

COURT OF APPEAL SITTING
TERRITORY OF THE VIRGIN ISLANDS
28th September 2015 – 2nd October 2015

APPLICATIONS AND APPEALS

Case Name: The Attorney General of the Virgin Islands
v
Daphne Alves
[BVIHCVAP2011/0065]

Date: Monday, 28th September, 2014

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal [Ag.]

Appearances:

Appellant / Respondent:	Ms. Natalie Sandiford, Senior Crown Counsel, Attorney General's Chambers
Respondent / Applicant:	Mr. John Carrington, QC

Issues: Application for final leave to appeal to Her Majesty in Council

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

Result / Order:

1. The applicant has final leave to appeal to Her Majesty in Council from the order made by the Court of Appeal on 11th November 2013 and the claim herein is barred under the Public Authorities Protection Act Cap. 62.
2. The costs of and occasioned by this application shall be costs in the appeal to Her Majesty in Council.

Case Name:

Clearlie Todman-Brown
v
The National Bank of the Virgin Islands
[BVIHCVAP2013/0004]

Date:

Monday, 28th September 2015

Coram:

The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal [Ag.]

Appearances:

Appellant:

Mr. Jamal Smith

Respondent:

Ms. Akilah Anderson

Issues:

Appeal against decision of learned judge granting respondent summary judgment in court below – Whether learned judge erred in finding that appellant's claim had no reasonable prospect of success – Application for an adjournment

Type of Oral Result/Order Delivered:

Directions

Result / Order:

- 1. The appellant shall prepare and file the record of appeal within 7 days and shall pay the respondent costs agreed in the sum of \$ 1,000.00 before the filing of the record.**
- 2. The appellant shall file and serve skeleton arguments on or before 14th October 2015.**
- 3. The respondent shall file and serve skeleton arguments on or before 28th October 2015.**
- 4. Unless the appellant complies with paragraphs 1 and 2 of the order, the appeal shall stand dismissed.**

5. The appeal is fixed for the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 11th January 2016.

Case Name:

**James Anthony
(as Personal Representative of the Estates of
Abraham, deceased and Clarita Anthony,
deceased)**

v

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

[BVIHCVAP2011/0038]

Date:

Monday, 28th September 2015

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of
Appeal [Ag.]**

Appearances:

Appellant:

Ms. Charmaine Rosan-Bunbury

Respondent:

Mr. Lewis Hunte, QC, with him, Ms. Monique Peters

Issues:

Application to obtain access to court files

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

Oral Judgment or Decision

Result / Order:

- 1. Rosan Law, the legal practitioner for the appellant,
pursuant to the application filed on 11th September**

2014 and, Rosan Law being the legal practitioner for the appellant, is granted access to the case file BVIHCV2010/0113 and all files pertaining to the appeal.

2. The appeal is fixed for the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 11th January 2016.

Case Name: **Simeon Power**
V
The Commissioner of Police

[BVIMCRAP2014/0012]

Date: **Monday, 28th September 2015**

Coram: **The Hon. Mr. Davidson K. Baptiste, Justice of Appeal**
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal [Ag.]

Appearances:

Appellant:	Ms. Ruthilia Maximea, with her, Ms. Ayodeji Bernard
Respondent:	Mr. Garcia Kelly, Senior Crown Counsel, holding papers for Ms. Tiffany Scaliffe, Principal Crown Counsel

Issues: **Appeal against conviction – Wounding – Criminal damage – Whether conviction is unreasonable and cannot be supported having regard to the evidence – Application for an adjournment**

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

- Result / Order:**
1. The appellant shall file and serve skeleton arguments on or before 28th October 2015.
 2. The respondent shall file and serve skeleton

arguments on or before 28th November 2015.

3. The hearing of the appeal is fixed for the next sitting of the Court of Appeal in the Territory of the Virgin Islands during the week commencing 11th January 2016.

Case Name:

**E. M. Watts Development Company Ltd
v
The Government of the Virgin Islands
[BVIHCVAP2015/0003]**

Date:

Monday, 28th September 2015

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. Guy Roots, QC, with him, Mr. Gerard Farara, QC

Respondent:

Mr. Baba Aziz, Attorney General, with him, Ms. Maya Barry, Crown Counsel, Attorney General's Chambers

Issues:

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

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

Oral Judgment or Decision

Result / Order:

Reason:

1. The appeal is allowed.
2. The respondent shall pay the appellant compensation for the acquisition of its land and mooring rights as follows:
 - a) A sum of 5 million dollars.
 - b) Severance in respect of parcel 235 in the sum of \$225,000.00.
 - c) Interest on the amount from the date of the entry of possession by the Crown from the date of payment of compensation awarded by this Court at the rate of 4% per annum pursuant to section 21 of the Land Acquisition Act.
 - d) Pre-acquisition costs in sum of \$86,049.58.
3. Costs of this appeal to be taxed if not agreed on an indemnity basis.

Reason:

This was an appeal against the award of the Board of Assessment appointed pursuant to section 12 of the Land Acquisition Act (Cap. 222, Revised Laws of the Virgin Islands 1991) on 16th April 2012, in accordance with the provisions of the Land Acquisition Act.

The Government of the Territory of the Virgin Islands acquired a total of approximately 41,000 square feet of land along with mooring rights belonging to the appellant ("the Land"). The Board of Assessment, after an inquiry in which expert reports on the value of the Land were presented to it by both parties, assessed the Land at 3 million dollars. It refused to grant the appellant interest on the sum awarded and it also refused to grant a portion of pre-acquisition costs in the sum of \$6,725.58. The appellant, dissatisfied with the Board's award, appealed on the following three grounds:

- (i) The Board's conclusion in paragraph 84 of its decision that the value of the land and rights compulsorily acquired was 3 million dollars was wrong and contrary to the evidence.
- (ii) The Board was wrong in paragraph 89 of its decision to refuse to award interest.
- (iii) The Board was wrong in paragraph 88(2) of its decision to refuse to award \$6,725.58 in respect to travel and associated costs.

Ground 2

The Attorney General conceded that the Board erred in the exercise of its discretion under section 21 of the Land Acquisition Act by failing to award the appellant interest. The Court was of the view that the appellant was entitled to interest from the date of entry into possession of the Crown to the date of payment of compensation awarded.

Ground 3

The Board's reason for its refusal to grant pre-acquisition costs was that the Government was not liable to pay the travel expenses of persons not resident in the British Virgin Islands as part of the compensation for the acquisition of their land. The Attorney General contented that the Board was right in so finding, as the costs were not reasonable. The Court took the view that while the appellant company was registered in the Virgin Islands, its directors resided outside the territory, and having regard to the nature of the matter – their property being compulsory acquisition – it was reasonable for the appellant to be represented by its directors. The Court applied the principle of equivalence to recover those costs which it considered to be reasonable.

Ground 1

The Board, in its decision, stated that the method of valuation used by the appellant's valuer, CBRE, which involved first valuing the upland comprised within the Land and then adding the value of the mooring rights calculated separately using the residual method of valuation, was not the correct method to value the Land, which was acquired as a whole. The Board found that it was impermissible for CBRE to divide compulsorily acquired land in single ownership into 'components' for the purposes of valuation and then to aggregate the resulting values. This essentially amounted to double counting since the same assets are being used twice over to generate two separate returns, when in any open market sale, there would only be one.

The appellant contended that the CBRE report which applied the residual method to get the value of the

mooring rights did not include the valuation of the two parcels of land; the value was solely restricted to the mooring rights. The Court, having considered the submissions of both sides, the award of the Board and the report of CBRE, found in favour of the appellant, and took the view that the CBRE report did not take into account the value of the two parcels of land. The Court therefore found that the Board erred in finding that the land was included in the valuation of the mooring rights. The evidence before the Board on the value of the land in the CBRE report was the sum of two million dollars while the value of the Government expert BCQS was the sum of \$215,600.00. The Board in its award rejected the valuation of the Government experts BCQS for reasons which it outlined at paragraphs 58-62. The Government did not appeal against the rejection of the BCQS report.

In relation to the CBRE report, having found that the CBRE valuation in relation to the mooring rights did not include the value of the two parcels of land, the Court was of the view that the appellant was entitled to the value of the two parcels of land that was obtained by CBRE.

As regards the value of the mooring rights, the Court was of the view that the adjustment made by the Board to the valuation of CBRE were correct.

Case Name:

East Pine Management Limited

Appellant

v

[1] Tawney Assets Limited

[2] Oldril Holdings Limited

[3] Guildron Trading Limited

Respondents

[BVIHCVAP2012/0035]

Date:

Monday, 28th September 2015

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

Appearances:
Applicant: Mr. William Hare
First Respondent: Ms. Renee de Gannes Penn

Issues: Application for conditional leave to appeal to Her Majesty in Council

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

Result / Order: Upon the Court accepting the consent order submitted by the parties, it is hereby ordered that:

1. The motion for conditional leave to appeal to Her Majesty in Council is adjourned to the first sitting of the Eastern Caribbean Supreme Court of Appeal in the Territory of the Virgin Islands in January 2016.
2. The appellant shall file written submissions in support of the application, and serve a copy of same on the first respondent, by Friday, 20th November 2015.
3. The first respondent shall file written submissions in opposition to the application and serve a copy of same on the appellant, by Friday 4th December, 2015.
4. The appellant shall file any written submissions in reply, and serve a copy of same on the first respondent, by Thursday, 17th December 2015.
5. There be no order as to costs as the appellant and first respondent agree to bear their own costs in respect of this order.

Reason: Counsel had indicated that the parties were in negotiations and were in agreement concerning the adjournment of the matter and the terms of a consent

order.

Case Name:

**Glen Henley
(Trading as Cane Garden Bay Pleasure and
Water Sports Equipment)**

V

**Poco Loco Enterprises Incorporated
(A Delaware Corporation)**

[BVIHCVAP2015/0007]

Date:

Monday, 28th September 2015

Coram:

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

Appearances:

Applicant: Mr. David A. Penn (the appellant was also present)

Respondent: Mr. William Hare

Issues:

**Application for leave to appeal assessment of
damages – Whether learned master erred in refusing
to hear the applicant on issue of causation –
Application for extension of time to appeal and relief
from sanctions – Whether order being appealed final
order of the court**

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

Oral Judgment or Decision

Result / Order:

**IT IS HEREBY ORDERED:
1. Application for leave is dismissed.
2. Each party to bear their own costs.**

Reason:

An order from an assessment of damages hearing is a

final order of the court and therefore, one which does not require the leave of the court to be appealed, pursuant to the West Indies Associated States Supreme Court (Virgin Islands) Act (Cap. 80, Revised Laws of the Virgin Islands 1991) and the Civil Procedure Rules 2000.

The Court held that, having regard to *Danone Asia PTE Limited et al v Golden Dynasty Enterprise Limited et al* BVIHCVAP2009/0002 (delivered 28th September 2009, unreported) and *Treasure Bay (St. Lucia) Limited v Cage St. Lucia Limited et al* SLUHCVAP2011/0045 (delivered 23rd January 2012, unreported) which state that applications for leave to appeal are really a means of filtering out unmeritorious appeals, inasmuch as this was an instance where no leave to appeal was required at all, it was appropriate for each party to bear its own costs.

Case Name:

Danny Benjamin

v

The Queen

[BVIHCRAP2013/0001]

Date:

Monday, 28th September 2015

Coram:

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

Appearances:

Appellant:

Mr. Patrick Thompson (the appellant was also present)

Respondent:

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

Issues:

**Appeal against conviction and sentence – Wounding
with intent to do grievous bodily harm – Whether**

learned trial judge erred in failing to give jury good character direction in respect of appellant – Whether appellant’s conviction rendered unsafe and unsatisfactory as a result – Whether jury was properly directed on transferred malice – Whether learned trial judge erred in failing to advise jury of statutory and lesser alternative of “inflicting grievous bodily harm” – Whether learned trial judge materially misdirected jury on issue of self defence – Whether count 1 of indictment was defective thus rendering conviction on this count unsafe and unsatisfactory – Whether learned trial judge erred in advising jurors that majority verdict could be delivered by them before time for doing so had properly arisen – Whether sentence imposed was excessive having regard to circumstances of case

Type of Oral
Result/Order
Delivered:

N/A

Result / Order:

It is hereby ordered that:

1. The decision is reserved.
2. The Court will notify the parties when the decision will be delivered.

Case Name:

Ng Man Sun
v
[1] Peckson Limited
[2] Chen Mei Huan

[BVIHCMAP2013/0026]

Date:

Tuesday, 29th September 2015

Coram:

The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Paul Webster, QC, Justice of Appeal
[Ag.]
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of

Appeal [Ag.]

Appearances:

**Appellant /
Respondent:**

Mr. Christopher Parker, QC, with him, Mr. Ian Mann

**Respondents /
Applicants:**

Mr. John McDonnell, QC, with him, Mr. Raymond Davern

Issues:

Ownership of shares – Claim for rectification of share register of 1st respondent company under s. 43 of the BVI Business Companies Act, 2004 (Act No. 16 of 2004, Laws of the Virgin Islands) – Whether it was open to learned trial judge to find that beneficial interest in shares in 1st respondent had been transferred to 2nd respondent – Whether learned judge was entitled to reject appellant's explanation as to why he had transferred legal title in shares to 2nd respondent – Whether shares held on resulting trust for appellant by 2nd respondent – Whether learned trial judge erred in finding on the facts that 2nd respondent was contractual owner of shares in absence of amended pleadings to include claim for ownership in contract – *Nilon Ltd and Another v Royal Westminster Investments SA and Others* [2015] UKPC 2 Privy Council decision dated 21st January 2015 – Application (by respondents to appeal) for interim relief – Whether dispute over ownership of shares can be decided on s. 43 claim for rectification of the register – Whether the claim/appeal in present proceedings rendered nugatory as a result of Privy Council decision – Whether Court of Appeal judgment *per incuriam* – Whether Court of Appeal judgment final – Whether Court *functus officio*

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

N/A

Result / Order:

The matter is adjourned to 2nd October 2015.

Case Name:

Wakima Lettsome

v

The Queen

[BVIHCRAP2012/0010]

Date:

Tuesday, 29th September 2015

Coram:

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

Appearances:

Appellant:

Mr. Patrick Thompson (the appellant was also present)

Respondent:

**Ms. Tiffany Scatliffe, Principal Crown Counsel, with
her, Mr. O'Neil Simpson, Crown Counsel, for the
Director of Public Prosecutions**

Issues:

**Appeal against conviction – Wounding with intent to
cause grievous bodily harm – Identification – Whether
learned trial judge: (i) failed to give jury full Turnbull
direction; (ii) failed to refer to evidence of appellant or
his witness; (iii) misdirected jury on time required to
give majority verdict – Appeal against sentence –
Whether sentence excessive**

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

N/A

Result / Order:

- 1. The matter is adjourned to Friday, 2nd October 2015
in the meantime the Crown shall endeavor to
produce a copy of the indictment and sentencing
guidelines and any other material relating to the
prior offence.**

Case Name:

André Penn

V
The Queen

[BVIHCRA2014/0006]

Date: Tuesday, 29th September 2015

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant: Mr. Jack Husbands (the appellant was also present)

Respondent: Mr. Wayne Rajbansie, Director of Public Prosecutions

Issues: For directions – Appeal against conviction – Indecent assault – Unlawful sexual intercourse with girl under age of 13 – Buggery – Widespread and sustained adverse publicity over extended period in relation to case – Whether learned trial judge failed to ensure that measures were taken to guarantee that retrial of appellant was fair and not oppressive – Whether conviction unsafe as a result – Jury selection – Whether jury members were selected in accordance with laws of Virgin Islands – Fairness of retrial – Whether statements made by learned Director of Public Prosecutions during retrial impacted on fairness of retrial – s. 146(1)(c) of Evidence Act, 2006 (Act No. 15 of 2006, Laws of the Virgin Islands) – Whether learned trial judge failed to warn jury about how evidence of virtual complainant may have been affected by self interest – Whether learned trial judge failed to direct jury on fact that there was no corroboration of virtual complainant’s account of events – Whether learned trial judge failed to put or to put adequately defence to jury in summing up

Type of Oral Result/Order Delivered: Directions

Result / Order: It is ordered and directed as follows:
1. This appeal be consolidated with Criminal Appeal

- No. BVIHCRA2015/0002 between the parties;
2. The appellant do file and serve an amended notice of appeal in this appeal and a consolidated skeleton in both appeals by 4:00 p.m. on Tuesday, 10th November 2015;
 3. The Director of Public Prosecutions do file and serve a consolidated skeleton by 4:00 p.m. on Tuesday, 8th December 2015;
 4. The appellant herein do file and serve a consolidated skeleton in reply, if so advised, by 4:00 p.m. on Friday, 18th December 2015; and
 5. The consolidated appeals be set for hearing during the next sitting of the court in the Virgin Islands on either 14th or 15th January 2016 with an approximate hearing time of 4 hours.

Case Name:

**The Queen
v
Andre Penn**

[BVIHCRA2015/0002]

Date:

Tuesday, 29th September 2015

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

Appellant: Mr. Wayne Rajbansie, Director of Public Prosecutions
Respondent: Mr. Jack Husbands (the appellant was also present)

Issues:

For directions – Appeal (by Crown) against sentence imposed on appellant – Indecent assault – Unlawful sexual intercourse with girl under age of 13 – Buggery – Sentence of 15 years imposed with total discount of 5 years for delay giving final sentence of 10 years imprisonment – Whether sentence in totality unduly lenient – Whether learned trial judge erred in law as to his powers of sentencing

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

Directions

Result / Order:

It is ordered and directed as follows:

- 1. This appeal be consolidated with Criminal Appeal No. BVIHCRA2014/0006 between the parties;**
- 2. The respondent do file and serve an amended notice of appeal in this appeal and a consolidated skeleton in both appeals by 4:00 p.m. on Tuesday 10th November 2015;**
- 3. The Director of Public Prosecutions do file and serve a consolidated skeleton by 4:00 p.m. on Tuesday, 8th December 2015;**
- 4. The respondent herein do file and serve a consolidated skeleton in reply, if so advised, by 4:00 p.m. on Friday, 18th December 2015; and**
- 5. The consolidated appeals be set for hearing during the next sitting of the court in the Virgin Islands on either 14th or 15th January 2016 with an approximate hearing time of 4 hours.**

Case Name:

**Melvin Rymer
v
Clearlie Todman-Brown
[BVIHCVAP2011/0028]**

Date:

Tuesday, 29th September 2015

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

Appellant:

Ms. Mishka Jacobs (the appellant, Mr. Melvin Rymer was also present)

Respondent:

Mr. Jamal Smith (the respondent, Ms. Todman-Brown was also present)

Issues:

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

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

N/A

Result / Order:

It is hereby ordered:
Having regard to the order of the Court of Appeal made on 22nd September 2015 allowing an extension of time to the respondent for filing skeleton submissions limited to 14 days, the hearing of this appeal is adjourned to the next sitting of the Court in the Virgin Islands during the week commencing 11th January 2015.

STATUS HEARING

Case Name:

The Commissioner of Police

V
[1] Lester Terrence DeCastro
[2] Isaac Bellony Caena

[BVIMCRAP2013/0016]

Date: Tuesday, 29th September, 2015

Coram: The Hon. Dame Janice M. Pereira, Chief Justice

Appearances:

Appellant: Ms. Tiffany Scatliffe, Principal Crown Counsel, with her, Mr. Garcia Kelly, Crown Counsel

Respondents: The 1st respondent, Mr. Lester Terrence DeCastro, in person
No appearance of the 2nd respondent

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

Type of Oral Result/Order Delivered: Directions

Result / Order:

1. The Magistrates' Court is to furnish a transcript of the proceedings in relation to the complaints which are the subject of these appeals by Friday, 30th October, 2015.
2. The appellant is to file and serve skeleton arguments in support of the appeal by Monday, 30th September 2015.
3. The respondent is to file and serve skeleton arguments by Wednesday, 30th September 2015. Thereafter the appeal shall be listed for hearing before the Court.

Case Name:

Keno Allen

v

The Queen

[BVIHCRAP2013/0005]

Date:

Tuesday, 29th September 2015

Coram:

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

Appearances:

Appellant:

Mr. David Penn

Respondent:

Ms. Tiffany Scatliffe, Principal Crown Counsel, with her, Mr. Garcia Kelly, Crown Counsel

Issues:

Status of matter – Appeal against conviction – Robbery – Attempting to choke – Indecent assault

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

Directions

**Result and
Reason:**

- 1. The record of appeal having being prepared and served on parties, the applicant is directed to file and serve skeleton arguments along with authorities to be relied upon by 30th October 2015.**
- 2. Respondent shall file and serve skeleton arguments along with authorities to be relied upon by 30th November 2015.**
- 3. Thereafter, the appeal shall be listed for hearing.**

Case Name:

Commissioner of Police

v

Carlton Herbert

[BVIMCRAP2014/0011]

Date: Tuesday, 29th September, 2015

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

Appearances:

Appellant: Ms. Tiffany Scatliffe, Principal Crown Counsel, with her, Mr. Garcia Kelly, Crown Counsel

Respondent: Mr. Patrick Thompson holding papers for Ms. Marie-Lou Creque

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

Type of Oral Result/Order Delivered: Directions

Result / Order:

1. The magistrate shall prepare and furnish the transcript of the proceedings below by 30th October 2015.
2. The appellant shall file and serve skeleton arguments in support of the appeal by 30th November 2015.
3. The Respondent shall file and serve skeleton arguments on or before 30th December 2015.
4. Thereafter, the appeal shall be listed for hearing.

Case Name:

[1] Henry Osmond Hodge
 [2] Reuben Rufus Hodge
 [3] Elliot McKinley Hodge
 v
 [1] Sylvia Hodge
 [2] Gordon M. Phillip
 [3] Ruby Jacinta Phillip

 [BVIHCVAP2012/0030]

Date:	Tuesday, 29th September 2015
Coram:	The Hon. Dame Janice M. Pereira, DBE, Chief Justice
Appearances:	
Appellants:	Ms. Patricia Archibald-Bowers (for the 1st appellant)
Respondents:	No appearance
Issues:	Status of matter – Whether learned judge erred in finding that there was agreement between parties for settlement of proceedings BVIHCV2004/0065
Type of Oral Result/Order Delivered:	Directions
Result / Order:	1. The appeal shall be listed for status hearing at the next sitting of the Court of Appeal in the Virgin Islands during the week commencing 11th January 2016. 2. The applicant shall serve notice of the status hearing on the appellant to attend during the week commencing 11th January 2016 and provide to the Court proof of service of such notice.
Reason:	Although the matter had previously been struck out because there had been no appearance of either party when the matter was called (despite service of the notice of hearing on the parties) the above order was subsequently made since the previous one striking out the matter had not been perfected as yet.
Case Name:	[1] Sylvia Maduro-Dale [2] Lucia Chalwell v The Registrar of Lands

[BVIHCVAP2010/0022]

Date: Tuesday, 29th September 2015

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

Appearances:

Appellants: Ms. Patricia Archibald-Bowers

Respondent: Ms. Isis Potter, Crown Counsel, holding papers for Ms. Jo-Ann Williams-Roberts, Solicitor General

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

Type of Oral Result/Order Delivered: Directions

Result / Order:

1. The parties are to enquire of the notes in the proceedings held before the Registrar of Lands leading to the Registrar's decision on 12th September 2008 which gave rise to the appeal to the High Court pursuant to section 174 of the Registered Land Act.
2. The parties are to report of their findings at the next status hearing commencing during the week of 11th January 2016.

Case Name:

Titan Oil Storage Investment Limited
v
[1] Saturn Storage Limited
[2] Titan Group Investment Limited

[BVIHCVAP2012/0022]

Date: Tuesday 29th September, 2015

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

Appearances:	Appellant: Mr. Richard Evans Respondents: Mr. Grant Carroll (for the 1st respondent) Mr. David Welford (for the 2nd respondent)
Issues:	Stay of appeal – Joint liquidators appointed over 2nd respondent by order of learned judge in court below – Whether learned judge erred in appointing liquidators – Whether Originating Application seeking appointment of liquidators was abuse of process on basis of it having been made by 1st respondent to obtain collateral advantage rather than for benefit of class of creditors – Whether 1st respondent had locus standi to bring Originating Application – Procedural unfairness – Whether learned judge erred in refusing to grant adjournment
Type of Oral Result/Order Delivered:	Oral Judgment or Decision
Result / Order:	The appeal is delisted with liberty to any of the parties to resort same to the hearing list.
Case Name:	In the Matter the Guardianship of Infants Cap 270 CFD v ZBC [BVIHCVAP2014/0003]
Date:	Tuesday, 29 th September, 2015
Coram:	The Hon. Dame Janice M. Pereira, DBE, Chief Justice

Appearances:

Appellant: No appearance

Respondent: No appearance

Issues:

Status of matter – Custody of minor children – Whether learned trial judge erred in dismissing appellant’s application to strike out respondent’s claim in court below for sole legal custody / parental responsibility of minor children – Whether learned trial judge erred in not giving reasons for dismissing appellant’s application – Whether learned trial judge erred in holding that legal custody / parental responsibility can be lost and/or taken away from the mother and transferred to an unmarried father – Weight given to fact that respondent is unmarried father – Whether mother is sole legal custodian as a result of father being unmarried – Whether there is arguable basis for granting sole legal custody to respondent – Whether learned trial judge erred in law in using court’s inherent jurisdiction to make minor children wards of the court in application for legal custody / parental responsibility – Limits of court’s jurisdiction to appoint guardian – Whether such jurisdiction limited to cases where child has no parent with legal custody / parental responsibility

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

Oral Judgment or Decision

**Result / Order:
& Reason:**

A notice of discontinuance having been filed, the appeal is accordingly dismissed.

Case Name:

Farnum Place, LLC

v

**[1] Joanna Lau and Kenneth Kryss
(as joint liquidators of Fairfield Sentry Limited
(In Liquidation))
[2] Fairfield Sentry Limited (In Liquidation)**

[BVIHCVAP2012/0006]

Date: Tuesday, 29th September, 2015

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

Appearances:

Appellant: No appearance

Respondents: No appearance

Issues: Status of matter – Discontinuance of appeal

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

Result / Order & Reason: A notice of discontinuance having been filed, the appeal is accordingly dismissed.

APPLICATIONS AND APPEALS

Case Name:

[1] Yates Associates Construction Company Ltd
[2] Christina Yates
v
Oil Nut Bay Inc

[BVIHCVAP2015/0004]

Date: Wednesday, 30th September 2015

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Paul Webster, QC, Justice of Appeal
[Ag.]

Appearances:

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

Respondent: Mr. James Morrin, with him, Mr. Gerard Farara, QC

Issues:

Construction agreement – Fixed contract – Whether learned judge erred in finding that agreement between first appellant and respondent was fixed contract – Whether learned judge improperly exercised her discretion in determining whether work could be regarded as variation or extra – Sum awarded to respondent in respect of costs of remedying defects in workmanship – Whether learned judge erred in arbitrarily assigning value of \$100,000.00 for remedial works carried out on construction project having found that respondent failed to prove its special damages claim with respect to amount of remedial works to be done on project – Failure to grant second appellant costs on dismissal of respondent's defamation claim for damages against second appellant – Whether learned judge's finding that respondent was not in breach of its obligations to allow appellant a reasonable opportunity to rectify any defects in workmanship was supported by the evidence

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

N/A

Result / Order:

Judgment reserved.

Case Name:

Sheila Callwood-Schulterbrandt

v

[1] Lucien Callwood

[2] Urman Callwood

[3] Gertrude Callwood-Coakley

[4] Wendell Callwood

[BVIHCVAP2012/0009]

Date: Wednesday, 30th September 2015

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Paul Webster, QC, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. Dave Marshall

Respondents: Ms. Patricia Archibald-Bowers

Issues: Land ownership – Whether respondents were entitled to be registered as proprietors of land by prescription
– Exclusive possession of land – Equivocal acts of user

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

Result / Order:

1. The appeal is allowed.
2. The order of the judge that the respondents are entitled to be the registered proprietors of parcel 25 is set aside and the order instructing the Registrar to do so.
3. The appellant is to remain on the register as the registered proprietor in respect of parcel 25. The prescriptive title dated 28th September 2009 and the instrument number 1871 of 2009, entered on the register in respect to parcel 25 be removed.
4. Costs to the appellant in the sum of \$3,500.00.

Reason:

In this appeal, the appellant sought an order to set aside the findings of the judge below, who held that the respondents had acquired ownership of “parcel 25” by prescription and declared that they were the rightful owners.

The critical issue in this appeal was whether the judge erred in finding that the respondents had been in

exclusive and uninterrupted possession of parcel 25 for a period of 20 years, solely on the basis of evidence presented to the court below that at some point in the past they burned coal on the land.

The Court was of the view that at paragraph 66 of the judgment, the judge made a very important finding, where she stated that with the exception of the parcels where the respondents constructed their buildings, the acts of the user on the rest of the land which included cultivation, animal rearing, burning of coal, fencing for cattle etc. and rearing of goats were equivocal at best. 'They [did] not evince an intention that would have been manifest to the owner, if he had attended upon the land that a trespasser was in possession and intended to maintain possession against the whole world including the owner.' This finding, in the Court's view, was inconsistent with the conclusion arrived at by the judge, and did not support the conclusion. The acts of the user in respect to parcel 25 from the evidence was simply of coal burning sometime in the past. This by itself would not attract prescriptive possession. The finding by the judge that the acts of the user were equivocal at best, in itself denied the obtaining of prescriptive rights. The Court was therefore of the view that the judge erred in the conclusion that she reached.

Case Name:

Codel Limited

v

Lafinex Limited

[BVIHCMAP2015/0006]

Date:

Wednesday, 30th September 2015

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. Robert Nader
Respondent: Ms. Rosalind Nicholson

Issues:

Insolvency – Failure by respondent to set aside statutory demand within required time frame – Application by appellant to appoint liquidator over respondent – Appellant’s application refused by learned judge – Whether learned judge erred in finding that evidence of Mr. Soteris Flourentzos was sufficient to explain and excuse respondent’s failure to apply to set aside statutory demand in circumstances where learned judge had found that demand was validly served – Whether circumstance of failure by respondent to apply to set aside statutory demand precludes exercise of a discretion by trial judge under s.167 of Insolvency Act, 2003 (Act No. 5 of 2003 of the Laws of the Virgin Islands) which section deals with the Court’s powers on hearing of an application for the appointment of a liquidator – Whether by reason of respondent’s failure to set aside statutory demand: (i) respondent was required to discharge burden of disproving presumption of insolvency established in s. 8 of Insolvency Act, 2003 which requires higher threshold than merely establishing “a substantial dispute” as required by section 157 of the Act and/or (ii) respondent should have been confined to making submissions as to whether or not statutory demand disclosed on its face existence of debt that was “due and payable” at date of presentation of demand – Whether appellate court entitled to interfere with trial judge’s exercise of discretion

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

Oral Judgment or Decision

Result / Order:

It is hereby ordered:
1. The appeal is dismissed.
2. Costs are awarded to the respondent in the amount of 2/3 of the sum awarded on the assessment of the application below.

Reason:

This was an appeal against the trial judge's refusal to appoint a liquidator over Lafinex. The complaint was that the learned trial judge treated the application to appoint a liquidator as if it were an application to set aside a statutory demand in that he accepted what the appellant said was a "bare excuse" as to why the respondent company had not set aside the statutory demand. The appellant contended that the learned trial judge ought to have applied a higher standard or a higher test than would be applied for an application to set aside a statutory demand.

Whilst it is true that where a demand is served, and has not been successfully set aside, a presumption of statutory insolvency arises, in the instant case the learned judge accepted that the demand served upon the registered agent did not in fact reach the company until the time for applying had already elapsed. By then, events had been overtaken in that an application to appoint liquidators had been made.

Section 167 of the Insolvency Act, 2003 (Act No. 5 of 2003 of the Laws of the Virgin Islands) gives the court a broad discretion. It states that the court, on the hearing of an application for the appointment of a liquidator, may, (pursuant to subsection (b)) 'dismiss the application, even if a ground on which the Court could appoint a liquidator has been proved'. So it imports to the Court a broad discretion.

It is clearly up to the trial judge to determine how that discretion is to be exercised and this can only be done on a case by case basis taking account of the facts and circumstances presented to the judge. Here, the learned trial judge was satisfied that the company had no knowledge of the statutory demand and there was evidence before him that the dispute was not frivolous and indeed there was evidence of a dispute over the debt giving rise to the statutory demand, to show that it was not a loan.

At pages 65-66 of the transcript the learned trial judge, beginning at line 8, says this:

"Mr. Nader complains that there is no hard

evidence from the other side to show that these were investments repayable out of assets when realised rather than loans. But it seems to me that the position on each side is confused. Neither account is satisfactory and it seems to me, therefore, that authority requires that I should not wind this company up in a situation where so much cries out ... to be answered. It may be that the Applicant is correct but as has been said before, when a dispute which can't be treated as frivolous or at any rate near frivolous is raised by a company which is the subject of an originating application, the Court should not make an Order on it.

“I am quite satisfied that there is sufficient uncertainty here to mean that it would be wrong, a wrong exercise of discretion for the Court to wind up Lafinex and for those reasons the Application is dismissed.”

Based on the evidence that was before the learned judge, evidence which he accepted, the approach which this appellate court must take is whether or not the exercise of the judge's discretion was such that it is warranted to be interfered with. The principles on an application of this nature in determining whether to disturb the learned judge's discretion are the same as the well known principles laid down in *Dufour and Others v Helenair Corporation Ltd and Others* (1996) 52 WIR 188 and those cases which follow such as *Charles Osenton & Co. v Johnston* [1941] 2 All ER 245 at 250 and *Edy Gay Addari v Enzo Addari* (BVIHCVAP2005/0002 (delivered 27th June 2005, unreported)).

In *Dufour* (at pp. 190-191) the Court said:

“We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or

being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

In the case of *Charles Osenton & Co.* (at p. 250) Viscount Simon LC stated:

"The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified."

The Court stated that in this case it was not satisfied that any good reason had been shown for interfering with the way in which the learned judge exercised his discretion in refusing to appoint a liquidator in the circumstances.

The timeline for applying to set aside statutory demand is rather strict. Section 167 of the Insolvency Act, 2003 gives the judge a discretion which is not fettered by the regime to set aside. It is still left up to the trial judge to take all the relevant factors into consideration and determine whether it is correct in all the circumstances to appoint liquidators. The Court stated that in this case it could not say that the way in which the learned judge exercised his discretion was wrong or his decision exceeded the generous ambit within which reasonable disagreement was permitted.

The appeal was dismissed for those reasons.

Case Name:

Petra Cooper (nee Klvacova)

V

Peter Cooper

[BVIHCVAP2012/0010]

Date:

Wednesday, 30th September 2015

Coram:

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

The Hon. Mde. Gertel Thom, Justice of Appeal

The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal [Ag.]

Appearances:

Appellant:

Mr. Lewis Hunte, QC holding papers for Ms. Marie-Lou Creque

Respondent:

No appearance

Issues:

Whether learned judge erred in holding that sum of £50,000.00 amounted to money loaned to appellant by the respondent which ought to be repaid

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

Directions

Result / Order:

- 1. Due to the emergency experienced by counsel for the appellant, the death of a parent, the hearing of this appeal, on the request of counsel for the appellant, is hereby adjourned to the next sitting of the Court in the Virgin Islands scheduled during the week commencing 11th January 2016.**
- 2. The Registrar of the Court is hereby directed to serve upon the respondent at the email address provided, petercoopsey@hotmail.com, a notice of hearing as contained in this order together with a copy of the said order.**
- 3. Same to be effected no later than 16th October**

2015.

Case Name:

**Jinpeng Group Limited
v
Peak Hotels and Resorts Limited**

**[BVIHCMAP2014/0025]
[BVIHCMAP2015/0003]**

Date:

Thursday, 1st October 2015

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Paul Webster QC, Justice of Appeal [Ag.]
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. Antony Zacaroli, QC, with him, Mr. Matthew Abraham

Respondent:

Mr. John Brisby, QC, with him, Mr. Alexander Cook

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

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

N/A

Result / Order:

**It is hereby ordered that:
1. Judgment is reserved**

Case Name:

**Nicholas Tranquille
v
The Commissioner of Police
[BVIHCVAP2015/0011A]**

Date:

Friday, 2nd October 2015

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal [Ag.]**

Appearances:

Applicant:

Mr. Ruggles Ferguson

Respondent:

**Ms. Giselle Jackman-Lumy, Senior Crown Counsel,
with her, Ms. Miglisa Cupid, Crown Counsel**

Issues:

Leave to appeal – Respondent refused to waive requirement that applicant sit 2012 examination for promotion to rank of sergeant – Application for leave to appeal decision of learned judge refusing applicant leave to apply for judicial review of decision of respondent – Whether learned judge misdirected herself and erred in law in arriving at conclusion that

respondent did not take any irrelevant considerations into account in making his decision to refuse applicant's request for waiver of requirement – Whether learned judge misdirected herself and erred in law in arriving at conclusion that respondent took into account reason why applicant did not sit examination for promotion to rank of sergeant – Whether learned judge erred in arriving at conclusion that respondent's decision denying applicant request for waiver was not irrational

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

Oral Judgment or Decision

**Result and
Reason:**

1. Leave to appeal is granted.
2. The appellant is to file an appeal for judicial review within 14 days of this order and thereafter in accordance with the CPR Rules 2000.
3. No order as to costs.

Reason:

The Court was of the view that the appellant had met the threshold for proving a prima facie case based on the evidence before it.

Case Name:

**Earl Hodge
v
[1] The Commissioner of Police
[2] The Senior Magistrate
[BVIHCVAP2015/0010]**

Date:

Friday, 2nd October 2015

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal [Ag.]**

Appearances:	Applicant: Mr. Patrick Thompson Respondents: Ms. Giselle Jackman-Lumy, Senior Crown Counsel, held papers for Ms. Natalie Sandiford, Senior Crown Counsel
Issues:	Application for leave to appeal against learned judge's refusal of application for leave to file claim for judicial review – Forfeiture – Procedural fairness – Whether rules of natural justice breached – Applicant not given notice of forfeiture proceedings instituted by first respondent concerning money seized by police from his home – Applicant in custody at H.M. Prison at time order of forfeiture proceedings made – Application made by applicant for leave to apply for judicial review
Type of Oral Result/Order Delivered:	Oral Judgment or Decision
Result / Order & Reason:	The matter is removed from the list as the matter is not in a state to be prosecuted.
Case Name:	Glenroy Pierre v Commissioner of Police [BVIMCRAP2014/0008]
Date:	Friday, 2nd October 2015
Coram:	The Hon. Mr. Davidson K. Baptiste, Justice of Appeal The Hon. Mde. Louise E. Blenman, Justice of Appeal The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal [Ag.]
Appearances:	Appellant: Mr. Patrick Thompson

Respondent:	Ms. Tiffany Scatliffe, Principal Crown Counsel, with her, Mr. O'Neil Simpson, Crown Counsel
Issues:	Appeal against sentence – Importation of a controlled drug – Offering to supply controlled drug – Possession of controlled drug – Illegal entry
Type of Oral Result/Order Delivered:	N/A
Result / Order:	Judgment reserved.
Case Name:	Ng Man Sun v [1] Peckson Limited [2] Chen Mei Huan [BVIHCMAP2013/0026]
Date:	Friday, 2nd October 2015
Coram:	The Hon. Mr. Davidson K. Baptiste, Justice of Appeal The Hon. Mr. Paul Webster, QC, Justice of Appeal [Ag.] The Hon. Mde. Joyce Kentish-Egan, QC, Justice of Appeal [Ag.]
Appearances:	
Appellant / Respondent:	Mr. Jonathan Addo
Respondents / Applicants:	Mr. John McDonnell, QC, with him, Mr. Raymond Davern (via teleconference)
Issues:	Ownership of shares – Claim for rectification of share register of 1st respondent company under s. 43 of the BVI Business Companies Act, 2004 (Act No. 16 of

2004, Laws of the Virgin Islands) – Whether it was open to learned trial judge to find that beneficial interest in shares in 1st respondent had been transferred to 2nd respondent – Whether learned judge was entitled to reject appellant’s explanation as to why he had transferred legal title in shares to 2nd respondent – Whether shares held on resulting trust for appellant by 2nd respondent – Whether learned trial judge erred in finding on the facts that 2nd respondent was contractual owner of shares in absence of amended pleadings to include claim for ownership in contract – *Nilon Ltd and Another v Royal Westminster Investments SA and Others* [2015] UKPC 2 Privy Council decision dated 21st January 2015 – Application (by respondents to appeal) for interim relief – Whether dispute over ownership of shares can be decided on s. 43 claim for rectification of the register – Whether the claim/appeal in present proceedings rendered nugatory as a result of Privy Council decision – Whether Court of Appeal judgment *per incuriam* – Whether Court of Appeal judgment final – Whether Court *functus officio*

Type of Oral
Result/Order
Delivered:

Oral Judgment or Decision

Result / Order:

1. The appeal is allowed and it is declared that Chen Mei Huan (“the second respondent”) holds the 40,000 shares in Peckson Limited (“the first respondent”) (“the Shares”) registered in her name on trust for Ng Man Sun (“the appellant”);
2. The second respondent do forthwith execute a share transfer of the Shares in favour of the appellant;
3. Within 7 days, the register of members of the first respondent be rectified by the first respondent to show the appellant as the registered shareholder of the Shares or, in the event that the register has been lost or destroyed, the first respondent shall draw up a new register of members of the first respondent reflecting the appellant’s ownership of the Shares as representing 80% of all the shares issued in the first respondent and such register shall stand as the definitive register of members;

4. In the event of non-compliance with the order in paragraph 2 and/or paragraph 3 the Registrar of Companies is hereby appointed to do the acts therein ordered to be done;
5. The second respondent do pay the appellant's costs of the appeal and at first instance, such costs to go to detailed assessment if not agreed;
6. The appellant to file written submissions in 14 days in support of his application for interim payment of costs on account and the respondent do have 14 days within which to file its written submissions in response.
7. The appellant abide by terms equivalent to those expressed in the stop notice dated 24th August 2012 and undertakes not to transfer, sell, charge, dispose of or otherwise deal with the Shares as registered in his name until determination of the respondents' application for leave to appeal to the Privy Council.

Case Name:

[1] Wendell Anthony

[2] Marvin Robinson

v

Commissioner of Police

[BVIMCRAP 2014/0016]

Date:

Friday, 2nd October 2015

Coram:

**The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

Appellants:

Mr. Hugh Wildman

Respondent:

**Ms. Tiffany Scatliffe, Principal Crown Counsel, with
her, Mr. Garcia Kelly, Crown Counsel, for the Director
of Public Prosecutions**

Issues:

Appeal against conviction – Assault causing actual

bodily harm – Whether appellants should be allowed to proceed also on additional grounds filed without leave one day prior to day’s hearing – Whether appellant should be allowed to rely on additional affidavits filed without leave of the court

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

Directions

Result / Order:

Having heard the application by the appellants and having heard the submissions of both counsel for the appellants and counsel for the Crown, it is hereby ordered:

1. Leave is granted to the appellants to file and serve two additional grounds of appeal being:

1) that a major witness for the prosecution a Denston Johnney, is a person of previous conviction of Criminal Trespass contrary to section 74(2) of the Criminal Code 1997 (as amended). Such evidence the Prosecution was under a duty to establish and their failure to do so is fatal to the conviction.

2) the failure of the learned magistrate to record the evidence that transpired at the visit of the locus in quo is a material irregularity rendering the conviction of the Appellants unsafe.

The two new grounds will be 7 and 8.

2. The affidavits filed by the appellants on 22 September are deemed to be properly filed. The respondent has leave to file affidavits in reply on or before 30th October 2015. The appellants shall file and serve written submissions in relation to the two additional grounds on or before the 7th November 2015. The respondents shall file and serve submissions in response on or before 7th December 2015.

3. The parties may by agreement amend the record of appeal if necessary on or before 18th December 2015. Hearing of this appeal is adjourned to the next sitting of the court of appeal in the Territory of the Virgin Islands commencing on the 11th day of January 2016.

Case Name:

**[1] Minco Enterprises Limited
[2] Norvalo (Overseas) Limited
[3] Mikhail Golub**

**Appellants in
BVIHCMAP2015/0013**

AND

**[4] Ian Smith
[5] Ruma Devi Anuradha Kissoondharry
[6] Attendus Trust Company AG (formerly
Attendus Treuhandgesellschaft)
[7] Curatus Trust Company (Mauritius) Limited
[8] Curatus Nominee Services One Limited**

**Appellants in
BVIHCMAP2015/0014**

v

**[1] Storca Intertrans Corp
[2] Evgeny Mulyukov**

Respondents

**[BVIHCMAP2015/0013]
[BVIHCMAP2015/0014]**

Date:

Friday, 2nd October 2015

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Paul Webster, QC, Justice of Appeal**

[Ag.]

Appearances:

Appellants:

Mr. Scott Cruickshank and Mr. Matthew Freeman of Lennox Patton for 1st and 2nd appellants (1st and 2nd defendants below) (Minco parties)

Mr. Robert Nader of Forbes Hare for the 3rd appellant (3rd defendant below) (Mikhail Golub party)

Mr. Andrew Willins and Ms. Olwyn Barry of Appleby for the intended appellants (4-8th defendants below) (Ian Smith/Attendus Trust parties)

Respondents:

Ms. Arabella di Iorio and Mr. David Welford (claimant/applicant below) (Storca parties)

Issues:

Application for directions – Appeal against order encapsulated in email to continue injunction

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

Directions

Result / Order:

It is hereby directed:

1. The two appeals involving the parties Minco Enterprises Limited; Norvalo (Overseas) Limited, Mikhail Golub, Storca Intertrans Corp, Evgeny Mulyukov, Ian Smith, Ruma Devi Anuradha Kissoondharry, Attendus Trust Company AG, Curatus Trust Company (Mauritius) Limited, Curatus Nominee Services One Limited those appeals are all consolidated;
2. The record of appeal filed in 13 / 2015 shall be the record in all two appeals;
3. The consolidated appeals are fixed for hearing in St. Lucia for Monday 16th November 2015;
4. The Smith / Attendus Trust parties to file and serve skeleton arguments by Tuesday 6th October 2015;
5. The Storca parties to file and serve skeleton submissions by Wednesday 28th October 2015 by 3:30 p.m.;
6. The Minco parties, Golub parties and the Smith /

Attendus Trust parties to reply if necessary by 4th
November 2015 by 3:30 p.m.

Case Name: **Delta Petroleum (Caribbean) Limited**

V

[1] Rene Montero Encarnacio

[2] Christobalina Vinzen

[BVIMCVAP2014/0002]

Date: **Friday, 2nd October 2015**

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

Appearances:

Appellant: **Mr. Terrance Neale, with him, Ms. Elizabeth Ryan**

Respondents: **Both respondents appearing in person and unrepresented**

Issues: **Appeal against learned magistrate's finding of negligence – Whether learned magistrate erred in finding that appellant (as employer) was liable for negligence of employee – Employer's vehicle used by employee without authorisation during course of commission of criminal act which resulted in damage to third party – Whether act could not have been within contemplation of employer and was therefore not foreseeable – Whether learned magistrate erred in holding that appellant owed employee and third party duty of care although the employee was acting outside scope of his employment and injury complained of was not one which could have been reasonably foreseen by appellant – Whether learned magistrate misapplied principles in *Donoghue v Stevenson* [1932] AC 562 in holding that the criminal act allegedly committed by the employee outside the scope of his employment made appellant liable in negligence –**

Whether learned magistrate was wrong to hold that appellant could still be liable in negligence despite finding that vicarious liability was irrelevant to circumstances of the matter

Type of Oral
Result/Order
Delivered:

Oral Judgment or Decision

Result / Order:

It is hereby ordered:

1. The appeal is allowed and the order of the learned magistrate is set aside.
2. No order on costs.

Reason:

The Court stated that having reviewed the record of appeal, the evidence in the Magistrate's Court and the decision of the magistrate, as well as the submissions on appeal made by the appellant, Delta Petroleum (Caribbean) Limited, and having also considered the submissions of the respondents, it was of the view that the learned magistrate erred when he found that the appellant was negligent and liable to pay the respondent \$8,000.00. The Court accepted the submissions made by the appellant.

The Court further stated that appellant having indicated that it was not seeking an order for costs either in the Court of Appeal or in the court below, no order was made as to costs.

Case Name:

Wakima Lettsome

v

The Queen

[BVIHCRAP2012/0010]

Date:

Friday, 2nd October 2015

Coram:

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

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

Appearances:

Appellant: Mr. Patrick Thompson (the appellant was also present)

Respondent: Ms. Tiffany Scatliffe, Principal Crown Counsel, with her, Mr. O'Neil Simpson, Crown Counsel, for the Director of Public Prosecutions

Issues:

Delivery of oral judgment – Appeal against conviction
– Wounding with intent to cause grievous bodily harm
– Identification – Whether learned trial judge: (i) failed to give jury full Turnbull direction; (ii) failed to refer to evidence of appellant or his witness; (iii) misdirected jury on time required to give majority verdict – Appeal against sentence – Whether sentence excessive

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

Oral Judgment or Decision

Result / Order:

It is hereby ordered:

2. The appeal against conviction is dismissed.
3. The appeal against sentence is allowed to the extent that the sentence of 20 years is varied and a sentence of 16 years is substituted.

Reason:

The Court held that having reviewed the record of appeal, while it agreed that the learned judge did not remind the jury of all of the details of the evidence of the appellant and his witness, it agreed with the submission of learned counsel for the Crown that the learned judge had accurately summarised the evidence of the appellant and his witness.

The appellant's defence was simple and straightforward. The Court stated that when the summation is read, there could be no doubt that the learned judge, in a clear and succinct manner, put both the nature of the defence and a summary of the evidence in support of the defence to the jury. The

Court was therefore not persuaded that the fact that the learned judge did not remind the jury more fully of the details of the evidence for the appellant would have cast doubt on the safety of the conviction: *Arthurs v Attorney-General for Northern Ireland* (1971) 55 Cr App R 161 and *Nicholls v R* [2000] All ER (D) 2305 followed.

It is well-settled that where the identification of an accused is in issue, then the learned judge is required to give a Turnbull direction. This is essentially what is also required by section 112 of the Evidence Act, 2006 (Act No. 15 of 2006, Laws of the Virgin Islands).

A trial judge, in directing a jury along the Turnbull guidelines is not required to use a particular set of words. As stated in *Mark France and Rupert Vassel v R* [2012] UKPC 28, the direction must comply with the sense and spirit of the Turnbull guidelines and, in this case, section 112. The learned judge directed the jury on various occasions that they could only convict the appellant if they accepted the evidence of the virtual complainant – if they felt sure that he was not mistaken in his identification of the appellant. The learned judge specifically directed the jury (at page 105) of the need to exercise special caution when considering the evidence of the virtual complainant of his recognition of the appellant. The judge further explained to the jury that experience has shown that numerous witnesses who were convinced of their recognition have made mistakes. He then warned the jury that unless they were sure that the virtual complainant's recognition of the appellant was correct and accurate they could not convict the appellant. He also directed them to consider carefully the circumstances in which the recognition was made.

The Court held that when the summation is considered in its entirety, the learned judge did comply with the sense and spirit of the Turnbull guidelines and section 112 of the Evidence Act, 2006. The Court was also of the opinion that paragraphs (g) and (h) of section 112 (which deal with the court's duty to identify to the jury evidence capable of supporting the identification and evidence which might appear to support the identification but which does not in fact

have that quality) are only engaged where there is evidence of that nature.

Among the aggravating factors identified by the learned judge was that this was an unprovoked use of a firearm at a time when the appellant was on a bond to keep the peace for 2 years, having been found guilty by a jury of the offence of inflicting grievous bodily harm (albeit the weapon used on that occasion was a piece of wood). The Court was of the view that the appellant had shown a flagrant and blatant disregard of the law and such conduct cannot be condoned by the court. The court must show its abhorrence to such behaviour.

While the court was of the view that a sentence of 20 years was excessive having regard to all of the circumstances, it held that a sentence of 16 years would meet the justice of this case.