hon. Mr. Davidson K. Baptiste, Justice of Appeal The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mr. Paul Webster, Justice of Appeal
Appearances:	
Appellant:	Mr. Lennox Lawrence
Respondent:	Mr. Henry Shillingford
Issues:	Application for leave to appeal – Application for stay of execution
Type of Oral Result / Order Delivered:	Oral Judgment or Decision
Result / Order:	[Oral delivery] 1. The application for leave to appeal is dismissed and costs in the sum of \$750.00 granted to the respondent. 2. The application for a stay, having been withdrawn, is accordingly dismissed and costs in the sum of \$750.00 granted to the respondent.
Reason:	As regards the leave to appeal, the Court held that this was not a matter that required leave to appeal since it involved an injunction and therefore the liberty of the subject and so the application for leave to appeal was redundant.

The Court dismissed it on these grounds and awarded costs to the respondent accordingly. Regarding the application for a stay- the application was withdrawn by counsel for the appellant and the Court granted costs to the respondent accordingly.

Case Name:

Sullivan Marcelle

V

The State

[DOMHCRAP2015/0002]

Date:

Monday, 9th November 2015

Coram:

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

The Hon. Mde. Gertel Thom, Justice of Appeal

The Hon. Mr. Paul Webster, Justice of Appeal

Appearances:

Appellant:

Mr. Geoffrey Letang

Respondent:

Ms. Fernilla Felix

Issues:

Criminal appeal against sentence – Indecent assault – Whether leave is required to file appeal having regard to the provisions of section 37(1) of the Eastern Caribbean Supreme Court Act Chapter 4:02 of the 1990 Revised Laws of Dominica – Whether the learned trial judge erred in law in not fully applying the one third discount principle and thereby sentencing the appellant to 4 years and 7 months imprisonment – Whether the learned trial judge erred in law by placing undue weight on the Social Inquiry report in handing down sentence – Whether the learned trial judge erred in law when he failed to compare the case at bar with similar cases locally, regionally and internationally – Whether the learned trial judge

failed to adequately consider and apply the mitigating factors in the matter

Result / Order:

[Oral delivery]

- 1. Leave to appeal is granted.**
- 2. The appeal against sentence is allowed to the extent that it is reduced to 3 years.**

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

Oral Judgment or Decision

Reason:

The Court concluded that there were two main issues for consideration before the Court. The first being the application of the one third discount in relation to the notional sentence. There was a notional sentence of seven years applied by the learned trial judge and based on his consideration of the discount, the sentence was reduced to 4 years and 7 months. The Court felt that the learned trial judge not only gave the one third discount but further reduced the amount by one month and so the Court could not rightly hold that he had not properly applied the one third discount.

However, as regards the failure to adequately weigh the mitigating factors, the Court was of the view that having weighed the mitigating and aggravating factors, a term of three years would meet the justice of the case. The Court took into consideration that this was not a worse case situation though that does not take away from the seriousness of the offense of indecent assault. The Court took into consideration that the virtual complainant was very young at the time of the commission of the offense as well as the many mitigating factors including the fact that there was no violence in the commission of the offense, the appellant had no previous convictions and pleaded guilty at an early stage.

Case Name:

David St. Jean

V

The State

[DOMHCRAP2015/0006]

Date:

Monday, 9th November 2015

Coram:

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

The Hon. Mde. Gertel Thom, Justice of Appeal

The Hon. Mr. Paul Webster, Justice of Appeal

Appearances:

Appellant:

Mr. Wayne Norde with him Ms. Bernadette Lambert

Respondent:

Ms. Evelina Baptiste, Director of Public Prosecutions

Issues:

Criminal appeal against sentence – Whether leave is required to file this appeal having regard to the provisions of section 37(1) of the Eastern Caribbean Supreme Court Act Chapter 4:02 of the 1990 Revised Laws of Dominica – Whether the sentence is excessive in all the circumstances of this case – Whether the trial judge erred when he departed from the established benchmark of fifteen years for the offense of manslaughter and whether his failure to furnish reasons for using a benchmark of twenty years has the effect of granting the Court of Appeal the ability to reduce the sentence imposed – Whether the trial judge erred and was wrong in law for failing to impose further reductions for the other mitigating factors apart from the guilty plea namely, the fact that the appellant had no previous convictions and was only twenty-one years old at the time of the commission of the offense and the remorse expressed by the appellant –

Whether the learned trial judge erred in placing an excessive or undue amount of weight on what he considered to be the only aggravating factor that is the fact that the trial judge held that the accused “[stabbed] the deceased and left him to die” – Whether the trial judge erred in his interpretation or understanding of the facts of the case, particularly the facts contained in the Pathologist’s report and whether the trial judge misinterpreted the facts by asserting that the deceased had been stabbed multiple times by the accused when he had in fact only been stabbed once by the appellant

Type of Oral
Result / Order
Delivered:

Oral Judgment or Decision

Result / Order:

[Oral delivery]

1. Leave to appeal is granted.
2. The appeal is allowed to the extent that the sentence of 13 years and 3 months is varied to 10 and half years, time spent on remand to be considered.

Reason:

The Court expressed its concern with the fact that the learned trial judge used a notional sentence of 20 years rather than the established 15 years without proffering any clear reasons for his departure from the established principle. The Court felt, therefore, that in this regard, the learned trial judge erred. Since the accused pleaded guilty at an early stage, the Court calculated that the one third reduction would take the notional term to 10 and a half years.

However, the Court rejected the appellant’s assertions that there were further mitigating factors that should lead to a further discount. The Court considered that the mitigating and aggravating factors were equally weighed. The Court further considered the fact that the accused was the aggressor and the manner in

which the deceased was killed and felt that the mitigating factors of his age and guilty plea were not sufficient to outweigh the aggravating factors. As a result, the Court did not feel that the accused was entitled to any further discount on his prison sentence.

Case Name:

Steven Wyke

V

The State

[DOMHCRAP2013/0002]

Date:

Tuesday, 10th November 2015

Coram:

**The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal**

Appearances:

Appellant:

Mr. Wayne Norde (amicus)

Respondent:

Ms. Fernilla Felix

Issues:

Criminal appeal against conviction – Burglary – Whether the Court should grant the appellant leave to amend his grounds of appeal filed on the 25th of February 2013 – Whether the learned trial judge erred when she failed to consider each of the appellants separately in her sentencing and whether this led to the learned trial judge imposing an unduly harsh sentence on the appellant – Whether the learned trial judge deeming the appellant a “recidivist” affected her ability to arrive at a fair notional sentence – Whether the learned trial judge erred in using a term of nine years as the notional sentence – Whether the mitigating factors outweighed the aggravating factors in this matter – Whether the sentence of six years was excessive in the circumstances of the case –

Whether the trial judge erred in not having sufficient regard for the mitigating factors such as the fact that most of the items were recovered, the appellant co-operated with the police and his early guilty plea

Type of Oral
Result / Order
Delivered:

Oral Judgment or Decision

Result / Order:

[Oral delivery]
Appeal against sentence dismissed.

Reason:

Regarding the application for leave to replace the appellant's ground of appeal, there was no objection from the Office of the Director of Public Prosecutions and the Court granted leave accordingly.

The Court held that having heard counsel for the appellant, the Court did not feel that the learned trial judge erred in principle in coming to a sentence of six years in respect of the appellant. Further, the Court indicated that it can find no basis on which to overturn the ruling of the judge on either her setting of the notional sentence of nine years or on imposing a sentence of six years. The Court opined that the mitigating factors did not outweigh the aggravating factors.

The Court commended Mr. Norde for his assistance to the Court.

Case Name:

Johan Charles
v
The State

[DOMHCRAP2013/0003]

Date:	Tuesday, 10th November 2015
Coram:	The Hon. Mr. Mario Michel, Justice of Appeal The Hon. Mde. Gertel Thom, Justice of Appeal The Hon. Mr. Paul Webster, Justice of Appeal
Appearances:	
Appellant:	Ms. Bernadette Lambert
Respondent:	Ms. Fernilla Felix
Issues:	Criminal appeal against conviction – Burglary – Whether the Court should grant the appellant leave to replace his grounds of appeal with the grounds of appeal filed on the 23rd of June 2015 – Whether the learned trial judge erred in using a term of nine years as the notional sentence – Whether the sentence of six years is excessive in all the circumstances of the case – Whether the learned trial judge erred when she took into account convictions that were spent in sentencing the appellant – Whether the learned trial judge erred in imposing a sentence of six years which was too harsh considering sentences for similar offenses from across the jurisdictions of the Eastern Caribbean Supreme Court – Whether the learned trial judge’s consideration of these spent convictions led to her using a high notional sentence of nine years
Type of Oral Result / Order Delivered:	Oral Judgment or Decision
Result / Order:	[Oral delivery] Appeal against sentence dismissed.
Reason:	Regarding the application for leave to replace the appellant’s ground of appeal, there was no objection from the Office of the Director of Public Prosecutions and the Court granted

leave accordingly.

Having heard Counsel for the appellant, the Court did not feel that the learned trial judge erred in principle in coming to a sentence of six years in respect of the appellant. Further, the Court indicated that it can find no basis on which to overturn the ruling of the judge on either her setting of the notional sentence of nine years or on imposing a sentence of six years on the appellant.

The Court further considered that even if the learned trial judge may have erred on the spent conviction point, the Court still has to consider if the sentence of six years meets the justice of the case.

Case Name:

Anthony Jeff Thomas

v

The State

[DOMHCRAP2014/004A]

Date:

Tuesday, 10th November 2015

Coram:

**The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, Justice of Appeal**

Appearances:

Appellant:

Mr. Tiyani Behanzin

Respondent:

Ms. Sherma Dalrymple

Issues:

Whether the Court of Appeal has jurisdiction to hear the appeal against the ruling of Stephenson J made on the 19th of June 2014 – Since the appellant was bringing an appeal against the ruling of the learned judge on a preliminary point, is the right to appeal afforded

by section 37 of the Eastern Caribbean Supreme Court Act Chapter 4:02 available to the appellant at this stage since the appellant has not yet been convicted.

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

Directions

Result / Order:

[Oral delivery]

1. The respondent shall file and serve written submissions within one month of the date of this order in support of its submissions that the Court has no jurisdiction to hear the appeal against the ruling of Stephenson J made on the 19th of June 2014.
2. The appellant shall file and serve written submissions in response within one month of being served with the respondent's submissions.
3. Upon receipt of submissions of both parties, the Court of Appeal will determine on the written submissions, the issue of its jurisdiction to hear the appeal
4. Any further hearing of the appeal against the ruling of Stephenson J shall be on a date to be fixed by the Court.

Reason:

Upon counsel for the appellant's indication that he would need some time to prepare a proper response to the submissions of counsel for the DPP and upon counsel for the DPP indicating that she would like an opportunity to file further written submissions on the jurisdiction point if the Court was minded to grant the appellant's application for more time, the Court decided that in the interest of justice, directions should be given to facilitate this.

Case Name:

[1] Marinor Enterprises Limited

[2] Michael Astaphan

v

**[1] First Caribbean International Bank
(Barbados) Ltd. Formerly known as**

Barclays Bank Plc.

[DOMHCVAP2013/0003]

Date:

Wednesday, 11th November 2015

Coram:

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

The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant:

**Mr. Hugh Marshall Jr with him Ms. Zara Lewis
instructed by Mrs. Noelize Knight-Didier**

Respondent:

Mr. Alick Lawrence, SC

Issues:

Whether the learned trial judge erred in law by striking out the applicant/appellant's amended defense and counterclaim by case management order dated 29th September 2009 – Whether the learned trial judge erred in law by refusing the applicant/appellant's first and second application to amend the defense under part 20.1 of the Civil Procedure (Amended) Rules 2011 – Whether the applicants/appellants should be granted leave to further amend their notice of appeal and what are the relevant rules particularly the rules governing late stage amendments – Whether Parts 62.15, 62.14(1), 62.20 and 26.1 (2)(w) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (as amended) proffer any guidance in the circumstances of this application – Whether the failure of the applicant to make an application to appeal the interlocutory order affects the jurisdiction of the Court of Appeal to hear the appeal (section 32 (3) of the Eastern Caribbean Supreme Court (Dominica) Act Chapter 4:02 of

the Laws of Dominica 1990) – Whether it would be in the interest of justice and furthering the overriding objective of the Court that the applicants/appellants be granted leave to file a further amended notice of appeal

Type of Oral
Result / Order
Delivered:

N/A

Result / Order:

Judgment reserved.

Case Name:

[1] David Robin
[2] Virginia Peters
v
[1] Ulysses Auguiste
[DOMHCVAP2010/0024]

Date:

Tuesday, 10th November 2015

Coram:

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

Appearances:

Appellant:

Mrs. Zena Dyer-Monroe

Respondent:

Mrs. Hazel Johnson with her Ms. Lisa Defreitas and Ms. Yakima Cuffy

Issues:

Whether the list of authorities filed in June 2014 and the list of authorities filed on 9th November 2015 were in compliance with Rule 62.11 of the Civil Procedure Rules 2000 and Practice Direction 62 D 10/2011 – If it is found that the above stated lists of authorities were found to

be in breach of Rule 62.11 and Practice direction 62 D 10/2011, should the cases not found in the appellant's skeleton arguments but included in the lists of authorities be disregarded by the Court and the appellant be made to rely only on the authorities cited in their skeleton arguments

Type of Oral
Result / Order
Delivered:

N/A

Result / Order:

[Oral delivery]
Matter adjourned to Thursday the 12th of
November 2015

Reason:

Counsel for the appellant requested time to
respond to the respondent's oral submissions
therefore an adjournment was granted
accordingly.

Case Name:

[1] David Robin
[2] Virginia Peters
v
[1] Ulysses Auguiste
[DOMHCVAP2010/0024]

Date:

Thursday, 12th November 2015

Coram:

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

Appearances:

Appellant:

Mrs. Zena Dyer-Monroe

Respondent:

Mrs. Hazel Johnson with her Ms. Lisa Defreitas and Ms. Yakima Cuffy

Issues:

Regarding the 1st appellant:

Whether the learned trial judge erred and was wrong in law in that in assessing loss of amenities, he failed to consider or adequately consider general damages under that head – Whether the learned trial judge erred and was wrong in law in his dealing with loss of amenities as if it had to be specifically pleaded – Whether the trial judge erred and was wrong in law when he awarded the first appellant general damages of EC\$30,000 – Whether there are cogent reasons why the Court of Appeal should interfere with the judge’s discretionary power in this respect – Whether the learned trial judge erred and was wrong in law in that he failed to consider the well-established legal principles governing the assessment of damages and whether the learned trial judge’s failure to do so resulted in an award of general damages that was not reasonably commensurate with the gravity of the injuries suffered by the first appellant – Whether the learned trial judge erred and was wrong in law in that he dealt with future loss of earnings in respect of the first appellant as if it had been special damages that had to be specifically pleaded and proven – Whether the learned judge failed to adequately consider the evidence led on behalf of the first appellant particularly the medical evidence and the evidence that the first appellant was now impotent as a result of the injury, in assessing general damages – Whether the learned trial judge used a multiplicand that was too low in assessing the loss of future earnings of the 1st appellant – Whether the learned trial judge erred and was wrong in law by failing to attach the necessary weight to certain findings of fact such as the fact that the first appellant was a part time farmer, a backhoe and truck operator and a registered taxi driver and that the injury affected his ability to perform such tasks –

Whether the learned judge erred and was wrong in law when he only awarded special damages of EC\$23,909.98 and failed to award special damages for other expenses although pleaded and proved by evidence and in the absence of contradictory evidence being led by the respondent – Whether the learned judge failed to award the first appellant sufficient damages for future medical care although the evidence led by the appellant was the only evidence before the Court – Whether the learned judge erred and was wrong in law when he failed to grant interest on general damages for loss of amenities and pain and suffering at the statutory rate of 5%

Regarding the second appellant:

Whether the amount of special damages awarded to the second appellant by the learned judge was insufficient – Whether the learned judge erred in discarding the evidence of Dr. Paul as to the permanent injuries of the second appellant in the face of no contradictory evidence from the respondent – Whether the learned judge's award of general damages was sufficient in the circumstances and whether in assessing general damages, the learned judge failed to consider pertinent well established legal principles governing the assessment of damages – Whether the learned judge erred and was wrong in law in failing to award compensation to this appellant under the heads of future medical care and expenses and future loss of earnings – Whether the learned judge erred in law in not granting interest in general damages for loss of amenities and pain and suffering from the date of service of the writ to trial at the statutory rate of 5% - Whether the learned judge erred and was wrong in law when he failed to grant interest on special damages from the date of the accident until trial

Regarding the counter notice:

Whether the award of general damages for both appellant should be set aside or reduced – Whether the award of interest on special

damages before the date of judgment should be set aside – Whether the trial judge erred in law and misdirected himself in assessing the award for loss of future earnings of the first appellant in that he failed to apply a discount to cater for the contingencies of life – Whether the learned judge erred in law and misdirected himself when he awarded interest on special damages from the date of service of the claim to judgment as the Courts have no jurisdiction to make such an award of interest under the Judgments Act Chap 4:70

Type of Oral
Result / Order
Delivered:

Oral Judgment or Decision

Result / Order:

[Oral delivery]

1. The appeal by the first appellant is allowed.
2. The award by the trial judge is varied as follows:
 - a. The order of \$30,000.00 for general damages made by the learned trial judge is set aside and the new order is \$40,000 for pain and suffering and \$60,000 for loss of amenities, bringing the order for general damages to a total of \$100,000.00.
3. The award for special damages is increased by \$200.00, bringing the amount to \$24,109.08.
4. Nominal damages of EC \$10,000.00 awarded to the first appellant.
5. The appeal of the second appellant is dismissed with costs to the respondent.
6. The counter notice is allowed as regards the issues of interest and the reduction in loss of prospective earnings.
7. Costs in the sum of $\frac{1}{2}$ of the costs awarded in the Court below awarded to the first appellant.
8. The second appellant is to pay the costs of this appeal to Respondent and this is to be prescribed costs.
9. Both appellants will pay $\frac{2}{3}$ of the

respondent's cost of the Counter Notice and this is to be prescribed costs.

10. Counsel is invited to prepare a draft order particularly re the orders for costs for the Court's approval.

Reason:

As regards the issues raised in this matter on the 10th of November, 2015, the Court of Appeal agreed with the submissions of counsel for the appellants that this was a procedural point that could have been raised by counsel for the respondent at an earlier point. However, the Court indicated to counsel for the respondent that she should utilize her ability to object and draw to the Court's attention, any new additions, cases and submissions by counsel for the appellants.

In making awards to the first appellant, the Court had regard to the following:

Pain and Suffering

The first appellant suffered a serious back injury that required four surgeries, he had to remove two damaged discs from his back, was hospitalized for seven days and required bed rest for three months. The Court also noted that his quality of life is severely affected in that the first appellant is now impotent, can no longer play sports and can no longer sit or stand for prolonged periods. The Court reviewed comparable authority and felt that even though the burden to cause the Court to interfere with such awards is a high one, the Court was justified in doing so in these circumstances. For guidance, the Court looked at the case of *Monica Lansiquot v Geest Plc* (SLUHCVP1999/0001) referred to in *Fraser v Dalrymple et al* (ANUHCVP2004/0513, delivered 5th May 2010) at paragraph 33 in which \$40,000.00 was awarded for pain and suffering and \$20,000.00 was awarded for loss of amenities where the applicant had slipped a disc. The case of *Cedric Dawson v Cyrus Claxton* (BVIHCVP2004/0023, delivered 23rd May 2005,

unreported) where the claimant suffered a herniation of two discs was also considered. In that case, the claimant was awarded \$36,000.00 for pain and suffering and loss of amenities.

Having considered the authorities, the Court felt that the learned trial judge erred in the amount he awarded for general damages and so the award for pain and suffering was increased accordingly. In respect of loss of amenities, the Court was guided by *Fraser v Dalrimple et al* and felt that although the injury was more serious than the case at bar, it was still instructive.

Regarding loss of prospective earnings and the multiplier

The trial judge used a multiplier of 8. The first appellant is 41 years old. The Court felt that for a person in their early 40's this multiplier is too low. The Court looked at the authority. In *Martin Alphonso et al v Deodath Ramnath (BVIHCVAP1996/0001)*, a multiplier of 12 was used for a 45 year old claimant and in *Franklin Lloyd v Nathaniel Phillip et al*, a multiplier of 10 was used for a 57 year old. According to the Court, the learned trial judge erred in using a multiplier that was too low and so it was raised to 10 by the Court.

Regarding the multiplicand

The trial judge disregarded the first appellant's activities of truck and backhoe driving and farming on the grounds that the appellant produced no evidence to substantiate the amounts he was claiming from these activities. The first appellant was employed as a fireman and claimed that his salary was some \$3000. In actuality, he was found to be making around \$800.00 less than that. The judge found that he earned \$2,205.78. It was clear that the trial judge was very unimpressed with the first appellant and felt that he was not a witness of truth. The first appellant produced no bank accounts or anything else that could prove his claims and the trial judge rejected his claim on

the basis that he was unreliable and had a propensity to exaggerate. The Court of Appeal felt that it should not interfere on this issue. However, the learned trial judge has a discretion to award nominal damages regardless of the first appellant's claims being unquantifiable. It was also clear to the Court that the trial judge was satisfied that there was some loss but simply no evidence of that loss. It is a difficult exercise to award nominal damages but the Court felt that the circumstances of this case warrants that some nominal damages be awarded and so the Court awarded \$10,000.00.

Regarding prospective medical expenses

This claim was based on the estimates of the doctors of \$800.00 per month. The Court was of the view that an estimate however is not proof of money actually spent. The learned trial judge looked into the amount actually spent and in one year, \$1800.00 was spent. The learned judge accepted this amount and so there was no reason to interfere with his award under this head.

Regarding the special damages

The appellant claimed for \$2000.00 under this head and the judge found that only \$200.00 was spent. The trial judge refused to allow it. The Court felt that this should have been allowed and so the award for special damages was increased by \$200.00.

Regarding the counter notice of appeal

The Court felt that the judge erred in not applying a discount to account for the contingencies of life and felt that 10% was appropriate interest for the loss of earnings. Additionally, the Court dismissed the application that the award of damages was excessive and should be set aside.

In relation to the second appellant

The Court dismissed the appeal of the second appellant. According to the Court, upon

examination of the injuries sustained by the 2nd appellant, the award for general damages given by the learned judge was sufficient in the circumstances and the Court felt it should not interfere with this award.

Case Name:

[1] Myron Luke

[2] Bobby Luke

v

[1] The Police

[DOMMCRAP2013/0012]

Date:

Wednesday, 11th November 2015

Coram:

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

The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant:

Mrs. Zena Moore-Dyer

Respondent:

Ms. Fernilla Felix

Issues:

Criminal appeal against sentence – Possession of controlled drug

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

Directions

Result / Order:

[Oral delivery]

- 1. The appellant has leave to prepare a copy of the submissions of counsel on the issue of no case to answer an application and plea in mitigation made on the 31st of March 2015.**
- 2. The submissions made on no case**

application and plea in mitigation shall form part of the record of appeal.

3. The matter is adjourned to the next sitting of the Court in the Commonwealth of Dominica commencing on the 4th of July 2016.

Reason:

The Court considered the oral submissions of both counsel on the issue and noted that the counsel for the State indicated that she was unable to assist in the reconstruction of the records because there were no documents available to her from the police prosecutor in respect of this matter.

Case Name:

Glendel Casey

v

The Police

[DOMMCRAP2015/0002]

Date:

Wednesday, 11th November 2015

Coram:

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

Appearances:

Appellant:

In person

Respondent:

Ms. Evelina Baptiste, Director of Public Prosecutions

Issues:

Criminal appeal conviction – Theft

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

Oral Judgment or Decision

**Result / Order /
Reason:**

**[Oral Delivery]
Appeal against sentence, having been
withdrawn, is hereby dismissed.**

Case Name:

**Jarlyn Africa
v
Alson Henry**

[DOMMCVAP2014/0008]

Date:

Wednesday, 11th November 2015

Coram:

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

Appearances:

Appellant:

No appearance

Respondent:

In person

Issue:

Civil appeal

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

Oral Judgment or Decision

Result / Order:

**[Oral delivery]
Appeal dismissed.**

Reason:

**The appellant was served by the Court's bailiff
in this matter and was absent with no reason
having been advanced for that absence.**

Case Name:

Oliver J. Wallace

v

Tithea Peter

[DOMMCVAP2014/0004]

Date:

Wednesday, 11th November 2015

Coram:

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

The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant:

No appearance

Respondent:

In person

Issue:

Civil appeal

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

Oral Judgment or Decision

Result / Order:

[Oral delivery]

Appeal dismissed for want of prosecution.

Reason:

The appellant was not present although he was served by the bailiff in this matter and proffered no reason for his absence.