

COURT OF APPEAL SITTING
TERRITORY OF THE VIRGIN ISLANDS
12th – 16th January 2015

JUDGMENTS

Case Name:

[1] WANG ZHONGYONG
[2] LIN HUI
[3] ZHU YAQING
[4] GONG YUDA
[5] GAO YUNTAI
[6] LU YIMIN
[7] ZHU MINGXING
[8] QIU JIAJUN

v

[1] UNION ZONE MANAGEMENT LIMITED
[2] JIN XIAOYONG
[3] WEN LIMING
[4] MA GUOMEI

[BVIHCMAP2013/0024]

Date:

Monday, 12th January 2015

Coram:

The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. C. Dennis Morrison, QC, Justice of Appeal [Ag.]

Appearances:

Appellants: Mr. Robert Christie

Respondents: Mr. René Butcher

Issues:

Commercial appeal – Winding up of company – Appointment of liquidators of a company on just and equitable ground – Whether common intention or

understanding among shareholders leading to quasi-partnership was formed – Whether sole or main purpose of company failed – Section 162 of the Insolvency Act, 2003 – Section 184I of the BVI Business Companies Act, 2004

**Result &
Reason:**

Held: dismissing the appeal and awarding costs to the respondents at two-thirds of the costs in the court below, that:

1. As a matter of principle and rules of pleading, a party is confined to their pleaded factual grounds for the basis of a just and equitable winding up and it is those matters pleaded which are open to be considered by a court. However, although a party seeking the winding up of a company on the just and equitable ground may not have specifically pleaded the state of affairs of a company, this ought not to be completely ignored by a court. The important consideration for a court is the cumulative effect of matters specifically pleaded. In this appeal, although the appellants did not allege mismanagement and resulting disarray in the business of Hangzhou Aida as a pleaded basis for a just and equitable winding up of Union Zone, it was still open to this Court to consider these allegations as part of the cumulative effect of what was specifically pleaded.

In re Fildes Bros. Ltd [1970] 1 WLR 592 at 593 applied; *Ebrahimi v Westbourne Galleries Ltd and Others* [1973] AC 360 applied.

2. Just and equitable provisions for winding up a company enable a court to subject the exercise of legal rights to equitable considerations which make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. There are a plethora of circumstances to which the equitable considerations may be applied. A court must look to the common law for the types of circumstances which have been found to give rise to the application of the just and equitable ground when considering the winding up of a company and exercising its discretionary powers and

remedies under sections 162 and 167 of the Insolvency Act. However, a court must be cautious to apply equitable principles of fairness to commercial transactions or relations. It is not the role of the court to impose its particular concept of what is fair on the parties and their transactions. The concept must be applied judicially having regard to the particular context which the judge has to address and based on rational principles.

Ebrahimi v Westbourne Galleries Ltd and Others [1973] AC 360 applied; *O'Neill and another v Phillips and others* [1999] 1 WLR 1092 applied.

3. The fact that a company is a small or private company is not enough to engage equitable considerations. The superimposition of equitable considerations would require something more; this may include an association formed or continued on the basis of a personal relationship; an agreement or understanding that all or some of the shareholders shall participate in the conduct of the business or restriction upon the transfer of the members' interest in the company. In this appeal, the trial judge was right to find that on the facts of the case there was no common superimposed understating between the original parties for mutual participation in the business affairs of Union Zone and any arrangement between the parties could not have survived the absorption of Hangzhou Aida into the Best Nation structure.

Ebrahimi v Westbourne Galleries Ltd and Others [1973] AC 360 applied.

4. The allegation that the business affairs of a company are in disarray does not of itself lead to a winding up order on the just and equitable ground. Further, in this appeal, although Hangzhou Aida's business may be inactive for whatever reasons, the businesses of some of its underlying companies are still active. Accordingly, such a consideration weighs against any claim that it would be just and equitable to wind up Union Zone. As such the learned judge was correct to reject this basis for winding up Union Zone.

5. An allegation of frustration of purpose if proved would normally be a ground for winding up a company on the just and equitable ground. However, in this appeal, the appellants' claim that the sole purpose of Union Zone was to obtain a public listing and that such purpose was frustrated or failed could not be supported by the facts of the case. The decision to create the new corporate structure involved not only the possible public listing, but also the sourcing of a major cash investment from a third party into the companies and their business. Further, the admitted failure to achieve a public listing was a failure of one of the purposes for Aida USA and the Earjoy structure. The learned trial judge was accordingly correct in his finding that this was not the sole or main purpose of Union Zone and accordingly, in his rejection of this ground.
6. The principle that the affairs of a company can include the affairs of a subsidiary and that a court has the power to make an order regulating the future management of the affairs of the holding company where it is the affairs of the wholly owned subsidiary that have been conducted in an unfairly prejudicial manner, is only applicable in a situations involving a holding company and its subsidiary. Union Zone is not a holding company of Hangzhou Aida, but rather the majority shareholder of Aida USA which indirectly is the holding company, of Hangzhou Aida. Further, this does not relate to the Best Nation structure under which Guobang is directly owned and there is no misconduct alleged at the level of Union Zone itself. The learned trial judge accordingly rightly rejected this basis for winding up Union Zone on the just and equitable ground.

Rackind and others v Gross and others [2005] 1 WLR 3505 applied.

APPLICATIONS AND APPEALS

Case Name:

**Mr. Alphonse Fletcher, Jr
v
Solon Group, Inc.**

[BVIHCMAP2014/0005]

Date:

Monday, 12th January 2015

Coram:

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

Appearances:

Appellant:

Mr. Robert Nader

Respondent:

Mr. Robert Christie

Issues:

Application for leave to appeal to Her Majesty in Council pursuant to section 3(2) of the Virgin Islands (Appeals to Privy Council) Order 1967 (S.I. No. 234 of 1967) – Commercial appeal – Whether unilateral written resolution of single director effective to remove company director on two-person board of directors – Interpretation of articles of association – Whether matter of great general or public importance

Result / Order:

[Oral delivery]

- 1. The motion for leave to appeal to the Privy Council under section 3 subsection 2 of the Virgin Islands Appeals to the Privy Council Order 1967 is refused.**
- 2. Costs of the application shall be borne by the applicant fixed in the sum of \$1,500.00.**

Reason:

The Court was not satisfied that the question involved in the appeal met the requirements of section 3(2) of the Virgin Islands (Appeals to Privy Council) Order 1967. The application did not raise any issue of great general or public importance, nor any other issue which ought to have been submitted to Her Majesty in Council.

Case Name:

**Bevinton Linton
v
The Commissioner of Police
[BVIMCRAP2012/0005]**

Date:

Monday, 12th January 2015

Coram:

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

Appearances:

Appellant:

Ms. Patricia Archibald-Bowers

Respondent:

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

Issues:

Appeal against sentence – Unlawful possession of cannabis with intent to supply – Whether learned magistrate took guilty plea into account when sentencing appellant – Application by appellant's legal practitioner to be removed from the record

Result / Order:

[Oral delivery]

Hearing of the application for removal is deferred until Friday, 16th January 2015, in the morning.

Reason:

The rules stipulate that the application for removal from the record must be served on the client. In the absence of a notice placed in the newspaper to ensure that the appellant is not prejudiced, the Court required that further information be sought from the immigration officials to ascertain whether the appellant was still residing in the Virgin Islands.

Case Name: Vendort Traders Inc.
v
Evrostroy Grupp LLC

[BVIHCMAP2012/0041]

Date: Monday, 12th January 2015

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

Appearances:
Appellant / Applicant: Mr. Jeremy Child
Respondent: Ms. Tamara Cameron

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

Result / Order: [Oral delivery]
It is hereby ordered that:
1. Final leave to appeal to the Privy Council is hereby granted.
2. Costs of the application be costs in the appeal to Her Majesty in Council.

Reason: The appellant had complied with the terms of the order granting conditional leave to appeal. The respondent had no objection to the applicant being granted final leave to appeal.

Case Name: Melvin Rymer
v
Clearlie Todman-Brown

[BVIHCVAP2011/0028]

Date: Monday, 12th January 2015

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

Appearances:

Appellant: Ms. Mishka Jacobs

Respondent: Ms. Patricia Archibald-Bowers

Issues: Application by respondent's legal practitioner to be removed from the record

Result / Order:

[Oral delivery]

It is hereby ordered that:

- 1. JS Archibald & Co be removed from the record as legal practitioners for the respondent, Clearlie Todman-Brown; and**
- 2. A copy of the order, once sealed by the Court Officer, must be served on Mrs. Todman-Brown in accordance with the rules of court.**

Case Name:

Melvin Rymer

v

Clearlie Todman-Brown

[BVIHCVAP2011/0028]

Date: Monday, 12th January 2015

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

Appearances:
Appellant: Ms. Mishka Jacobs

Respondent: In person

Issues: Hearing for directions

Result / Order: [Oral delivery]
1. Time granted to the respondent to file and serve submissions is extended to 25th February 2015.
2. The appeal will be heard at the next sitting of the Court of Appeal in the Territory of the Virgin Islands scheduled for the week commencing 18th May 2015.

Reason: Time was extended to enable the respondent to instruct new counsel and to file submissions in response to the submissions of the appellant.

Case Name: [1] Staray Capital Limited
[2] Marlon Ray Chen
v
Cha, Yang (also known as Stanley)

[BVIHCMAP2013/0009]

Date: Monday, 12th January 2015

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

Appearances:
Appellants: Mr. Oliver Clifton

Respondent: Mr. Jeremy Child

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

Result / Order: [Oral delivery]
It is hereby ordered that:
1. Final leave to appeal to Her Majesty in Council is granted; and
2. Costs be costs in the appeal to Her Majesty in Council.

Reason: The appellants had complied with the terms of order dated 30th September 2014 which granted them conditional leave to appeal to Her Majesty in Council. There was no objection by the respondent to the appellants being granted final leave to appeal.

Case Name: Tony Alphonso
v
Masley Allan

[BVIMCVAP2013/0001]

Date: Monday, 12th January 2015

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

Appearances:
Appellant: Mr. Stephen Daniels
Respondent: In person

Issues: Oral application by appellant for permission to withdraw appeal – Application (by respondent) for costs of the day in the amount of \$1,000.00 – No

submissions filed by the appellant

Result / Order:

[Oral delivery]

It is hereby ordered that:

- 1. With leave of the Court, the appeal is hereby withdrawn.**
- 2. The appellant is to bear costs of today in the sum of \$750.00.**

Reason:

The Court held that the sum of \$750.00 for costs was fair and reasonable in the circumstances.

Case Name:

[1] Patrick Facey

[2] Michael Facey

v

The Queen

[BVIHCRA2013/0009]

Date:

Monday, 12th January 2015

Coram:

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

Appearances:

Appellants:

Mr. Patrick Thompson

Respondent:

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

Issues:

Appeal against conviction – Preliminary issue whether appellant required leave to file amended notice of appeal – Whether Crown erred in not pursuing alternative verdict – Whether learned trial judge made reference to time limit for majority verdict and

rendered conviction unsafe – Whether failure of learned trial judge to give good character direction in respect of second appellant rendered his conviction unsafe – Appeal against sentence – Whether sentence was unreasonable in the circumstances

Result / Order:

The decision is reserved. Counsel will be notified of the time of delivery.

JUDGMENTS

**[1] Brilla Capital Investment Master Fund Spc
Limited**

**(A Cayman Islands segregated portfolio
company, for and on behalf of Brilla Cap
Juluca Segregated Portfolio M, a segregated
portfolio thereof)**

[2] Anguilla Hotel Investors II Limited

[3] Bridge Funding Limited

v

Leeward Isles Resorts Limited (In Liquidation)

[AXAHCVAP2013/0010]

Monday, 12th January 2015

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]**

Appearances:

Appellants:

**Mr. Grant Carroll holding papers for counsel of Alex
Richardson & Associates**

Respondent:

**Ms. Arabella di Iorio holding papers for counsel of
Daniel, Brantley & Associates**

Issues:

Interlocutory appeal – Winding up of respondent company – Post-liquidation debt arising from breach of pre-liquidation obligation – Arbitration proceedings commenced out of jurisdiction by appellants against respondent company – Whether improper – Whether arbitration proceedings should be stayed pending resolution of extant applications between the parties within jurisdiction – Whether learned judge erred in granting respondent permanent injunction against continuation of arbitration proceedings commenced by them

**Result &
Reason:**

Held: allowing both the appeal and counter appeal and upholding the order of Mathurin J restraining the appellants from proceeding with the arbitration proceedings, and granting the appellants leave to submit their claim to the liquidator of the respondent company, and ordering that each party bears its own costs, that:

1. The learned judge erred in applying the *American Cyanamid* principles to the determination of an application for a permanent injunction, these principles being inapplicable to the grant of such injunctions. Additionally, or alternatively, she erred in granting an injunction against the continuation by the appellants of arbitration proceedings begun by them, without providing any reasons in her judgment for so doing.
2. The appellants are required by section 221(b)(iii) of the Companies Act to submit any claims existing at the date of liquidation to the liquidator so that he may adjudicate upon them. While the claim submitted by the appellants to arbitration concerned a post-liquidation debt arising from the continued operation of the resort by the liquidator, it arose as a result of the breach of an agreement between them, which agreement was a pre-liquidation obligation of the respondent company. This therefore brought the appellants' claim within the scope of section 221(b)(iii) and accordingly, the appellants' claim against the respondent ought

properly to have been submitted to the liquidator for adjudication, instead of being pursued by way of arbitration proceedings outside the reach of the winding-up court.

APPLICATIONS AND APPEALS

Case Name:	Delta Petroleum (Caribbean) Limited v Commissioner of Customs [BVIHCVAP2013/0008]
Date:	Monday, 12th January 2015
Coram:	The Hon. Mr. Davidson K. Baptiste, Justice of Appeal The Hon. Mr. Mario Michel, Justice of Appeal The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal [Ag.]
Appearances:	
Appellant / Respondent:	Mr. Terrance Neale
Respondent / Applicant:	Ms. Jo-Ann Williams-Roberts, Solicitor General, with her, Ms. Kaidia Edwards-Alister, Senior Crown Counsel
Issues:	Application (by appellant/respondent) to dismiss appeal – Application (by respondent/applicant) for leave to extend time to transmit record of appeal to the Registrar of the Judicial Committee of the Privy Council
Result / Order:	[Oral delivery] 1. The respondent/applicant is granted leave to make a formal application in respect of the leave to extend time.

2. This application is to be filed no later than Tuesday, 13th January 2015.
3. The matter is adjourned to Wednesday, 14th January 2015 at 9:00 a.m.
4. Both parties are to make submissions on the issue of the Court's jurisdiction to entertain the application to dismiss the appeal.

Case Name: **Fairfield Sentry Limited (In Liquidation)**
v
Farnum Place LLC

[BVIHCMAP2014/0026]

Date: **Monday, 12th January 2015**

Coram: **The Hon. Mr. Davidson K. Baptiste, Justice of Appeal**
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:

Applicant: **Mr. Andrew Westwood**

Respondent: **Ms. Sue Prevezer, QC, with her, Mr. Richard Evans**

Issues: **Whether leave required to appeal costs order of learned judge – (If leave required) application for extension of time to file application for leave to appeal costs order – Application for leave to file notice of appeal in respect of costs order out of time**

Result / Order: **[Oral delivery]**
1. The application to extend time is granted.
2. The time for filing the notice of appeal in respect of the costs order is granted.
3. The notice of appeal in respect of the costs order is to be filed on or before 19th January 2015.
4. Permission is granted to include within the Court of Appeal, the judgment of the United States

Appeal Court for the second circuit dated 26 September 2014.

5. Costs be costs in the appeal.

Reason:

The Court was of the view that on the clear wording of section 30(3) of the West Indies Associated States Supreme Court (Virgin Islands) Ordinance (Cap. 80, Revised Laws of the Virgin Islands 1991), leave to appeal was required. The Court considered, however, that the order made by the learned judge could correctly be interpreted as granting leave to appeal the costs order. In any event, having heard the submissions, the Court stated that the application before it for leave would succeed as the requisite criteria had been satisfied. With respect to the extension of time for leave to file the appeal out of time, the Court held that the requisite principles were to be found in the case of *C.O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd.* (SLUHCVAP2011/0017 (delivered 19th March 2012, unreported)). The Court did not agree with counsel for the respondent that this was a relief from sanctions issue. If it agreed with that point, then it would in fact be returning to the concept of implied sanctions, which was negated by the decision in *The Attorney General v Keron Matthews* [2011] UKPC 38 (see paragraph 15 of the judgment).

The Court held that the criteria established in *C.O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd.* would apply to this case. The length of delay in the present matter was about a year and a half. This, on its face, would seem substantial. However, the affidavit of Mr. Kenneth Krys explained the position, which was that nothing could have been done before a decision was given by the second circuit court in the United States, this decision having been given in September 2014. Mr. Kenneth Krys, in his affidavit, also sought to explain the reasons for the delay.

The Court was satisfied that good reasons were advanced for the delay and it also took into consideration the issue of the prospect of success. The Court was also satisfied that this criterion had

been established. The Court also considered the authority of the English appeal court which had been referred to in the proceedings, namely, *The Queen on the application of Dinjan Hysaj v Secretary of State for the Home Department* [2014] EWCA Civ 1633 (at paragraph 36), as to the proper approach the court should embark upon in such an application. The reasoning of the appeal court in paragraph 46 of the judgment was applied. With respect to the issue of prejudice, the Court agreed with Mr. Westwood, counsel for the applicant, that there would be no material prejudice to the respondent if the Court was to grant the application.

The relevant criteria for the grant of the application to extend time having been satisfied, the application was granted.

Case Name:

**Unicorn Worldwide Holdings Limited
v
Bluestone Securities Limited**

[BVIHCMAP2014/0021]

Date:

Monday, 12th January 2015

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]**

Appearances:

**Appellant /
Applicant:**

Mr. Thomas Lowe, QC, with him, Ms. Claire Goldstein

Respondent:

Mr. Philip Marshall, QC, with him, Ms. Arabella di Iorio

Issues:

Application for leave to adduce fresh evidence

Result / Order:

[Oral delivery]

- 1. The application is dismissed.**
- 2. Costs to be assessed if not agreed within 21 days.**

Reason:

The Court reiterated the criteria in *Ladd v Marshall* [1954] 1 WLR 1489 for adducing fresh evidence:

- 1. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.**
- 2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive.**
- 3. The evidence must be such as is presumably to be believed, or, in other words, it must be apparently credible, though it need not be incontrovertible.**

While it might be said that Bluestone Securities Limited was not entirely forthcoming with information requested on a timely basis, the Court was not persuaded that it engaged in filibustering or obfuscation. The Court further stated that it was not persuaded that the letters that Unicorn Worldwide Holdings Ltd. (“Unicorn”) wished to adduce as evidence raised or dealt with new matters arising after the decision of the learned judge dated 24th September 2014. The Court took the view that they went more to matters raised previously (if not entirely to matters raised previously) although perhaps in greater detail.

Additionally, the Court was not persuaded that the evidence that Unicorn wished to adduce could not have been obtained with reasonable diligence and neither was it persuaded that if the fresh evidence was adduced, it would have an important influence on the result of the case.

Accordingly, the application was dismissed.

Case Name:

Joseph Rosan

v
Valerie Stephens

[BVIHCVAP2013/0009]

Date: Monday, 12th January 2015

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:

Appellant: Ms. Charmaine Rosan-Bunbury

Respondent: Ms. Tamara Cameron

Issues: Leave to appeal to Her Majesty in Council

Result / Order: [Oral delivery]
The matter is struck from the Court's list.

Reason: There was no application before the Court.

STATUS HEARING

Case Name: Sheila Callwood-Schulterbrandt

v

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

[BVIHCVAP2012/0009]

Date: Monday, 12th January 2015

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:

Appellant: Ms. Nelcia St. Jean

Respondents: Ms. Patricia Archibald-Bowers

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

Result / Order: [Oral delivery]
The matter is adjourned to the next status hearing in the Territory of the Virgin Islands during the week of 18th May 2015.

Reason: Counsel for the appellant had only recently been retained and had yet to be fully instructed. Also, the parties requested some time in the hope of achieving a negotiated settlement.

Case Name:

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

[BVIHCVAP2012/0030]

Date: Monday, 12th January 2015

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:

Appellants: Ms. Patricia Archibald-Bowers

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

Result / Order: [Oral delivery]
The matter is adjourned to the next status hearing in the Territory of the Virgin Islands during the week of 18th May 2015.

Reason: The first appellant and first respondent had both died since the matter last came on for hearing. The first appellant's family was in the process of probating the will, and counsel would need to take further instructions when the executor is appointed.

Case Name: The Commissioner of Police
v
[1] Lester Terrence DeCastro
[2] Isaac Bellony Caena
[BVIMCRAP2013/0016]

Date: Monday, 12th January 2015

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. O'Neil Simpson, Crown Counsel, Office of the Director of Public Prosecutions

Respondents: No appearances (attempts to effect service proved futile)

Issues: Status of matter – Appeal against the 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

Result / Order: [Oral delivery]
The matter is adjourned to the next status hearing in the Territory of the Virgin Islands during the week of 18th May 2015.

Reason: The transcript was incomplete but would be made available on or before 31st March 2015.

Case Name: Richard Hearnshaw
v
Commissioner of Police
[BVIMCRAP2013/0017]

Date: Monday, 12th January 2015

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:

Appellant: Ms. Nelcia St. Jean

Respondent:	Mr. O'Neil Simpson, Crown Counsel, Office of the Director of Public Prosecutions
Issues:	Status of matter – Appeal against conviction – Driving without due care and attention
Result / Order:	[Oral delivery] The matter is adjourned to the next status hearing in the Territory of the Virgin Islands during the week of 18th May 2015.
Reason:	The transcript was incomplete but would be made available on or before 16th January 2015.
Case Name:	The Commissioner of Police v [1] Denzil Flax [2] Kelon Browne [3] Kareem Hillhouse [BVIMCRAP2014/0007]
Date:	Monday, 12th January 2015
Coram:	The Hon. Mr. Davidson K. Baptiste, Justice of Appeal The Hon. Mr. Mario Michel, Justice of Appeal The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Mr. O'Neil Simpson, Crown Counsel, Office of the Director of Public Prosecutions
Respondents:	No appearance (counsel on record, Mr. Patrick Thompson, was before another panel of the Court of Appeal)

Issues: Status of matter – Appeal against the decision of learned (acting) senior magistrate to uphold no case submission in favour of respondents – Gross indecency with a child

Result / Order & Reason: [Oral delivery]
The transcript being available, the appeal is to proceed according to the rules of Court.

Andres Bailey
v
Commissioner of Police
[BVIMCRAP2012/0008]

Date: Monday, 12th January 2015

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:

Appellant:	No appearance (counsel on record, Mr. Patrick Thompson, was before another panel of the Court of Appeal)
Respondent:	Mr. O’Neil Simpson, Crown Counsel, Office of the Director of Public Prosecutions

Issues: Status of matter – Appeal against sentence – Unlawful possession of cannabis – Being concerned in the supply of cannabis – Whether sentence imposed by learned magistrate was unduly severe

Result / Order & Reason: [Oral delivery]
The transcript being available, the appeal is to proceed according to the rules of Court.

Case Name: **Eddie Medina Thomas Baez**
v
Commissioner of Police
[BVIMCRAP2012/0002]

Date: **Monday, 12th January 2015**

Coram: **The Hon. Mr. Davidson K. Baptiste, Justice of Appeal**
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:
Appellant: **No appearance**
Respondent: **Mr. O'Neil Simpson, Crown Counsel, Office of the**
Director of Public Prosecutions

Issues: **Status of matter – Appeal against sentence**

Result / Order: **[Oral delivery]**
The matter is adjourned to the next status hearing in
the Territory of the Virgin Islands during the week of
18th May 2015.

Reason: **The transcript was incomplete but would be made**
available on or before 31st January 2015.

Case Name: **Bentley Roach**
v
Commissioner of Police
[BVIMCRAP2012/0004]

Date: Monday, 12th January 2015

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:

Appellant: No appearance

Respondent: Mr. O'Neil Simpson, Crown Counsel, Office of the
Director of Public Prosecutions

Issues: Status of matter – Appeal against conviction and
sentence – Indecent assault – Whether sentence of 12
months imprisonment imposed by learned magistrate
was unduly severe

Result / Order: [Oral delivery]
The matter is adjourned to the next status hearing in
the Territory of the Virgin Islands during the week of
18th May 2015.

Reason: The transcript was incomplete but would be made
available on or before 31st January 2015.

Case Name: Clinton Romney
v
Commissioner of Police

[BVIMCRAP2013/0001]
[BVIMCRAP2013/0002]
[BVIMCRAP2013/0003]

Date: Monday, 12th January 2015

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

**The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]**

Appearances:

Appellant: Mr. Stephen Daniels

Respondent: Mr. O'Neil Simpson, Crown Counsel, Office of the
Director of Public Prosecutions

Issues:

**Status of matter – Joint application to consolidate
appeals – Appeals against conviction**

Result / Order:

[Oral delivery]

- 1. On the oral application of counsel for the appellant,
the magistrate is directed to proceed with the
sentencing of the appellant.**
- 2. The matter is adjourned to the next status hearing
in the Territory of the Virgin Islands during the
week of 18th May 2015.**

Reason:

**Counsel for the appellant indicated that the learned
magistrate had not passed sentence on the appellant
as yet. The magistrate indicated to counsel, in light of
the present appeal, that the Court's direction should
be sought in that regard.**

Case Name:

Ralph James

v

The Queen

[BVIMCRAP2013/0008]

AND

Adrian Arthur

v

The Queen

[BVIMCRAP2013/0009]

Date: Monday, 12th January 2015

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:

Appellants: Mr. Michael Maduro

Respondent: Mr. O'Neil Simpson, Crown Counsel, Office of the
Director of Public Prosecutions

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

**Result / Order
& Reason:** [Oral delivery]
The transcript being available, the appeal is to
proceed according to the rules of Court.

Case Name: Jerome Allen
v
The Commissioner of Police

[BVIMCRAP2014/0001]

Date: Monday, 12th January 2015

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. Stephen Daniels

Respondent: Mr. O'Neil Simpson, Crown Counsel, Office of the Director of Public Prosecutions

Issues: Status of matter – Appeal against sentence – Whether sentence imposed was excessive having regard to sentences imposed for similar offences in courts of equal jurisdiction

Result / Order: [Oral delivery]
The matter is adjourned to the next status hearing in the Territory of the Virgin Islands during the week of 18th May 2015.

Reason: The transcript was incomplete but would be available on or before 15th February 2015.

Case Name: Commissioner of Police
v
Carlton Herbert
[BVIMCRAP2014/0011]

Date: Monday, 12th January 2015

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. O'Neil Simpson, Crown Counsel, Office of the Director of Public Prosecutions

Respondent: No appearance

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

Result / Order: The matter is adjourned to the next status hearing in the Territory of the Virgin Islands during the week of 18th May 2015.

Reason: The transcript was incomplete but would be available on or before 15th March 2015.

Case Name: The Commissioner of Police
v
Sasha Hodge

[BVIMCRAP2013/0010]

Date: Monday, 12th January 2015

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:
Appellant: Mr. O'Neil Simpson, Crown Counsel, Office of the Director of Public Prosecutions
Respondent: No appearance

Issues: Status of matter – Appeal against decision of learned senior magistrate to acquit respondent – Acquisition, possession or use of proceeds of criminal conduct

Result / Order: [Oral delivery]
The matter is adjourned to the next status hearing in the Territory of the Virgin Islands during the week of

18th May 2015.

Reason: The transcript was incomplete but would be made available on or before 31st March 2015.

Case Name: Kareem Simon
v
The Queen
[BVIHCRAP2012/0003]

Date: Monday, 12th January 2015

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:
Appellant: Ms. Nelcia St. Jean
Respondent: Mr. O'Neil Simpson, Crown Counsel, Office of the Director of Public Prosecutions

Issues: Status of matter – Appeal against sentence – Aggravated burglary – Whether sentence imposed was unduly severe

Result / Order: [Oral delivery]
A notice of withdrawal having been filed, the appeal is accordingly dismissed.

Case Name: Glenroy Pierre
v

Commissioner of Police

[BVIMCRAP2014/0008]

Date: Monday, 12th January 2015

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:
Appellant: Counsel on record, Mr. Patrick Thompson, was not present since he was before another panel of the Court of Appeal. The appellant, however, was present.

Respondent: Mr. O'Neil Simpson, Crown Counsel, Office of the Director of Public Prosecutions

Issues: Status of matter – Appeal against sentence – Importation of a controlled drug – Offering to supply controlled drug – Possession of controlled drug – Illegal entry

Result / Order: [Oral delivery]
The matter is adjourned to the next status hearing in the Territory of the Virgin Islands during the week of 18th May 2015.

Reason: The transcript was incomplete but would be made available on or before 16th January 2015.

Case Name: Ryan Chirlon Robin
v
Commissioner of Police
[BVIMCRAP2013/0011]

Date: Monday, 12th January 2015

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:

Appellant: In person

Respondent: Mr. O'Neil Simpson, Crown Counsel, Office of the
Director of Public Prosecutions

Issues: Status of matter – Appeal against sentence –
Production of controlled drug – Importation of
controlled drug

**Result / Order
& Reason:** [Oral delivery]
The appeal having been discontinued by the appellant
by oral application made in person, the appeal stands
dismissed.

Case Name: Leonard Sprauve
v
The Queen

[BVIHCRAP2012/0006]

Date: Monday, 12th January 2015

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:

Appellant: Counsel on record, Mr. Patrick Thompson, was not
present since he was before another panel of the
Court of Appeal. The appellant, however, was

present.

Respondent: Mr. O'Neil Simpson, Crown Counsel, Office of the Director of Public Prosecutions

Issues: Status of matter – Appeal against conviction and sentence – Robbery – Possession of firearm with intent to endanger life

Result / Order & Reason: The transcript being available, the appeal is to proceed according to the rules of Court.

Case Name: Roro Edoure
v
The Queen

[BVIHCRAP2014/0005]

Date: Monday, 12th January 2015

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:
Appellant / Applicant: Counsel on record, Mr. Patrick Thompson, was not present since he was before another panel of the Court of Appeal. The appellant, however, was present.

Respondent: Mr. O'Neil Simpson, Crown Counsel, Office of the Director of Public Prosecutions

Issues: Status of matter – Application for transcript to be provided free of charge – Appeal against conviction and sentence – Manslaughter – Smuggling of migrants

Result / Order:

[Oral delivery]

1. The transcript of the trial proceedings which is now available is to be provided to the appellant/applicant's legal practitioners, Grace Chambers, free of charge.
2. The appeal is to proceed according to the rules of Court.

Case Name:

Renold Plaisimond

v

The Queen

[BVIHCRA2012/0008]

Date:

Monday, 12th January 2015

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]**

Appearances:

Applicant/Appellant: Counsel on record, Mr. Patrick Thompson, was not present since he was before another panel of the Court of Appeal. The appellant, however, was present.

Respondent: Mr. O'Neil Simpson, Crown Counsel, Office of the Director of Public Prosecutions

Issues:

Status of matter – Application for bail – Application for transcript to be provided free of charge – Appeal against sentence – Manslaughter – Smuggling of migrants

**Result / Order
& Reason:**

[Oral delivery]

The applications were adjourned to 9:00 a.m. on Wednesday, 14th January 2015 to enable the

appellant's counsel, Mr. Patrick Thompson, to attend.

APPLICATIONS AND APPEALS

Case Name:

[1] Zorin Sachak Khan
[2] Afaque Ahmed Khan
[3] Sasheen Anwar

v

[1] Gany Holdings (PTC) SA
[2] Asif Rangoonwala

[BVIHCMAP2014/0018]

Date:

Tuesday, 13th January 2015

Coram:

**The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]**

Appearances:

Appellants:

**Mr. Richard Wilson, with him, Mr. Robert Christie and
Ms. Clare-Louise Whiley**

Respondents:

**Mr. Christopher Tidmarsh, QC, with him, Ms. Arabella
di Iorio and Mr. Brian Lacy (for the first respondent)**

**Ms. Sue Prevezer, QC, with her, Mr. Andrew Willins
(for the second respondent)**

Issues:

Whether learned judge erred in finding that burden was on appellants to prove that assets vested in 1st respondent company other than shares in company European Commodities Limited, were held on trusts of the ZVM Trust – Whether learned judge ought to have found that burden was on 1st respondent company to prove that said assets were not held on trusts of the ZVM Trust – Validity of the “1998 Appointment” – Whether learned judge’s conclusion

that 1998 Appointment was not a sham was wrong in law and failed to give proper weight to all evidence before the court – Whether learned judge erred in holding that 2nd respondent was not personally liable to account for assets received by him pursuant to 1998 Appointment on basis of knowing receipt – Whether learned judge erred in ordering that the appellants pay 1st respondent's costs

Result / Order: Judgment is reserved.

Case Name: [1] Andrey Adamovsky
[2] Stockman Interhold SA
v
[1] Andriy Malitskiy
[2] Igor Filipenko
[BVIHCMAP2014/0022]

Date: Wednesday, 14th January 2015

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. C. Dennis Morrison, QC, Justice of Appeal [Ag.]

Appearances:
Appellants: Mr. Justin Fenwick, QC, with him, Mr. Dan Wise
Respondents: Mr. Peter McMaster, QC, with him, Mr. Andrew Willins

Issues: Application (by respondent) for discharge of stay of execution granted by single judge of Court of Appeal and/or for security for costs pending outcome of appeal

Result: [Oral delivery]
It is hereby ordered that:

1. The full sum of the judgment debt, being principal, interest and costs awarded in the court below along with statutory interest accrued until the date of this order, be paid into court by way of cash payment or bank guarantee in a form issued by a financial institution reasonably acceptable to the respondents for the judgment debt, interest and costs within 30 days of the date of this order.
2. The appellants provide security for costs in the sum of \$300,000.00 within 30 days of this order failing which the appeal will stand dismissed with costs as per rule 62.17 of the Civil Procedure Rules 2000.
3. The order granting a stay is varied to the extent that pending provision of the security of the judgment debt being satisfied in the manner before specified, then the respondents shall be restrained from proceeding with the liquidation save to the extent that the respondents may within the 30 day period take steps as are necessary to resist the application to set aside the statutory demand and to make application for the appointment of a liquidator but to take no further steps in the liquidation proceedings.
4. Costs of the application be costs in the appeal.

Reasons:

Having regard to all the evidence, the Court was led to the irresistible conclusion that the appellants had ordered the dealings with their assets, which conclusion was such as to raise a strong prima facie case that they had chosen to dispose of various assets which would otherwise have been available to discharge a debt against them. The appellants' actions gave rise to a risk of dissipation.

The Court was left with a feeling generally that the appellants had not made full and frank disclosure of all of the assets and dealings as there were many unanswered questions. Given the evidence presented on the appellants' own affidavits, there was a real likelihood that if the respondents were to be successful, enforcement of the judgment would be difficult or impossible.

The Court held that in this case, justice required either

that the stay be discharged or the judgment debt be paid into court.

Case Name: **Delta Petroleum (Caribbean) Limited**
v
Commissioner of Customs
[BVIHCVAP2013/0008]

Date: **Wednesday, 14th January 2015**

Coram: **The Hon. Mr. Davidson K. Baptiste, Justice of Appeal**
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:

Appellant / Respondent:	Mr. Terrance Neale
Respondent / Applicant:	Ms. Jo-Ann Williams-Roberts, Solicitor General, with her, Ms. Kaidia Edwards-Alister, Senior Crown Counsel, and Ms. Sarah Potter, Crown Counsel

Issues: **Application (by appellant/respondent) to dismiss appeal – Application (by respondent/applicant) for leave to extend time to transmit record of appeal to the Registrar of the Judicial Committee of the Privy Council**

Result / Order: **[Oral delivery]**

- 1. The respondent/applicant's application to extend time to transmit the record of appeal to the Registrar of the Judicial Committee of the Privy Council is granted, with a consequential denial of the application to dismiss the appeal.**
- 2. The respondent/applicant is ordered to transmit the record to the Registrar of the Judicial Committee of the Privy Council within 14 days of the date of this order, failing which the appeal shall**

stand dismissed.

3. The respondent/applicant is also ordered to pay costs to the appellant/respondent in the sum of \$6,000.00.

Case Name:

Renold Plaisimond

v

The Queen

[BVIHCRAP2012/0008]

Date:

Wednesday, 14th January 2015

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]**

Appearances:

**Appellant /
Applicant:**

Mr. Patrick Thompson

Respondent:

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

Issues:

**Application for bail – Application for transcript to be
provided free of charge – Appeal against sentence –
Manslaughter – Smuggling of migrants**

Result:

[Oral delivery]

It is ordered that:

1. The transcript of the trial proceedings be provided to the appellant free of charge.
2. The appeal is allowed.
3. The sentence of the learned trial judge is varied to the extent that the sentence of six years will commence from the date the appellant was remanded into custody, that date being 24th February 2011. The sentence will start from February 2011.

Reasons:

Time spent on remand must be taken into consideration by the sentencing judge and it is incumbent upon the Court (not in some general form of words) to indicate that time spent on remand has been or was taken into consideration. It is incumbent upon the Court to do the arithmetical calculation to make it abundantly clear that the period of time spent on remand by the convicted person has actually been taken into account and calculated in the final sentence pronounced. It is abundantly clear in this circumstance and this particular case that the learned trial judge failed to do so. The learned trial judge merely said: 'I take into consideration time spent on remand' without doing the arithmetical calculations required by the authorities in this matter (See *Callachand & Anor v State of Mauritius (Mauritius)* [2008] UKPC 49, *Romeo Da Costa Hall v The Queen* [2011] CCJ 6 (AJ) and *Shonovia Thomas v The Queen* BVIHCRA2010/0006 (delivered 27th August 2012, unreported)).

Case Name:

Sheikh Mohamed Bin Issa Al Jaber
Appellant
v

[1] Unicredit Bank Austria AG
[2] Registrar of Corporate Affairs
Respondents
v

**[1] Immoconsult Ares Leasinggesellschaft
mbH**
**[2] Galeana Telecommunications
Investesments Inc**
[3] David Kinnon
Interested Parties

[BVIHCMAP2013/0021]

Date: Wednesday, 14th January 2015

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. John Carrington, QC, with him, Ms. Corine George

Respondent: Mr. Paul Chaisty, QC, with him, Mr. Jonathan Ward

Issues: Appeal against learned judge's refusal to terminate liquidation of MBI International & Partners, Inc. under section 233 of the Insolvency Act, 2003 (Act No. 5 of 2003, Laws of the Virgin Islands)

Result: [Oral delivery]
1. The appeal stands dismissed.
2. No order as to the costs of the appeal.

Reasons: In considering the appeal, the Court applied the well-known principles set out in the case of *Dufour and Others v Helenair Corporation Ltd and Others* (1996) 52 WIR 188. As counsel for the appellant set out in his submissions, the Court was to decide whether the judge below was blatantly wrong in exercising his discretion and, on this basis, whether his decision should be set aside. The Court stated that while it may not be in complete agreement with the learned judge's conclusions and reasons, it had not been persuaded that he was so blatantly wrong as to justify setting aside his decision. In particular, the Court agreed with the learned judge's findings that MBI International was insolvent when the winding-up order was made and that there was no valid reason to return it to its members.

The Court opined that, in any event, had it been necessary for it to exercise its discretion afresh, it would not have come to a different conclusion. It fell to the appellant to persuade the Court that it was just

and equitable to terminate the liquidation. The principal reason and, rising above that as the very good sole reason put forward for doing so, is that it is preferable for the company (rather than the liquidator) to defend the claims against it. This, it is said, will reduce the expense and hopefully, reduce the length of time to conclude what one might well consider to be a long outstanding matter. The Court stated that this submission was to be taken in the context of the earlier submission that it is at least arguable that MBI International was solvent.

Against this were the arguments that there was a lack of evidence demonstrating the solvency of MBI International and/or any other special circumstances to show that the termination of the liquidation would be just and equitable. Additionally, Immoconsult's section 273 application to reverse the liquidator decision rejecting its claim was listed for hearing in two weeks and hence, Galeana had a similar application. To terminate the liquidation at that point would result in those applications going by the board and those claimants having to institute new proceedings ab initio – this would have inevitably resulted in delay and expense to all concerned.

Having regard to the costs which had been agreed below, the Court did not think it appropriate to trouble that order. However, where the costs of the appeal were concerned under the provisions of the Civil Procedure Rules 2000, in particular, rule 65 and rule 65(2)(d), given the circumstances of the appeal, the Court made no order as to the costs of the appeal.

JUDGMENTS

Case Name:

**1st National Bank St. Lucia Limited
v
St. Honore de Sainte Lucie Limited
(In Receivership)**

[SLUHCVAP2013/0030]

Date: Thursday, 15th January 2015

Coram: The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. C. Dennis Morrison, QC, Justice of Appeal [Ag.]

Appearances:

Appellant: Ms. Tamara Cameron holding papers for the counsel for the appellant

Respondent: Ms. Corine George holding papers for counsel for the respondent

Issues: Civil appeal – Judicial hypothec – Receivership – Sale of property – Companies Act – Civil Code – Code of Civil Procedure – Loans obtained by respondent from appellant and another bank secured by property owned by respondent – Judicial hypothecs registered by both banks – Whether appellant as junior creditor could be overreached – Whether learned judge erred in his interpretation and application of receiver’s powers under mortgage debenture and the Companies Act – Whether learned judge erred in cancelling appellant’s registered judicial hypothec under article 2028 of the Civil Code and authorising private sale of property by receiver under s. 287(4) of the Companies Act

Result and Reason: Held: allowing the appeal, setting aside the order of the learned judge, and ordering the respondent to pay the appellant’s costs of the appeal and in the court below, that:

1. In Saint Lucia, a receiver appointed under a debenture and exercising a power of sale does not have a common law right to overreach junior creditors, and the court does not have an inherent power to make an order allowing the receiver to do so. The system for realising secured property is contained in two complementary statutory

regimes, namely, the Civil Code (which incorporates the Code of Civil Procedure in this regard), and the Companies Act. Neither of these can be ignored if it contains provisions that are relevant to the proposed sale of secured property. While the Civil Code does contain a procedure for overreaching junior creditors, the Companies Act does not. In particular, the court does not have the power under the general words in section 295 of the Companies Act, ('the court may make any order it thinks fit') to extinguish a junior hypothec and thereby take away that secured creditor's right to have the secured property sold by the courts by public auction. Such general words do not give a receiver the right to exercise a power which contravenes the express provisions of the Civil Code. Accordingly, in the present case, the court does not have the power under the hypothec or the Companies Act to order the sale of Parcel 1119 free and clear of the appellant's judicial hypothec.

Nelson and others v First Caribbean International Bank (Barbados) Limited [2014] UKPC 30 considered; *In Re B. Johnson & Co. (Builders) Ltd.* [1955] Ch 634 distinguished; *Peat Marwick Limited v Consumers' Gas Company* 1980 CarswellOnt 167 distinguished; *Montreal Trust Co. v Atlantic Acceptance Corp.* 1966 CarswellOnt 77 distinguished.

2. Section 289 of the Companies Act preserves the right of secured creditors to participate in the distribution of the net sale proceeds according to their priority. However, the rights protected do not extend to withholding consent to the realisation of the secured property in a sale that is otherwise in accordance with the laws for selling property that is subject to a junior hypothec.
3. There being no issue of consent in this case and no evidence or submission that the registration of the appellant's hypothec was irregular or void in any way, the respondent cannot rely on article 2028 of the Civil Code to cancel the appellant's junior hypothec. The learned judge erred in finding that it was possible for the hypothec to be

cancelled under this article of the Civil Code.

APPLICATIONS & APPEALS

Case Name: Profitstar Anstalt
v
[1] Westburg Anstalt
[2] Mortimer Finance & Holding SA
[BVIHCMAP2014/0030]

Date: Thursday, 15th January 2015

Coram: The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. C. Dennis Morrison, QC, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Paul Dennis, QC, with him, Ms. Nadine Whyte

Respondents: Mr. Jeremy Child, with him, Ms. Marcia McFarlane (for the 1st respondent)
Mr. Mark Forte for the receiver, Mr. Matthew Richardson

Issues: Appeal against learned judge's dismissal of application to set aside appointment of receiver – Application (by appellant) for stay of execution – Application (by 1st respondent) to strike out appeal – Application (by 1st respondent) for security for costs – Application to withdraw appeal – Costs implications of withdrawal of appeal – Rule 62.26(1) of Civil Procedure Rules 2000

Result / Order: [Oral delivery]
1. The appellant is hereby granted leave to withdraw the notice of appeal filed on 10th December 2014

and the application for stay of execution filed 11th December 2014.

2. The notice of appeal and the stay application are hereby deemed to be withdrawn.
3. The appellant should bear the first respondent's costs of the appeal, the stay application and the strike out application, to be assessed if not agreed within 21 days.
4. The receiver's costs of the appeal, and of the applications would be costs in the receivership.

Reasons:

Counsel for the appellant submitted that the receiver had significantly modified his approach to the receivership, in particular, as regards the proposed timetable for the sale of the shares, and that in these circumstances the appeal was no longer necessary as the appellant had now been substantially vindicated on the position it had taken before the judge in the court below and which it had wished to advance on appeal.

Concerning the issue of costs, counsel for the appellant argued that it was the conduct of the receiver that necessitated the proceedings in the first place and that this therefore amounted to special circumstances which enabled the Court to make a different order for costs than that stated by rule 62.26(1) of the Civil Procedure Rules 2000 to be the general rule, as the rule permits in appropriate circumstances.

The Court took the view that counsel's approach was inviting the Court, in effect, to consider the merits of the very appeal which his client was seeking to withdraw. The Court was clearly of the view that, in light of the provisions of rule 62.26(1), the appellant could not avoid the consequence, upon withdrawal, of paying the first respondent's costs.

With regard to the receiver's costs of the appeal, the Court was in agreement with making an order, as had been agreed between the receiver and the appellant, that those should be costs in the receivership. As regards the receiver's costs in the court below, in keeping with the order of the learned judge, which, based on the result of the appeal, would remain

undisturbed, the Court noted that the receiver and the appellant had agreed on those costs at \$20,796.25.

Case Name:

**[1] Lucan Invest Limited
[2] Duview Holdings Inc
v
[1] Afaith Investment Limited
[2] Vinson Holdings Limited
[3] Alverstone Trade & Invest Limited
[BVIHCMAP 2014/0023]**

Date:

Thursday, 15th January 2015

Coram:

**The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. C. Dennis Morrison, QC, Justice of Appeal [Ag.]**

Appearances:

**Applicants: Mr. Jonathan Ward
Respondents: Mr. Richard Evans**

Issues:

Commercial appeal – Application for leave to appeal and stay of execution – Whether learned judge erred in making order for sale of shares held by applicants company Nemiroff Vodka Limited – Said shares charged in applicants’ favour pursuant to terms of final charging order – Whether learned judge erred in appointing receiver with power to sell shares without shares first being valued – Whether appointment of receiver should be stayed (so that receiver remains in office, but without any power to sell shares) – Whether execution of order for sale should be stayed – Whether trial judge erred in not setting sale price but leaving it to receiver to obtain best possible market price – Whether there was evidence that trial judge blatantly erred in exercise of his discretion – Whether appeal had realistic prospect of success

Result / Order:

[Oral delivery]

- 1. Application for leave of the court is dismissed.**
- 2. Respondents to be entitled to their costs to be assessed if not agreed.**

Reason:

The Court stated that an appellate court will not interfere with the exercise of a trial judge's discretion unless it is blatantly wrong. The test to be applied is that stated by Flossiac CJ in *Dufour and Others v Helenair Corporation Ltd and Others* (1996) 52 WIR 188.

The Court further stated that it is also well established that an applicant seeking leave to appeal must satisfy the Court that the appeal has a realistic prospect of success. In the present case therefore, the applicants had to satisfy the court that they had a reasonable prospect of succeeding in an appeal against the exercise of the trial judge's discretion. The Court held that they had failed to meet the required threshold.

Case Name:

Comodo Holdings Limited

v

[1] Renaissance Ventures Limited

[2] Joseph Katz (as Executor for the estate of the late Eric D. Emanuel, deceased)

[BVIHCMAP2014/0032]

Date:

Thursday, 15th January 2015

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]**

Appearances:

Applicant:

Mr. Stephen Moverly Smith, QC, with him, Ms.

Hazelann Hannaway

Respondents: Mr. Robert Christie, with him, Ms. Clare-Louise Whiley

Issues: Commercial appeal – Application for leave to appeal – Application for stay of order of learned judge – Rule 20.1(1) of the Civil Procedure Rules 2000 – Whether permission required to amend reply and defence to counterclaim prior to first case management hearing – CPR 24.3 and CPR 2.4 – Whether security for costs available against external company

Result / Order: [Oral delivery]

1. Leave to appeal the decision of Hon. Justice Edward Bannister dated 4th December 2014 is granted.
2. Leave to appeal decision of Hon. Justice Edward Bannister dated 15th December 2014 allowing the summary judgment is granted.
3. The stay of the order of Hon. Justice Edward Bannister dated 15th December 2014 is refused.
4. The appeal will be heard on written and oral submissions before the Full Court.
5. The costs on the application for leave shall be costs in the appeal.
6. The applicants shall pay the respondents costs on the application for a stay to be assessed if not agreed within 14 days.

Reason: The Court held that the applicable principles were set out in the case of *Hammond Suddard Solicitors v Agrichem International Holdings Limited* [2001] EWCA Civ 2065.

The Court stated that the general rule is that a stay should not be granted. The grant of a stay is an exception to the general rule. The grant is discretionary and the court needs to balance the risk of injustice on refusal of the stay.

Having considered the submissions of both sides that the prejudice referred to by the applicant was

speculative as it was dependant on the applicants' success, the Court held that it was not appropriate to grant a stay and, in the exercise of its discretion, refused the application.

Case Name: **Abdel-Karim Taher Itum**
v
[1] Sami Kteily
[2] Adib Kouteili
[3] P.E.B. (Indochina) Limited
[BVIHCMAP2014/0028]

Date: **Thursday, 15th January 2015**

Coram: **The Hon. Mr. Davidson K. Baptiste, Justice of Appeal**
The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, Justice of Appeal
[Ag.]

Appearances:
Applicant: **Mr. Andrew Westwood**
Respondents: **Mr. James Collins, QC, with him, Mr. Jonathan Addo**

Issues: **Application for leave to appeal against order of learned judge setting aside permission to serve claim form outside the jurisdiction – Permission to serve out set aside by learned judge on basis that substantive claims against BVI domiciled defendants stayed in favour of arbitration and learned judge held that accordingly there was no longer a claim against a defendant domiciled within the jurisdiction within meaning of rule 7.3(2)(a) of Civil Procedure Rules 2000 and since ground for service out no longer available, order granting permission to serve out ought to be set aside – Whether learned judge erred in coming to this conclusion – Whether application for leave is ex-parte application – Whether respondents entitled to be heard – Whether appeal is reasonably arguable –**

Whether there had been full and frank disclosure by applicant – Whether this warrants exception to general rule that this is an ex-parte application – Whether grounds of appeal should be limited – Whether respondent should be allowed costs

Result:

[Oral delivery]

It is hereby ordered that:

- 1. The applicant be granted leave to appeal the order and judgment of the Hon. Justice Edward Bannister dated 5th November 2013 in Commercial Claim No. 4 of 2014, such appeal being limited to the availability of the gateway in CPR rule 7.3(2)(a).**
- 2. There be an oral hearing in addition to written submissions and that oral hearing be listed on the joint application of the parties.**
- 3. Costs in the appeal.**

Reason:

Having read the application and submissions, the Court was satisfied to grant leave to appeal limited to the ground as agreed by counsel.

Case Name:

**[1] PEB Steel Indochina Limited
[2] PEB Steel Asia Ltd
[3] PEB Steel Vietnam Holdings Ltd
v
Abdel Karim Itum**

[BVIHCMAP2014/0019]

Date:

Friday, 16th January 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:

**Appellants /
Respondents:**

Mr. James Collins, QC, with him, Mr. Jonathan Addo

**Respondent /
Applicant:**

Mr. Andrew Westwood

Issues:

Interlocutory appeal – Extension of time to file notice of opposition and written submissions – Appeal against costs order – Whether grounds exist for interfering with the exercise of the trial judge’s discretion – Rule 64.6 of the Civil Procedure Rules 2000 – Correction of sealed order

Result / Order:

[Oral delivery]

It is ordered that:

- 1. An extension of time be granted for filing the respondent’s notice of opposition pursuant to rule 62.10(3) to 12th September 2014.**
- 2. Time is also extended for filing the respondent’s written submissions and bundle of documents pursuant to 62.10(4) to 25th September 2014.**
- 3. The respondents’s notice of opposition and written submissions and bundle of documents relative to the appeal are deemed properly filed.**
- 4. The appeal against the judgment of Hon. Justice Edward Bannister dated 23rd July 2014 and the order of Hon. Justice Edward Bannister dated 23rd July 2014 shall be allowed as follows:**
 - a. Any claims of the claimant (the respondent in this appeal) against the 5th defendant (the 3rd appellant in this appeal) under section 184I of the BVI Business Companies Act 2004 shall be struck out.**
 - b. The claimant (the respondent in this appeal) shall pay the 3rd-5th defendants (the appellants in this appeal) 75% of the costs below.**
- 5. Costs in the appeal to be assessed if not agreed within 21 days.**

Reason:

The Court was of the view that no proper reasons had been advanced by the respondent in his affidavit evidence to explain the delay in filing the notice of opposition, written submissions and bundle of documents relative to the appeal. Having said that, the Court was not of the view that the delay was

unduly long. The fact that it had not been advanced that any party was prejudiced by the respondent's application for an extension of time was also taken into account. In the Court's view, not allowing the extension would be a disproportionate sanction. It accordingly held that it would exercise its discretion to grant the respondent/applicant's application.

Further, the Court was of the view that the learned judge erred in the exercise of his discretion in failing to consider certain factors that he ought properly to have considered, in particular, the extent to which the appellants had in fact prevailed in the claims before the court and that the appellants were therefore entitled, in accordance with rule 64.6 of the Civil Procedure Rules 2000, to their costs as the successful parties in the proceedings. The Court therefore held that the learned judge was blatantly wrong in coming to his decision and allowed the appeal and set aside the costs order that he made. Furthermore, the Court, in the exercise of its discretion ordered that the respondent pay to the appellants 75% of the costs in the court below.

On the substantive appeal for correction of the judge's sealed order, the court accepted the consensual position arrived at by counsel.

Case Name:

**Bevinton Linton
v
The Commissioner of Police**

[BVIMCRAP2012/0005]

Date:

Friday, 16th January 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:

Ms. Patricia Archibald-Bowers

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

Issues: Appeal against sentence – Unlawful possession of cannabis with intent to supply – Whether learned magistrate took guilty plea into account when sentencing appellant – Application by solicitors acting for the appellant to be removed from the record – Whether appellant present in the jurisdiction or whether had been deported

Result / Order: [Oral delivery]
It is hereby ordered that:
1. Leave be granted to be removed from the record.
2. The appeal is struck out for want of prosecution.

Reason: The result of inquiries made by counsel to the Immigration Department indicated that the appellant had been deported from the Territory of the Virgin Islands two years previously.