

COURT OF APPEAL SITTING
TERRITORY OF THE VIRGIN ISLANDS
28th April – 2nd May 2014

JUDGMENTS

Case Name:

**[1] The Hon. Gaston Browne, Leader Of The
Opposition
[2] The Hon. Lester B. Bird
[3] The Hon. Asot A. Michael
[4] Mr. Eisen Baptiste
[5] Ms. Paulet Hinkson
Appellants / Applicants
v
[1] The Constituencies Boundaries
Commission
[2] The Attorney General of Antigua and
Barbuda
[3] The Speaker of the House of
Representatives
[4] The Prime Minister of Antigua and
Barbuda
[5] The Attorney General (for and on Behalf of
Her Excellency The Governor General)
Respondents**

[ANUHCVP2013/0026]

Date: Monday, 28th April 2014

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal

Appearances:

Appellants: Ms. Nadine Whyte holding papers for Mr. Anthony
Astaphan, SC

Respondents: Ms. Maya Barry holding papers for all counsel

representing the respondents

Issues:

Civil appeal – Constitutional law – Constituencies Boundaries Commission – Antigua and Barbuda Constitution Order 1981 – Constituencies Boundaries Commission Guidance Act, 2012 – Election petition – Whether the Commission engaged in gerrymandering – Bias – Whether Commission was biased – Consultation – Information provided – Time allotted for consultation – Whether consultation adequate

Result and Reason:

Held: allowing the appeal only on the ground that consultation was inadequate and dismissing the other grounds of appeal and ordering that the parties bear their own costs, that:

1. A party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point. Failure to cross-examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence. The appellants failed to cross-examine or test the evidence of Mr. Crump. In addition, there was simply no undisputed objective evidential material, either oral or documentary, inconsistent with the evidence of Mr. Crump which could not have been sensibly explained away. Bare assertions or equivocal inferences, which may be drawn from a primary fact, do not suffice. Accordingly, there is no basis for this Court to reject or disregard the evidence of Mr. Crump.
2. A decision making body is required to provide to persons with whom it must consult such information, in clear terms, as to what the proposal is and why it is under positive consideration. The decision making body ought to furnish enough information to enable persons to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this. In this regard, the Commission's

obligation was to consult with the appellants on the changes being proposed to existing constituency boundaries and why the changes were being proposed. The Commission was obligated to disclose enough information to enable the appellants to make an intelligent response. The undisputed evidence indicates such evidence was provided to the appellants. There was no request by the appellants, who are veteran politicians and who would know the boundaries of their existing constituencies, for further information. It is unlikely that the body consulting would be on notice of its failure to provide additional information in the absence of a request for specific information. The body may have reasonably concluded that the information provided was sufficient for the consultation purposes. Accordingly, the complaint of failure to disclose information in the circumstances of this case cannot be sustained.

Regina v North and East Devon Health Authority, Ex parte Coughlan [2001] QB 213 applied; *Bushell and Another v Secretary of State for the Environment* [1980] 3 WLR 22 applied.

3. In order for a charge of gerrymandering to succeed, two elements must be satisfied by cogent evidence. Firstly, it must be shown that the Commission altered the boundaries and that the alterations had the effect of diluting or weakening the opposing party's support in those altered constituencies. Secondly, it must be shown that the Commission so altered the boundaries precisely for achieving that effect – that is, the strengthening of the other party's electoral chances over the opposing party thus weakening the opposing party's electoral chances in those constituencies. On the facts of this case, gerrymandering was clearly not made out. The evidence fell short of establishing with clarity and certainty, that the ALP votes have been diluted to the advantage of the UPP. Further, there was no evidence which amounted *prima facie*, let alone established, that the Commission in fact set about re-drawing the constituency boundaries in order

to negatively impact the ALP's chances and positively impact the UPP's chances or vice versa. Consequently, this ground of appeal also fails.

In re H. and Others (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563 applied; and *In re Dellow's Will Trusts* [1964] 1 WLR 451 applied.

4. The test for establishing apparent bias is whether a fair minded and informed observer would consider that there was a real possibility of bias. An allegation of apparent bias is to be considered having regard to all the relevant facts and circumstances of the particular case based on the material before it and within the context of the issue to be decided. Therefore, a fair minded and informed observer having regard to all the facts would be aware of the constitutional provisions establishing the Commission. Where the Constitution itself provides for the appointment of members to a council, commission or other constitutional body in a certain manner and there is compliance with those provisions in making the appointment, the composition of the commission or such body so appointed, cannot in and of itself ground a charge of apparent bias. The fact that the Commission was appointed in accordance with specified provisions of the Constitution would trigger the presumption of impartiality in favour of the members regardless of their personal affiliations. That means that the onus would then be placed on the appellants to rebut that presumption by cogent evidence on a balance of probabilities. An examination of the appellant's allegations fall significantly short of this threshold. There was no evidence on which a fair minded and well-informed observer who is not given to suspicion, or is overly sensitive would conclude that the Commission was infected with bias and discharged its functions so as to prejudice the appellants or the parties to which they belong.

Vance Amory v Thomas Sharpe et al Saint Christopher and Nevis High Court Civil Appeal SKBHCVAP2009/0013 (Nevis Circuit) (delivered

27th August 2012, unreported) followed; *Constituency Boundaries Commission and Another v Baron* (1999) 58 WIR 153 applied; *George Meerabux v The Attorney General of Belize* [2005] UKPC 12 applied.

5. A body which is under a duty to consult must let those with whom it must consult know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. It is not sufficient simply to inform those with whom the Commission must consult that the Commission is considering altering boundaries and ask for their recommendations. Proposals must be put forward around which comments and alternative proposals may be put forward for the Commission's consideration.

R v North and East Devon Health Authority, ex parte Coughlan [2001] QB 211, para 112

6. Section 3(2) of the Guidance Act cannot be interpreted as requiring the Commission to consult even before it develops its proposals. The phrase “during the process of review” must therefore be interpreted holistically to encompass the entire process commencing with the appointment of the Commission and ending with its recommendations to the Speaker. Consultation must take place during this period, but it would be pre-mature to have any consultation before the Commission has some idea of what it proposes should be done, that is to say, until there is something specific around which consultation may be usefully held. Consultation at too early a stage would be insufficient to discharge the Commission’s duty to consult ‘if matters have not been formulated with sufficient detail to enable meaningful responses. A decision is still at a formative stage even where a decision-maker has identified a preferred option or reached a provisional view upon which it wishes to consult. There was no pre-determination on the part of the Commission and no final decision had been made.

East Devon District County Council and The Electoral Commission, The Boundary Commission for England [2009] EWHC 4 (Admin); *Port Louis Corporation v Attorney General of Mauritius* [1965] 3 WLR 72 applied; *Sardar v Watford Borough Council* [2006] EWHC 1590 considered.

7. Fairness in the decision-making subject to public consultation does not generally require internal workings of a decision-maker to be disclosed as part of the consultation. The learned judge did not err when he held that the Commission was not required to disclose the various scenarios for the boundaries and other information or data which were submitted to the Statistics Division and other public officers. Fairness did not so require and there was no exceptional circumstance which required the disclosure.

Regina v North and East Devon Health Authority, Ex parte Coughlan [2001] QB 213 applied; *Bushell and Another v Secretary of State for the Environment* [1980] 3 WLR 22 applied; *R v (Alconbury Developments Ltd) v Secretary of State for the Environment Transport and the Regions* [2003] 2 AC 295 applied; *Edwards & Anor v The Environmental Agency & Ors* [2006] EWCA Civ 877 applied; *The Queen on the application of Robin Murray & Co and The Lord Chancellor* [2011] EWHC 1528 at para 47 applied.

8. While the appointment of a Commission or report is not a condition precedent to a lawful election, it cannot be said that the Commission was not to perform its duty as required by the Constitution. Even though the Commission was required to submit its report by a specified date, it was also required to do so in full observance of its statutory duties as contemplated by section 64(3) of the Constitution. One obligation cannot be sacrificed so as to achieve compliance with another. The Commission was not entitled to deprive or deny interested parties the right to proper and adequate consultations. It could not have been the intention of the Parliament that the statutory right to be

consulted which it had enacted into law could or would be rendered nugatory by delay through no fault of the appellants, or due to the conduct or failures of the Commission. Adequate time for consultation in relation to changes in constituency boundaries is a matter of considerable public importance in ensuring the effective exercise of the right to vote in properly constituted constituency boundaries drawn in full regard of the principles and provisions set out in the Guidance Act.

Randolph B. Russell and Another v Attorney-General for St Vincent and the Grenadines and another [1997] 1 WLR 1134 distinguished.

9. The learned judge erred in holding that the respondents could rely on an urgency and that the consultations though '*not ideal were adequate*'. The respondents could not rely on an urgency primarily of its own making to justify the wholly inadequate time given for consultation. The last general election was in 2009. The Commission was appointed at latest in March 2012. The Guidance Act was enacted in December 2012. The first report was withdrawn at the end of April 2013 and the review process re-started. A definitive proposal was not put out until 13th June 2013. Whilst the appellants may be regarded as veteran politicians that does not diminish the right to be accorded adequate time to study, review, carry out their own investigations on the proposal, and formulate counter-proposals if need be in a meaningful way. Seven days in a matter of this kind, coupled with the lack of printed maps depicting the changes can hardly be said to be adequate. Whereas failure to produce or lack of a report does not invalidate a subsequent election, a flawed report could jeopardise the constitutional right to vote in a properly demarcated constituency. Consultation at the end of the process is unacceptable, where there is insufficient time to comment or where the impact of any response on the body consulting is likely to be minimal since it will already have formulated its view. The time allowed for consultation was

neither ideal nor adequate. The urgency brought about in part by the Commission does not justify abrogation of the duty to adequately consult on so vital a matter.

East Devon District Council and Electoral Commission [2009] EWHC 4 per Mr. Justice Cranston applied.

Case Name:

**The Hon. Gaston Browne
(The Leader of the Opposition)
v
The Attorney General of Antigua and Barbuda
v
[1] Mr. Juno Samuel
[2] Mr. Nathaniel James
[3] Mr. Jack Kelsick
[4] Mr. Anthonyson King
[5] Mrs. Glendina McKay
[6] Mrs. Paula Lee
(Members of the Antigua and Barbuda
Electoral Commission under the provisions
of the Representation of the People
(Amendment) Act No. 12 of 2011)
[ANUHCVP2013/0028]**

Date: Monday, 28th April 2014

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal

Appearances:

Appellants:	Ms. Nadine Whyte holding papers for Mr. Anthony Astaphan, SC
Respondents:	Ms. Maya Barry holding papers for all counsel representing the respondents

Issues:

Civil appeal – Constitutional law – Antigua and Barbuda Constitution Order 1981 – Electoral Commission – Right to vote – Entitlement to vote – Representation of the People Act – Representation of the People (Amendment) Act 2010 – Change in qualification for Commonwealth Citizens to vote in elections – Whether amendment to Act contravenes the provision of the Constitution – Whether amendment to Act limits or restricts the right of Commonwealth Citizens to vote – Registration process – Whether registration process illegal – Bias – Whether Electoral Commission was tainted with bias

Result and Reason:

Held: dismissing the appeal and making no order as to costs, that:

1. The scope of section 40 of the Constitution identifies the parameters within which a person becomes entitled to vote. It recognises that the right to vote is made subject to inter alia a person's registration as a voter. Apart from being a Commonwealth citizen having attained the age of 18 years and having not been disqualified to vote, a person must possess such qualifications relating to residence or domicile in Antigua and Barbuda as Parliament may prescribe to be entitled to register as a voter. The words "may prescribe" specifically mentioned in section 40(2) of the Constitution gives to Parliament the power to legislate from time to time and as it sees fit in respect of the qualifications relating to residence or domicile for registration of any person as a voter. The section clearly reserves to Parliament the power to pass ordinary laws in relation to the specified qualifications. Thus, it must be presumed that the framers of the Constitution intended that Parliament retain such power. In that regard, Parliament having made an amendment to the principal Act was not infringing section 40 or any other provision of the Constitution. Parliament purported to act within the powers directly conferred on it by the Constitution, particularly section 40(2).

Section 40 of the Antigua and Barbuda Constitution Order 1981 applied; *Lester Bryant Bird v Attorney General* Claim No. ANUHCv2012/0164 approved; *Attorney General v McLeod* [1984] 32 WIR 451 applied; *George Rick James v Ismay Spencer and Lorna Simon* Civil Appeal No. 27 of 2004 followed.

2. Fundamental rights and freedoms are generally protected under the Constitution except in certain instances where the provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society. The right to vote, though it is a constitutional right, is not a fundamental right. As such, there was no requirement for the State to show that the amendment was justifiably required in a democratic society. Auxiliary to that, section 40(2) of the Constitution does not speak to “justifiably required in a democratic society”. On those bases, the changing of the provision with respect to the residency qualification does not attract or engage the requirement of “reasonably justifiable in a democratic society”. Simply, section 40(2) does not engage the issue of proportionality.

Elloy de Freitas v The Permanent Secretary of Ministry of Agriculture, Fisheries Lands and Housing et al (Privy Council Appeal No. 42 of 1997) distinguished; *Paponnette v Attorney General of Trinidad and Tobago* (2010) 78 WIR 474 distinguished.

3. There is a common law presumption that a statute is not intended to operate retrospectively. The presumption can be rebutted if it clearly appears that it was the intention of Parliament to produce the result in question. The words contained in the amendment to the Act in no way suggest that it was the intention of Parliament for the Act to operate retroactively or retrospectively. The entitlement to vote belongs to a person entitled to be registered. Parliament, exercising powers sanctioned by the Constitution, amended the law.

The fact that the law is amended from time to time does not mean that those who were entitled to vote before the amendment and not entitled after the amendment could succeed in arguing that the amendment has retroactive effect. The amending Act 2010 unmistakably affected or altered existing rights prospectively. Therefore, the appeal on the retrospectivity of the amending Act 2010 fails.

Wilson v Secretary of State for Trade and Industry [2003] UKPC 40 applied; Section 40 of the Antigua and Barbuda Constitution Order 1981 applied.

4. Section 40 of the Constitution does not confer on a person an entitlement to be registered for the purpose of voting ad infinitum or in perpetuity. The entitlement to vote is restricted to every person who is registered as a voter. With respect to the residency qualifications, Parliament reserves the right to alter such qualifications as it sees fit and from time to time. The amending Act 2010 altered the residency qualifications from 3 years to 7 years. That is the law which Parliament has prescribed and which law is currently in force. To be entitled to be registered to vote every Commonwealth citizen must satisfy the 7 year requirement. It follows that persons who do not fall within the new residency criteria are not entitled to be registered to vote. A re-registration process is but one method of ensuring that all persons registered to vote are so entitled based on the new residency criteria and so as to ensure that the register of electors are properly maintained at all times. Persons who were previously registered but have now failed to meet the new qualifications that Parliament lawfully prescribed cannot rightfully assert the right to remain registered. They have become “disqualified for registration” by virtue of the amending Act 2010.

Section 19 of the Representation of the People Act applied; Section 40 of the Antigua and Barbuda Constitution Order 1981.

5. The appropriate test in determining an issue of

apparent bias is whether the fairminded and informed observer, having considered the facts, would conclude that there was a real possibility of bias. The fair-minded and informed observer can be assumed to have full knowledge of all the material facts and must adopt a balanced approach in assessing the facts. The material facts in this case indicate that the Chairman of the Commission was appointed by the Prime Minister after consultation with the leader of the Opposition, the majority of the members of the Commission are not nominees of the Prime Minister, the changes made to the principal Act were made by Parliament and not the Commission or its Chairman and finally, that there was no evidence the Chairman of the Commission conspired with or caused the UPP to make the statements which they made. Those material facts are what a fair-minded and informed observer would have within their contemplation when assessing whether there exists any evidence of apparent bias. The facts plainly show that there would be no basis for a fair-minded and informed observer to conclude that there was a real possibility of bias.

Porter v Magill [2001] UKHL 67 applied; *Belize Bank Ltd. v Attorney General* [2011] UKPC 36 applied; *R v Abdroikov* [2007] 1 WLR 2679 applied; *Gillies v Secretary of State for Work and Pensions (Scotland)* [2006] 1 WLR 781 applied.

6. The position of Chief Registration Officer had previously not been statutorily established and hence not mentioned or specifically defined in the principal Act. General direction and control of the preparation of the register is given to the Commission and not to the Supervisor of Elections or the Chief Registration Officer. The Supervisor of Elections had always acted under the direction of the Commission, whether it be under the principal Act or the amending Act 2010. The Commission's use of registration officers in the re-registration process was provided for in both the principal Act and the amending Act 2010. That being the case, there can be nothing unlawful

about that procedure being adopted by the Commission. Moreover, there are no specific statutory duties assigned to the Supervisor of Elections. As such, there could not have been an usurpation of the Supervisor of Elections' role in the re-registration process. Additionally, it could not be the intention of Parliament that if the wrong person is appointed Chief Registration Officer the registration process is void.

Charles (Herbert) v Judicial and Legal Service Commission and Another (2002) 61 WIR 471 applied.

APPLICATIONS AND APPEALS

Case Name:

Chang Ho Kwok David

v

[1] Winbless Inc

[2] Amazing Inc

[BVIHCMAP2013/0007]

Date:

Monday, 28th April 2014

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, Justice of Appeal
[Ag.]**

Appearances:

Applicant:

Mr. Jeremy Child

Respondents:

Mr. John Carrington, QC for the first respondent

Issues:

Application for leave to appeal costs order made by learned judge in ex tempore judgment dated 15th May 2013 – Applicant's summary judgment

application in court below dismissed by learned judge and costs awarded to respondents – General rule in awarding costs applied by learned judge – Whether learned judge erred in making costs order

Result / Order:

[Oral delivery]

1. Leave to appeal is refused and the application is dismissed.
2. No order as to costs.

Reason:

After hearing the applicant's application for summary judgment, the learned judge in the court below held that the applicant's pleaded case had not disclosed any cause of action. Counsel for the applicant sought an adjournment of the application in order to put his pleadings in order, but the learned judge did not accede to his request, and dismissed the summary judgment application with costs. The learned judge reasoned that an applicant for summary judgment who essentially asks to abandon the application should pay costs to the respondent who has successfully resisted it. He saw no good reason why costs should not follow the event in the ordinary way.

The Court held that when one seeks leave to appeal against costs, it must be shown why it is asserted that the judge has exceeded that generous ambit of his discretion in making the costs award. The general rule is that costs follow the event. The Court found that no reason had been advanced which showed that the judge had exercised his discretion incorrectly in not deviating from the general rule in the circumstances of this case, and noted that the dismissal itself was not under appeal. Accordingly, the Court held that the applicant did not have an arguable case which warranted the grant of leave to appeal the costs order.

The Court held that it would make no order as to costs on the instant application since it was one for leave to appeal, this Court having made clear in previous decisions such as *Treasure Bay (St. Lucia) Limited v Cage St. Lucia Limited et al*

SLUHCVAP2011/0045 (delivered 23rd January 2012, unreported) and *Danone Asia PTE Limited et al v Golden Dynasty Enterprise Limited et al* BVIHCVAP2009/0002 (delivered 28th September 2009, unreported) how applications for leave to appeal ought to be treated, such applications being a filtering process, which do not engage the respondent at that stage. The Court stated that notwithstanding that in the instant case a notice of opposition had been filed by the respondent, this did not mean that the nature of the application, which was one for leave, had changed in any respect and that it ought to be treated differently.

Case Name: **United Best Developments Limited**
v
[1] Noble Field Overseas Limited
[2] Offshore Incorporations Limited

[BVIHCMAP2013/0025]

Date: **Monday, 28th April 2014**

Coram: **The Hon. Dame Janice M. Pereira, DBE, Chief Justice**
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, Justice of Appeal
[Ag.]

Appearances:

Appellant / Applicant / Respondent:	Mr. Jonathan Ward
Respondent / Applicant:	Mr. Richard Brown, with him, Ms. Colleen Farrington (for the first respondent)

Issues: **Amendment of register of members of appellant company ordered by learned judge so as to give effect to purported transfer of all issued shares from Mr. Chen Bin (director of appellant company) to first**

respondent – Application (by Mr. Chen Bin) to be joined as party to proceedings – Concern that civil proceedings in BVI should not prejudice criminal proceedings instituted by applicant in Thailand regarding conduct of first respondent and certain of its officers in procuring share charge which is subject of present appeal – Application (by appellant) for permission to adduce fresh evidence relating to criminal complaint to put matters into context – Application (by first respondent) to strike out paragraphs 4 and 5 of amended notice of appeal

Result / Order:

[Oral delivery]

Joinder

The applicant in appeal BVIHCMAP2014/0001, Mr. Chen Bin, is hereby joined as a party to the proceedings herein in respect of appeal BVIHCMAP2013/0025, as an appellant.

Strike Out

1. Grounds 4 and 5 of the amended grounds of appeal filed in the amended notice of appeal filed on 28th February 2014 are struck out.
2. Mr. Chen Bin, on being added to the appeal, is permitted to insert into the amended notice of appeal filed on 28th February 2014, any grounds contained in the applicant's amended notice of appeal in appeal BVIHCMAP2014/0001, dated 28th February 2014, which shall not include the grounds in paragraphs 4 and 5 which have been struck out.
3. Appeal BVIHCMAP2014/0001 being consolidated herewith and discontinued, directions to be agreed and presented to the Court for consideration by Tuesday, 29th April 2014.

Fresh Evidence

The application to adduce fresh evidence is dismissed.

Costs

The Court makes no order as to costs on the applications.

Reasons:

Joinder

The Court held that the justice of the matter required that Mr. Chen Bin be joined as a party to the appeal. Under rules 26.1(2)(g) and 19.2(3) of the Civil Procedure Rules 2000, the Court has broad powers. The conjoined effect of Parts 19 and 26 is to ensure the furtherance of the overriding objective which is to deal with cases justly, particularly where any order is adverse to a party's interest. Mr. Chen Bin has a proprietary interest in the matter and could be adversely affected by its outcome. It would be a breach of those principles should Mr. Chen Bin, who stands to be adversely affected and has been adversely affected by the orders made, is not made a party either by the Court or by the proceedings as filed or by him having sought to be joined on the basis that he considered that the claims in the court below should not have succeeded, having regard to the declarations sought. However, orders were made against him on a very different point relating to a statutory provision under the BVI Business Companies Act, 2004 (Act No. 16 of 2004, Laws of the Virgin Islands). In those circumstances, he ought to be joined as a party to the appeal to ensure that substantial justice is done.

Fresh Evidence

The test to adduce fresh evidence as established in the case of *Ladd v Marshall* [1954] 1 WLR 1489, which is adopted and applied herein, is that:

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.

The Court held that the evidence which ought to have been put in the appeal to support the application to adduce fresh evidence did not satisfy the test established in *Ladd v Marshall*.

Strike Out

The Court held that paragraphs 4 and 5 of the amended grounds of appeal filed in the amended notice of appeal on 28th February 2014 were not proper grounds of appeal.

Costs

The Court took the view that since the parties had each had some success in relation to the applications heard, it may be said that they were equally successful in the circumstances. Accordingly, no order was made as to costs.

Case Name:

Mr. Chen Bin

v

[1] Noble Field Overseas Limited

[2] Offshore Incorporations Limited

[3] United Best Developments Limited

[BVIHCMAP2014/0001]

Date:

Monday, 28th April 2014

Coram:

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

The Hon. Mr. Mario Michel, Justice of Appeal

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

Appearances:

**Appellant /
Applicant /
Respondent:**

Mr. Jonathan Ward

**Respondent /
Applicant:**

**Mr. Richard Brown, with him, Ms. Colleen Farrington
(for the first respondent)**

Issues:

Amendment of register of members of appellant company ordered by learned judge so as to give effect to purported transfer of all issued shares from Mr. Chen Bin (director of appellant company) to first respondent – Application (by Mr. Chen Bin) to be joined as party to proceedings – Concern that civil proceedings in BVI should not prejudice criminal proceedings instituted by applicant in Thailand regarding conduct of first respondent and certain of its officers in procuring share charge which is subject of present appeal – Application (by appellant) for permission to adduce fresh evidence relating to criminal complaint to put matters into context

**Result / Order
& Reason:**

The decision and reasons in this matter are as set out in the decision in appeal BVIHCMAP2013/0025.

Case Name:

**Charmaine Rosan-Bunbury
v
[1] The Judicial and Legal Services
Commission
[2] Governor of the British Virgin Islands
William Boyd McCleary
[3] Senior Magistrate Valerie Stephens
[4] Permanent Secretary in the Deputy
Governor's Office David Archer
[5] Additional Magistrate Tamia Richards
[6] The Attorney General of the British Virgin
Islands**

[BVIHCVAP2011/0072]

Date:

Monday, 28th April 2014

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

Appearances:

Appellant / Applicant: Ms. Charmaine Rosan-Bunbury in person

Respondents: Ms. Maya Barry, with her, Ms. Miglisa Cupid and Ms. Isis Potter

Issues: Application for conditional leave to appeal to Her Majesty in Council – Application to adduce fresh evidence – Judicial review – Natural justice – BVI Constitution Order 2007 – Whether leave should have been granted for judicial review of decision to interdict magistrate – Whether interdiction of magistrate without first affording her an opportunity to be heard was contrary to principles of natural justice – Public Service Commission Regulation 37(1)(a)

Result / Order: [Oral delivery]

Application for conditional leave to appeal to Her Majesty in Council

1. Leave to appeal to Her Majesty in Council is hereby granted upon condition that:-
 - a) The appellant/applicant within 90 days from the date of this order enter into good and sufficient security in the sum of £500 sterling for the due prosecution of the appeal, such security to consist of a deposit of the said amount at the court office.
 - b) Within 90 days of the date hereof, the appellant/applicant do take the necessary steps for the purpose of procuring the preparation of the record, the settling of such record with the solicitors for the respondents to this application, and certification of the record by the Registrar of the Court of Appeal.
 - c) The record shall be prepared in accordance with Rules 18 to 20 of the Judicial Committee

(Appellate Jurisdiction) Rules Order 2009 and its Practice Direction 4.2.1 to 4.3.2 and Practice Direction 5; and shall be transmitted to the Registrar of the Judicial Committee of the Privy Council without delay where final permission to appeal has been granted.

2. The appellant/applicant shall make an application to the Court for final permission to appeal to Her Majesty in Council, supported by the certificates of the Registrar that the security for costs ordered herein has been given within the time prescribed by this order to the satisfaction of the Registrar.
3. The costs of and incidental to this application shall be costs in the appeal to Her Majesty in Council.

Application to Adduce Fresh Evidence

1. The application to adduce fresh evidence is dismissed.
2. No order as to costs.

Case Name:

Sherwin Fahie

v

The Queen

[BVIHCRAP2012/0007]

Date:

Monday, 28th April 2014

Coram:

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

Appearances:

Applicant:

Ms. Marie-Lou Creque

Respondent:

**Ms. Tiffany Scatliffe, Director of Public Prosecutions
[Ag.]**

Issues:

Appeal against conviction and sentence – Wounding

with intent – Whether learned trial judge erred in directing jury on issue of identification – Whether learned trial judge pressured jury into reaching verdict

Result / Order: [Oral delivery]
The matter is adjourned to 30th April 2014.

Case Name: Irvin Fletcher Scatliffe
v
Dora Scatliffe

[BVIHCVAP2012/0004]

Date: Monday, 28th April 2014

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

Appearances:
Appellant / Applicant: Mr. Menelik Miller
Respondent: Ms. Willa Tavernier

Issues: Application for final leave to appeal to Her Majesty in Council – Application for stay of execution

Result / Order: [Oral delivery]
Application for final leave to appeal to Her Majesty in Council

1. Leave to appeal to Her Majesty in Council is hereby granted upon condition that:-
 - a) The appellant/applicant within 90 days from the date of this Order enter into good and sufficient security in the sum of £500 sterling for the due

prosecution of the appeal, such security to consist of a deposit of the said amount at the court office.

- b) Within 90 days of the date hereof, the appellant do take the necessary steps for the purpose of procuring the preparation of the record, the settling of such record with the solicitors for the respondent to this application, and certification of the record by the Registrar of the Court of Appeal.
 - c) The record shall be prepared in accordance with Rules 18 to 20 of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 and its Practice Direction 4.2.1 to 4.3.2 and Practice Direction 5; and shall be transmitted to the Registrar of the Judicial Committee of the Privy Council without delay where final permission to appeal has been granted.
2. The appellant/applicant shall make an application to the Court for final permission to appeal to Her Majesty in Council, supported by the certificates of the Registrar that the security for costs ordered herein has been given within the time prescribed by this order to the satisfaction of the Registrar.
 3. The costs of and incidental to this application shall be costs in the appeal to Her Majesty in Council.

Application for Stay of Execution

1. The application for an order of stay of execution the decision of the Court of Appeal is dismissed.
2. Costs to the respondent in the sum of \$500.00.

Case Name:

Joseph Rosan

v

Valerie Stephens

[BVIHCVAP2013/0009]

Date:

Monday, 28th April 2014

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

Appearances:

Applicant: Ms. Charmaine Rosan-Bunbury and Mr. Joseph Rosan (in person)

Respondent: Ms. Tamara Cameron

Issues: Leave to appeal decision of learned master to strike out applicant's defence and dismiss his application to strike out respondent's claim and statement of case – Whether applicant's defence was defective – Whether learned master erred in finding that applicant's defence did not disclose any reasonable ground for defending respondent's claim in court below – Application for counsel for the appellant to be removed from record – Application for an adjournment

Result / Order: [Oral delivery]
1. The application for counsel for the appellant to be removed from the record is granted.
2. A final adjournment is granted to the appellant and the matter is traversed to the next sitting of the Court in the Territory of the Virgin Islands during the month of September 2014.

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: Tuesday, 29th April 2014

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

Appearances:

Applicant / Appellant:	Mr. John Carrington, QC, with him, Mr. Kissock Laing
Respondents:	Mr. Nelson Samuel for the second respondent
Interested parties:	Mr. Jonathan Ward for the first interested party Mr. Robert Nader for the second interested party Mr. David Harvey for the third interested party (David Kinnon, the liquidator)

Issues: Application for leave to appeal 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) – Application for leave to file evidence out of time and to adduce fresh evidence

Result / Order: [Oral delivery]
1. Leave to appeal is granted.
2. Costs be costs in the appeal.

Section 233 of the Insolvency Act, 2003 (Act No. 5 of 2003, Laws of the Virgin Islands) involves the exercise of a discretionary power in terms of whether or not to terminate a liquidation. The test may be said to be set out in cases such as *David Friedland v Xena*

Investments Limited et al BVIHCM2010/0083 (delivered 6th June 2011, unreported) and *Slim Malouche v Registrar of Corporate Affairs* BVIHCV2010/231 (delivered 22nd July 2011, unreported) and *Emirates International Investment Company v Slim Malouche et al* BVIHCVAP2011/0032 (delivered 29th May 2012, unreported). It is a broad discretion and one where all the circumstances must be considered. The threshold test by which leave to appeal may be granted is that the applicant must show an arguable case for appeal, that is, that the case should have a realistic prospect of success. The Court was of the view, given the nature of the claims and the seemingly disputed positions as it related to the two potential claims being asserted as against the company MBI International & Partners, Inc. and, having regard to the very principles espoused in the case of *Slim Malouche*, that the applicant had met the threshold for the grant of leave.

Case Name:

Collin Green
v
The Queen

[BVIHCRAP2013/0010]

Date:

Tuesday, 29th April 2014

Coram:

The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, Justice of Appeal
[Ag.]

Appearances:

Appellant:

Mr. Stephen Daniels

Respondent:

Ms. Tiffany Scatliffe, Director of Public Prosecutions
[Ag.]

Issues:

Appeal against sentence – Whether sentence imposed by learned trial judge was excessive – Appellant pleaded guilty to offence

Result / Order:

[Oral delivery]

- 1. By consent, the appeal against sentence is allowed.**
- 2. The appellant is sentenced to 5 years imprisonment in substitution of the sentence of 7 years. This sentence is to take effect from the date of the appellant's remand.**

Reason:

The trial judge failed to apply the relevant principles of sentencing and did not use the notional sentence as his starting point. Using 5 years as the starting point and taking into consideration the relevant mitigating factors and aggravating factors (which balanced out each other), the Court found that a sentence of 5 years would have been appropriate; there was no basis for the learned judge to have increased the sentence from that point, to 7 years.

Case Name:

Mukhtar Ablyazov

v

JSC BTA Bank

[BVIHCMAP2013/0010]

Date:

Tuesday, 29th April 2014

Coram:

**The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Mr. George Hayman

Respondent:

Mr. Philip Jones, QC, with him, Ms. Tameka Davis

Issues:

Appeal against order of learned judge dismissing appellant's application to set aside or vary orders

registering in BVI two judgments of English Commercial Court – Whether registration orders should be set aside – Whether execution of judgments should be stayed – Whether learned judge erred in law in concluding that s. 3(1) of Reciprocal Enforcement of Judgments Act (Cap. 65, Revised Laws of the Virgin Islands 1991) confers discretion to refuse registration of judgment only if circumstances pertaining to the Territory of the Virgin Islands render enforcement of judgment unjust or inconvenient – Whether even if s. 3(1) of Act confers a discretion only if circumstances pertaining to the Territory of the Virgin Islands exist, learned judge erred in fact in finding that circumstances did not prevail in the Territory which rendered it unjust and inconvenient to enforce judgments in the Territory – Whether in exercising his discretion under s. 3(1) of Act learned judge erred in law in failing to take into account within the rubric “just and convenient” (or gave insufficient weight to) considerations of public policy such as natural justice and the right to a fair hearing

Result / Order:

The Court rose for a break.

Case Name:

Mukhtar Ablyazov

v

JSC BTA Bank

[BVIHCMAP2013/0010]

Date:

Tuesday, 29th April 2014

Coram:

**The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, Justice of Appeal
[Ag.]**

Appearances:

Applicant:

Mr. George Hayman

Respondent:

Mr. Philip Jones, QC, with him, Ms. Tameka Davis

Issues: Appeal against order of learned judge dismissing appellant's application to set aside or vary orders registering in BVI two judgments of English Commercial Court – Whether registration orders should be set aside – Whether execution of judgments should be stayed – Whether learned judge erred in law in concluding that s. 3(1) of Reciprocal Enforcement of Judgments Act (Cap. 65, Revised Laws of the Virgin Islands 1991) confers discretion to refuse registration of judgment only if circumstances pertaining to the Territory of the Virgin Islands render enforcement of judgment unjust or inconvenient – Whether even if s. 3(1) of Act confers a discretion only if circumstances pertaining to the Territory of the Virgin Islands exist, judge erred in fact in finding that circumstances did not prevail in the Territory which rendered it unjust and inconvenient to enforce judgments in the Territory – Whether in exercising his discretion under s. 3(1) of Act learned judge erred in law in failing to take into account within the rubric “just and convenient” (or gave insufficient weight to) considerations of public policy such as natural justice and the right to a fair hearing

Result / Order: The Court rose for the lunch break and to consider its judgment.

Case Name: Mukhtar Ablyazov
v
JSC BTA Bank
[BVIHCMAP2013/0010]

Date: Tuesday, 29th April 2014

Coram: The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. George Hayman

Respondent: Mr. Phillip Jones, QC, with him, Ms. Tameka Davis

Issues:

Appeal against order of learned judge dismissing appellant's application to set aside or vary orders registering in BVI two judgments of English Commercial Court – Whether registration orders should be set aside – Whether execution of judgments should be stayed – Whether learned judge erred in law in concluding that s. 3(1) of Reciprocal Enforcement of Judgments Act (Cap. 65, Revised Laws of the Virgin Islands 1991) confers discretion to refuse registration of judgment only if circumstances pertaining to the Territory of the Virgin Islands render enforcement of judgment unjust or inconvenient – Whether even if s. 3(1) of Act confers a discretion only if circumstances pertaining to the Territory of the Virgin Islands exist, judge erred in fact in finding that circumstances did not prevail in the Territory which rendered it unjust and inconvenient to enforce judgments in the Territory – Whether in exercising his discretion under s. 3(1) of Act learned judge erred in law in failing to take into account within the rubric “just and convenient” (or gave insufficient weight to) considerations of public policy such as natural justice and the right to a fair hearing

Result / Order:

[Oral delivery]

1. The appeal, in its entirety, is dismissed.
2. Costs to the respondent to be assessed if not agreed within 21 days of this order.

Reason:

Ground of Appeal #1 – Whether the learned judge erred in law in concluding that s. 3(1) of the Reciprocal Enforcement of Judgments Act confers a discretion to refuse registration of a judgment only if circumstances pertaining to the Territory of the Virgin Islands render enforcement of that judgment unjust or inconvenient

The Court held that there was no basis to fault the learned judge's interpretation of section 3(1) of the Reciprocal Enforcement of Judgments Act (Cap. 65, Revised Laws of the Virgin Islands 1991); the section clearly provides that the court can only register a foreign judgment if it is just and convenient to do so. The discretion is a narrow one. The trial judge's reasons and analysis given in paragraphs 8, 9, 10 and 12 of the judgment are sound.

Ground of Appeal #2 – Whether even if s. 3(1) of the Reciprocal Enforcement of Judgments Act confers a discretion only if circumstances pertaining to the Territory of the Virgin Islands exist, the judge erred in fact in finding that circumstances did not prevail in the Territory which rendered it unjust and inconvenient to enforce judgments in the Territory

and

Ground of Appeal #3 – Whether in exercising his discretion under s. 3(1) of Reciprocal Enforcement of Judgments Act the learned judge erred in law in failing to take into account within the rubric “just and convenient” (or gave insufficient weight to) considerations of public policy such as natural justice and the right to a fair hearing

In relation to grounds of appeal 2 and 3, the Court looked at the manner in which the learned judge had exercised his discretion in dealing the appellant's application to set aside or vary the orders registering the two Commercial Court judgments, and it took the view that there was no indication that the judge took into account the following relevant considerations: the fact that a Receiver Manager had been appointed over the appellant's assets within the jurisdiction which could have had the effect of holding the ring; the fact that the possibility of success of the appellant's application to the European Court of Human Rights (“ECHR”) (challenging the order of the English Court of Appeal dated 7th November 2012) would render the underlying judgments vulnerable; the fact that even if the appellant were to succeed in the ECHR and was awarded just satisfaction this

would not compensate him for the loss and so the appellant would suffer irreversible harm. Accordingly, the learned judge erred in exercising his discretion (see *Dufour and Others v Helenair Corporation Ltd and Others* (1996) 52 WIR 188). In the circumstances, the Court saw it fit to exercise its discretion afresh. In so doing, it was obliged to take into account the factors that were relevant to the appellant's case as well as those relevant to the respondent's case.

The Court gave consideration to the length of time that the respondent was likely to be kept out of its money if the stay of the execution of the judgments was granted, which could have been for as many as 3-4 years, pending the outcome of the appellant's application to the ECHR. The Court noted that the appellant did not argue that the unless order (with which he did not comply, which non-compliance led to the making of the judgments, which are the subject of this matter, being entered against him) breached Article 6 of the European Convention on Human Rights or that it was a breach of the Constitution in the BVI or a breach of his right to natural justice. The Court also took into account the contention that it was the appellant's conduct which debarred him from being heard. Additionally, a very relevant factor was that the appellant had not given any account of the assets that may be rolled up and realised.

The Court mentioned that it was important to state that the parties agreed that once the Court is minded to exercise its discretion afresh it should take into account the additional evidence which was adduced by the respondent, with respect to the ECHR's refusal to grant the appellant interim measures, and the Court did take this into account. The Court was also of the view that it should proceed on the basis that the respondent would be in a position to provide restitution.

The Court made it clear that it had proceeded on two assumptions of the trial judge, namely, that the appellant had a real prospect of persuading the ECHR to recommend that the English judgments be set aside and had a similarly real prospect of persuading

the English Courts in light of such a ruling that they should be set aside, and secondly, that there was a real risk that the appellant may suffer irreversible damage if the English judgments were executed.

Taking into consideration the totality of the circumstances that were relevant to the appellant's position and the respondent's position, and exercising its discretion afresh, the Court held that there was no doubt that the justice in the matter required that the registration orders be neither set aside nor varied. The balance weighed in favour of the respondent.

On the public policy issue which was raised by counsel for the appellant on the basis of breach of natural justice, the Court stated that this had been dealt with safely under its findings in relation to ground of appeal #2.

Case Name:

[1] Yang Hsueh Chi Serena
[2] Mong Sien Yee Cynthia
[3] Mong Tak Yeung David
[4] Mong Wai Yee Viola
[5] Mong Tak Fun Stephen
[6] Mong Jo Yee Josephine
v
[1] Equity Trustee Limited
[2] Wong Pui Fan
[3] Mong Pui Yee Perlie
[BVIHCMAP2013/0012]

Date:

Wednesday, 30th April 2014

Coram:

The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Gerard St. C. Farara, QC, Justice of Appeal [Ag.]
The Hon. Ms. Joyce Kentish-Egan, Justice of Appeal [Ag.]

Appearances:

Appellants: Ms. Shân Warnock-Smith, QC, with her, Mr. Raymond Davern

Respondents: Mr. David Brownbill, QC, with him, Mr. Mungo Lowe for the first respondent
Mr. Nicholas Le Poidevin, QC, with him, Ms. Arabella di Iorio and Mr. Brian Lacy for the second and third respondents

Issues:

Commercial appeal – Trust fund – Entitlements of beneficiaries – Construction of provisions of trust deed – Whether trustee had power to effect variation of trust deed in accordance with wishes of settlor – First appellant removed from list of beneficiaries and entitlements of remaining beneficiaries altered by settlor – Whether ‘words of entitlement’ in annexure of trust deed by which appellants were initially made beneficiaries conveyed immediate, absolute and indefeasible interest in trust assets in favour of appellants – Whether any power granted in deed to trustee to change beneficiaries and/or percentage entitlements rendered otiose

Result / Order:

1. Judgment is reserved.
2. Notice to be given as to the date of delivery of the judgment.
3. The respondent shall file and serve submissions in respect of costs by Friday, 16th May 2014.
4. The appellants, if necessary, shall file and serve a reply to the respondents’ submissions on costs no later than Monday, 26th May 2014.

Case Name:

Sherwin Fahie

v

The Queen

[BVIHCRA2012/0007]

Date: Wednesday, 30th April 2014

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

Appearances:

Appellant: Ms. Marie-Lou Creque

Respondent: Ms. Tiffany Scatliffe, Director of Public Prosecutions [Ag.]

Issues: Appeal against conviction and sentence – Wounding with intent – Whether learned trial judge erred in directing jury on issue of identification – Whether learned trial judge pressured jury into reaching verdict

Result / Order: Matter adjourned to 2:30 p.m. for judgment to be delivered.

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

Date: Wednesday, 30th April 2014

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

Appearances:

Appellant / Respondent: Mr. Terrance Neale

Respondent / Applicant: Mr. E. Anthony Ross, QC

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

Result / Order: [Oral delivery]

Application (by Respondent) for Conditional Leave to Appeal to Her Majesty in Council

1. The respondent/applicant is granted leave to appeal to the Judicial Committee of the Privy Council upon condition that:-
 - a) The respondent/applicant within 90 days from the date of this order enter into good and sufficient security in the sum of £500 sterling for the due prosecution of the appeal, such security to consist of a deposit of the said amount at the court office.
 - b) Within 90 days of the date hereof, the respondent/applicant do take the necessary steps for the purpose of procuring the preparation of the record, the settling of such record with the solicitors for the respondent to this application, and certification of the record by the Registrar of the Court of Appeal.
 - c) The record shall be prepared in accordance with Rules 18 to 20 of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 and its Practice Directions 4.2.1 to 4.3.2 and Practice Direction 5; and shall be transmitted to the Registrar of the Judicial Committee of the Privy Council without delay where final permission to appeal has been granted.
2. The respondent/applicant shall make an application to the Court for final permission to appeal to Her Majesty in Council, supported by the certificates of the Registrar that the security for costs ordered herein has been given within the time prescribed by this order to the satisfaction of the Registrar.
3. The costs of and incidental to this application shall be costs in the appeal to Her Majesty in Council.

Application (by Appellant) for Conditional Leave to

Cross Appeal to Her Majesty in Council

- 1. Leave is granted appellant/respondent to cross appeal to the Judicial Committee of the Privy Council upon condition that:-**
 - a) The appellant/respondent within 90 days from the date of this order enter into good and sufficient security in the sum of £500 sterling for the due prosecution of the appeal, such security to consist of a deposit of the said amount at the court office.**
 - b) Within 90 days of the date hereof, the appellant/respondent do take the necessary steps for the purpose of procuring the preparation of the record, the settling of such record with the solicitors for the respondent to this application, and certification of the record by the Registrar of the Court of Appeal.**
 - c) The record shall be prepared in accordance with Rules 18 to 20 of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 and its Practice Directions 4.2.1 to 4.3.2 and Practice Direction 5; and shall be transmitted to the Registrar of the Judicial Committee of the Privy Council without delay where final permission to appeal has been granted.**
- 2. The appellant/respondent shall make an application to the Court for final permission to appeal to Her Majesty in Council, supported by the certificates of the Registrar that the security for costs ordered herein has been given within the time prescribed by this order to the satisfaction of the Registrar.**
- 3. The costs of and incidental to this application shall be costs in the appeal to Her Majesty in Council.**

Case Name:

[1] Andrew Fahie

[2] Petra Benjamin
v
National Bank of the Virgin Islands

[BVIHCVAP2013/0010]

Date: Wednesday, 30th April 2014

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

Appearances:

Appellants: Mr. Terrance Neale

Respondent: Mr. Paul Webster, QC, with him, Ms. Ronda Browne

Result / Order: [Oral delivery]
1. By consent, the appeal is withdrawn.
2. No order as to costs.

Case Name: The Commissioner of Police
v
Garfield Anderson

[BVIMCRAP2013/0013]

Date: Wednesday, 30th April 2014

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

Appearances:

Applicant: Mr. Patrick Thompson

Respondent: Ms. Tiffany Scatliffe, Director of Public Prosecutions
[Ag.]

Issues: Appeal against exercise of discretion of learned magistrate – Charges against respondent dismissed by learned magistrate – Whether decision was unreasonable – Indecent assault

Result / Order: [Oral delivery]
The appeal is dismissed.

Reason: The circumstances in which an appellate court would review the exercise of discretion of a judge in a lower court are well known and are set out in the case of *Dufour and Others v Helenair Corporation Ltd and Others (1996)* 52 WIR 188.

Having examined the reasons given by the learned magistrate, as well as the history of the matter, the Court found that it could not be said that his decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly wrong.

Case Name: Sherwin Fahie
v
The Queen

[BVIHCRA2012/0007]

Date: Wednesday, 30th April 2014

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

Appearances:

Appellant: Ms. Marie-Lou Creque

Respondent: Ms. Tiffany Scatliffe, Director of Public Prosecutions [Ag.]

Issues:	Appeal against conviction and sentence – Wounding with intent – Whether learned trial judge erred in directing jury on issue of identification – Whether learned trial judge pressured jury into reaching verdict
Result / Order:	[Oral delivery] 1. The appellant's conviction and sentence are set aside. 2. The matter is remitted to the High Court for retrial. 3. The appellant is admitted to bail on the same terms and conditions granted by the High Court.
Reason:	The Court held that it was clear that the learned trial judge erred in not properly directing the jury on the critical issue of identification in the case. The judge's directions on this issue were essentially confined to the sightings of the appellant by the virtual complainant at the gas station. The trial judge failed to give the jury adequate directions concerning identification in relation to what transpired some hours after the virtual complainant sustained the injuries and the Court found this to be a serious and fatal omission which rendered the trial unfair. Two and a half hours into retirement, the jury returned and posed a question to the judge which was to the effect that if the prosecution had satisfied all three elements of the offence but was not certain, on the evidence, that the appellant was the perpetrator, what was the legal position? The learned trial judge responded to the question by recapping the evidence proffered by the prosecution on the issue of identification. However, the judge failed to point out to the jury the evidence given by the appellant's witnesses in respect of identification. Moreover, the question posed by the jury admitted of only one answer which was that it must find the defendant not guilty. Apart from that, the trial judge found it necessary at that point to remind the jury of the time of departure of the ferry to the island of Virgin Gorda where one juror resided. It was clear that it was nearing the time

of departure of the ferry. Within 8 minutes of retiring again the jury returned and found the appellant guilty 7 to 2.

The appellant's complaint was that the trial judge exerted pressure on the jury. The Court stated that it was clear that the jurors were having a distinct difficulty with respect to the issue of identification and this was seen by the question which was posed to the judge. However, the learned judge's response did not assist the accused insofar as the evidence of his witnesses was not ventilated.

Case Name:

**[1] Lucan Invest Limited
[2] Duview Holdings Inc
v
[1] Afaith Investment Limited
[2] Vinson Holdings Limited
[3] Alverstone Trade & Invest Limited
[BVIHCMAP2014/0003]**

Date:

Thursday, 1st May 2014

Coram:

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

Appearances:

Applicants:

Mr. Jonathan Ward

Respondents:

Mr. Richard Evans, with him, Mr. Murray Laing

Issues:

Application for leave to appeal against learned judge's refusal to adjourn first hearing of matter in court below or alternatively to treat first hearing as case management conference to permit applicants time to investigate matters which became known to their legal advisors shortly before hearing –

Application for stay of proceedings in court below

Result / Order:

[Oral delivery]

- 1. The application for leave to appeal is refused.**
- 2. The application for a stay of proceedings is of no further issue.**
- 3. In relation to the stay application, the respondents are to have their costs to be assessed, if not agreed, within 14 days of the date of this order.**

Reason:

The Court held that the applicants did not meet the required threshold for the Court to exercise its discretion in their favour and grant them leave to appeal; they were unable to demonstrate that the appeal had a realistic prospect of success. The leave application having been refused, the application to stay the proceedings in the court below fell away with it.

Case Name:

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

[BVIHCMAP2014/0014]

Date:

Thursday, 1st May 2014

Coram:

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

Appearances:

Appellants:

Mr. Jonathan Ward

Respondents: Mr. Richard Evans, with him, Mr. Murray Laing

Issues: Permission to adduce and rely upon fresh evidence –
Hearing in camera

Result / Order: [Oral delivery]
1. The application is to be heard in camera.
2. The application to adduce fresh evidence is refused.
3. Costs on the appeal to adduce fresh evidence to be paid by the applicants to the respondents to be assessed if not agreed within 21 days of the date of this order.
4. By consent, substantive appeal no. BVIHCMAP2014/0003 is dismissed with no order as to costs.

Reasons: In relation to the application to adduce fresh evidence, the Court was of the view that the applicant failed to meet the threshold test set out in the case of *Ladd v Marshall* [1954] 1 WLR 1489, particularly in relation to the conditions of materiality and credibility.

Furthermore, there was no basis on which the Court could exercise a discretion to give directions in the matter, in order to enable the respondents to take any steps in relation to ascertaining the authenticity of the photographs/documents.

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: Thursday, 1st May 2014

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

Appearances:

Appellants: Mr. Matthew Collings, QC, with him, Mr. Ray Ng and Ms. Clare-Louise Whiley

Respondents: Mr. James Thom, QC, with him, Mr. David Fisher and Mr. René Butcher

Issues: Commercial appeal – Winding up of company – Whether learned judge erred in refusing to wind-up company on basis of just and equitable principles – 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 / Order:

1. Judgment reserved.
2. Notice to be given as to the date of delivery of the judgment.
3. Costs to be assessed if not agreed within 21 days of delivery of the judgment.

Case Name: Applied Enterprises Limited

V
[1] Interisle Holdings Ltd.
[2] Quorum Island (BVI) Limited
[3] Blenheim Trust (BVI) Limited

[BVIHCMAP2013/0011]

Date: Thursday, 1st May 2014

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

Appearances:

Applicant: Mr. Robert Nader

Respondent: Mr. Paul Webster, QC, with him, Ms. Nadine Whyte

Issues: Interlocutory appeal – Agreement between appellant and first respondent for development (by first respondent) of property in BVI owned by second respondent – First respondent to acquire 50% shareholding in second respondent under agreement – Proceedings brought by appellant after first respondent failed to make instalment payment under agreement and refused to surrender unpaid shares – Application made in court below by first respondent to stay proceedings on basis that agreement between parties contained arbitration clause – Application made in court below by appellant for summary judgment – Whether learned judge erred in dismissing appellant’s application for summary judgment and ordering that claim be stayed pending arbitration – Whether learned judge erred in holding that force majeure clause in agreement could be interpreted to include inability to obtain credit – Whether learned judge erred by holding that in relying upon doctrine of frustration, first respondent was asserting not merely that a particular obligation could not be performed in the present circumstances but that the project, as originally envisaged, was incapable of being brought to fruition, without giving

any or any proper consideration to whether first respondent had provided any material to support that assertion, or whether, as a matter of law, first respondent could in the circumstances rely on doctrine of frustration – Whether learned judge failed to consider whether, as a matter of law, agreement was subject to conditions precedent alleged by first respondent and whether these conditions precedent were met prior to closing

Result / Order: The Court rose for a break.

Case Name: Applied Enterprises Limited
v
[1] Interisle Holdings Ltd.
[2] Quorum Island (BVI) Limited
[3] Blenheim Trust (BVI) Limited
[BVIHCMAP2013/0011]

Date: Thursday, 1st May 2014

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

Appearances:
Applicant: Mr. Robert Nader
Respondent: Mr. Paul Webster, QC, with him, Ms. Nadine Whyte

Issues: Interlocutory appeal – Agreement between appellant and first respondent for development (by first respondent) of property in BVI owned by second respondent – First respondent to acquire 50% shareholding in second respondent under agreement – Proceedings brought by appellant after first respondent failed to make instalment payment under

agreement and refused to surrender unpaid shares – Application made in court below by first respondent to stay proceedings on basis that agreement between parties contained arbitration clause – Application made in court below by appellant for summary judgment – Whether learned judge erred in dismissing appellant’s application for summary judgment and ordering that claim be stayed pending arbitration – Whether learned judge erred in holding that force majeure clause in agreement could be interpreted to include inability to obtain credit – Whether learned judge erred by holding that in relying upon doctrine of frustration, first respondent was asserting not merely that a particular obligation could not be performed in the present circumstances but that the project, as originally envisaged, was incapable of being brought to fruition, without giving any or any proper consideration to whether first respondent had provided any material to support that assertion, or whether, as a matter of law, first respondent could in the circumstances rely on doctrine of frustration – Whether learned judge failed to consider whether, as a matter of law, agreement was subject to conditions precedent alleged by first respondent and whether these conditions precedent were met prior to closing

Result / Order:

Court rose for the lunch break and to consider its judgment.

Case Name:

Applied Enterprises Limited

v

[1] Interisle Holdings Ltd.

[2] Quorum Island (BVI) Limited

[3] Blenheim Trust (BVI) Limited

[BVIHCMAP2013/0011]

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Appearances:

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Issues: Interlocutory appeal – Agreement between appellant and first respondent for development (by first respondent) of property in BVI owned by second respondent – First respondent to acquire 50% shareholding in second respondent under agreement – Proceedings brought by appellant after first respondent failed to make instalment payment under agreement and refused to surrender unpaid shares – Application made in court below by first respondent to stay proceedings on basis that agreement between parties contained arbitration clause – Application made in court below by appellant for summary judgment – Whether learned judge erred in dismissing appellant’s application for summary judgment and ordering that claim be stayed pending arbitration – Whether learned judge erred in holding that force majeure clause in agreement could be interpreted to include inability to obtain credit – Whether learned judge erred by holding that in relying upon doctrine of frustration, first respondent was asserting not merely that a particular obligation could not be performed in the present circumstances but that the project, as originally envisaged, was incapable of being brought to fruition, without giving any or any proper consideration to whether first respondent had provided any material to support that assertion, or whether, as a matter of law, first respondent could in the circumstances rely on doctrine of frustration – Whether learned judge failed to consider whether, as a matter of law, agreement was subject to conditions precedent alleged by first respondent and whether these conditions precedent were met prior to closing

Result/Order: [Oral delivery]

1. The appeal is dismissed.
2. Costs are awarded to the appellant in the sum of 2/3 of the assessed or agreed costs of the court below.

Reason:

The Court found that the trial judge gave proper consideration to the summary judgment application, notwithstanding that he expressed himself briefly and succinctly. The Court agreed, in particular, with the learned judge's finding that the possible defences of frustration and breach of the conditions precedent (to which the agreement was originally subject), would very likely require a more in depth investigation of all the relevant facts and circumstances, and this could not be done without a mini trial. The judge said that the issues were fact sensitive and, without more, the Court could not say that he exceeded the generous ambit within which reasonable disagreement is possible. On the force majeure clause issue, the Court held that while the reason given by the trial judge for his lack of attention to the authority of *Tandrin Aviation Holdings Limited v Aero Toy Store LLC and another* [2010] EWHC 40 (Comm) may seem to have been dismissive this does not undermine the exercise of his discretion in holding that this issue too may have, on a question of interpretation, been fact sensitive.

Case Name:

**André Penn
v
The Queen**

[BVIHCRAP2013/0006]

Date:

Friday, 2nd May 2014

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal**

Appearances:

Appellant: Mr. Jack Husbands holding papers for Mr. Jerome Lynch, QC

Respondent: Mr. Wayne Rajbansie, Director of Public Prosecutions

Issues: Indecent Assault – Unlawful sexual intercourse – Buggery – Application for adjournment

Result / Order: [Oral delivery]
1. The hearing of the appeal is adjourned.
2. The Court will give:
a) notice of the date when the appeal will be heard in another State; and
b) further directions as to whether the matter will be heard by teleconference, videoconference or in person either in the month of June or July 2014.

Reasons: In hearing the application for an adjournment, the Court considered the protracted period of time that this matter had been in the system and also that there was another matter of like status involving similar parties in the system. The Court was also made to understand that prospective counsel for the appellant, Mr. Jerome Lynch, QC, had been briefed in the matter, but despite being available to appear on other days during the current sitting, he was not available to attend on Friday, 2nd May 2014.

The Court was keen to avoid in future the possibility that on each occasion matters were simply being rolled over in a myriad of applications and cross-applications, without progressing through the system. The Court stated that there has to be finality to the proceedings.

Case Name: André Penn
v

[1] The Director of Public Prosecutions of the

Virgin Islands
[2] The Attorney General of the Virgin Islands

[BVIHCVAP2013/0003]

Date: Friday, 2nd May 2014

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant: Mr. Jack Husbands holding papers for Mr. Jerome Lynch, QC

Respondents: Ms. Natalie Sandiford

Issues: Appellant's constitutional motion dismissed by learned judge – Whether learned judge erred in proceeding to hear constitutional motion in absence of Attorney General – Whether learned judge erred in finding that the law practice and procedure of England in regard to a retrial ordered by a Court of Appeal is not applicable in the Virgin Islands – Application for adjournment

Result / Order: [Oral delivery]

1. The hearing of the appeal is adjourned.
2. Skeleton arguments on behalf of the respondents shall be filed and served by Friday, 16th May 2014.
3. Reply skeleton arguments, if necessary, to be filed and served by the appellant by Friday, 30th May 2014.
4. The hearing of the appeal is to be fixed on a date to be heard either in the month of June or July 2014 on notice from the Court, such hearing to be conducted in another State either by videoconference, teleconference or in person as the Court may direct.
5. Any further application to be made in this appeal shall be made no later than Friday, 16th May 2014.
6. The appeal in this matter and in appeal no. BVIHCRAP2013/0006 are to be heard one after the other.

Case Name: **Royal Fiduciary Group Limited**
(a company incorporated in Hong Kong)
(trustee of the New Huerto Trust)

[BVIHCMAP2013/0022]

Date: **Friday, 2nd May 2014**

Coram: **The Hon. Dame Janice M. Pereira, DBE, Chief Justice**
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:
Appellant: **Mr. David Brownbill, QC**

Respondent: **No appearance**

Issues: **Learned judge refused sanction to appellant for entry into deed of appointment relating to the New Huerto Trust which sanction would have permanently excluded Settlor from benefit under trust – Whether learned judge erred in holding that appellant trustee has no power under the New Huerto Trust deed to vary terms of settlement as proposed in draft deed of appointment – Whether learned judge erred in finding that draft deed of appointment would not be an exercise of the power contained in clause 2 of the New Huerto Trust deed because it did not have the effect of appointing any property in favour of any person – Whether learned judge erred in finding that draft deed of appointment would be a nullity if executed by appellant**

Result / Order:
1. Judgment reserved.
2. Notice to be given as to the date of delivery of the judgment.