

COURT OF APPEAL SITTING
TERRITORY OF THE VIRGIN ISLANDS
13th – 17th January 2014

JUDGMENTS

Case Name:

**[1] The Prime Minister of the Commonwealth
of Dominica**
**[2] The Speaker of the House of Assembly of
the Commonwealth of Dominica**
**[3] The Attorney General of the
Commonwealth of Dominica**
v
Hector John (Leader of the Opposition)

[DOMHCVAP2013/0006]

Date: **Monday, 13th January 2014**

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

Appearances:

Appellant: **Ms. Tamara Cameron holding papers for Mr. Anthony Astaphan, SC**

Respondent: **Mr. John Carrington, QC holding papers for Mr. J. Gildon Richards**

Issues: **Civil Appeal – Constitutional Law – Interpretation to be given to exclusion clauses of the Constitution – Whether Court can interfere in parliamentary procedures – Whether Court can question the certificate of election of the President issued by the Speaker of the House of Assembly – General and specific provisions – Sections 22(5) and 103(1) of the Constitution of the Commonwealth of Dominica – Application of section 121(11) of the Constitution of the Commonwealth of Dominica**

**Result and
Reason:**

Held: allowing the appeal, granting the application to strike out the claim and making no order as to costs.

1. It is well established that exclusion clauses in statutes as well as in constitutions, are ordinarily to be accorded a literal (as distinct from a liberal) interpretation. In essence, they must be treated as meaning what they say, and no more. Sections 22(5) and 103(1) of the Constitution should be interpreted literally. The framers of the Constitution, holding the office of President in the highest regard, sought to protect the integrity of the office from disrepute, which may arise out of a challenge to the electoral process. The most effective way to do this was to preclude any inquiry by the court into the process. In relation to section 22(5) it may be said that the framers of the Constitution provided a double shield. Firstly, they provided that the Speaker's certificate is conclusive evidence of the fact. Accordingly, this would not permit rebuttal evidence of the fact as sought to be established by the respondent. Secondly, section 22(5) goes on further to say, that the certificate stating that conclusive fact shall not be questioned in any court of law. The language could not be plainer as to its meaning. This was deliberate. To give any other interpretation to this provision would not represent the intention of the framers.

In the matter of an application brought by Aubrey Norton 1997 No. 5932 applied, Lestrade v The House of Assembly and Others [1985] LRC (Const) 48 applied.

2. Contrary to the argument presented by the respondent, section 121(11) of the Constitution does not allow the court to make an inquiry into the electoral process of the office of President and cannot be called in aid whenever any person or authority fails to follow a procedure provided for, or engages in a process not in compliance with the constitutionally provided methods. The Constitution cannot be seen to contradict itself or

have competing provisions. Therefore, save for the very limited jurisdiction granted to the Court of Appeal in relation to challenges to the qualifications of a person to be nominated or elected to the office of President, it is clear that the court was not meant to have jurisdiction over the process of electing a President. Further, in the interpretation of the Constitution, general clauses cannot be seen to override the specific clauses. It becomes clear that section 121(11) of the Constitution is a general provision which must be read down and thus must give way to the specific provision of section 22(5), which ousts the Court's jurisdiction. To accede to the interpretation to this section offered by the respondent calls for ignoring the well-established rules of interpretation with the resulting conflict between the provisions. Such a course would promote uncertainty and lead to undesirable consequences, which would inevitably flow therefrom.

Re Blake (1994) 47 WIR 174 and *Browne v Francis Gibson* (1995) 50 WIR 143 followed; *International Management Group (UK) Limited v Peter German, Hr Trustees Limited* [2010] EWCA Civ 1349 applied; *Re Gerriah Sarran* (1969) 14 WIR 361, *Endell Thomas v The Attorney General of Trinidad and Tobago* (1982) AC 113, *Jones and others v Solomon* 41 WIR 269, *Smith v Mutasa et al* [1990] LRC (Const.) 87 distinguished.

3. The court may not impute fraud or improper conduct or motive to the Parliament or any officer or inquire into any matters within Parliament's jurisdiction. There is good reason for the separation of powers doctrine and it is in matters of this kind that we see its full merit. It is no part of the court's function or responsibility to meddle in parliamentary affairs particularly when the Constitution clearly precludes it from so doing. The office of President is one, which was meant to be held in the highest regard and subjected to the highest form of integrity. To allow the court to meddle into the affairs of the election process of the President is an affront to the dignity of the

high office of President. It is a course, which a court, in the face of expressed exclusion ought to be loath to permit incursion no matter how inviting the invited excursion may appear to be.

Hoani Te HeuHeu Tukino v Aotea District Maori Land Board [1941] AC 308, *British Railways Board v Pickin* [1974] AC 765 applied.

APPLICATIONS AND APPEALS

Case Name:

**Joseph Rosan
v
Valerie Stephens**

[BVIHCVAP2013/0009]

Date:

Monday, 13th January 2014

Coram:

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

Appearances:

**Applicant: Ms. Charmaine Rosan-Bunbury
Respondent: Ms. Tamara Cameron**

Issues:

Application for 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 adjournment to September/October 2014 sitting of the Court in Territory of the Virgin Islands

Result / Order: The matter is stood down to a later time in the morning.

Reason: To allow consultation between Mr. John Carrington, QC and counsel for the applicant.

Case Name: The Attorney General of the Virgin Islands
v
Daphne Alves

[BVIHCVAP2011/0065]

Date: Monday, 13th January 2014

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

Appearances:

Appellant / Respondent:	Ms. Natalie Sandiford, Senior Crown Counsel, holding papers for the Attorney General, with her, Ms. Maya Barry, Crown Counsel
Respondent / Applicant:	Mr. John Carrington, QC

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

Result / Order: [Oral Delivery]
The Court, having heard counsel for the applicant/appellant and counsel for the respondent, is of the view that the issue raised in this matter is one which satisfies the requirements of section 3(1)(a) of the Virgin Islands (Appeals to the Privy Council) Order 1967.

Leave to appeal is granted under the following

conditions:

- 1) That the applicant within 90 days of the date hereof enter into good and sufficient security the sum of £500 for the due prosecution of the appeal such security to be paid into the court office and be certified by the said court officer;**
- 2) Within 90 days of the date hereof the applicant do take necessary steps in preparing the record and the settling of the record with the solicitor for the respondent to the application and certification of the same by the Registrar of the Court of Appeal;**
- 3) The record shall be prepared in accordance with rules 18-20 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.**
- 4) The applicant shall make an application to the Court for final permission to appeal to Her Majesty in Council supported by the Certificate of the Registrar that security for the costs order has been given within the time prescribed by this Order to the satisfaction of the Registrar; and**
- 5) The costs of this application for conditional leave to appeal shall be costs in the appeal.**

Case Name:

**[1] The Attorney General
[2] Chairman, Public Service Commission
[3] Director of Human Resources
v
Julian Willock**

[BVIHCVAP2011/0027]

Date: Monday, 13th January 2014

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

Appearances:

Appellant / Applicant:	Ms. Maya Barry (Crown Counsel) holding papers for Dr. Christopher Malcolm (Attorney General), with her, Ms. Isis Potter (Crown Counsel)
Respondent:	No appearance

Issues: Judicial review – Application (by respondent) for adjournment – Whether there was still any live issue between the parties

Result / Order: The matter is stood down until 11:45 a.m.

Reason: There was no appearance of or on behalf of the respondent.

Case Name:

Ogier Corporate Services (UK) Limited (as trustee of the Montenegro Development Unit Trust)
v
Deanhill Overseas Limited

[BVIHCMAP2013/0004]

Date: Monday, 13th January 2014

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

Appearances:

Appellant:	Mr. Robert Christie, with him, Ms. Clare-Louise Whiley
Respondent:	No appearance

Issues: **Whether learned judge erred in dismissing appellant's application in court below to appoint liquidators over respondent pursuant to s. 162(1)(a) of the Insolvency Act, 2003**

Result / Order: **[Oral delivery]**
The appellant is to prepare a draft order to the effect that the appeal is allowed and that the order of the learned trial judge dismissing the application to appoint a liquidator over the respondent is set aside.

It is further ordered that:

- 1. Liquidators be appointed over Deanhill Overseas Limited, the respondent herein, and that Mr. Mark McDonald be appointed liquidator of the company;**
- 2. The liquidator may exercise all those powers set out in Section 186 and Schedule 2 of the Insolvency Act, 2003; and**
- 3. The costs of the appellants in this Court and in the court below be costs in the liquidation.**

Case Name:

[1] The Attorney General
[2] Chairman, Public Service Commission
[3] Director of Human Resources
v
Julian Willock

[BVIHCVAP2011/0027]

Date: **Monday, 13th January 2014**

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

Appearances:

Appellant / Applicant:	Dr. Christopher Malcolm, Attorney General, with him, Ms. Maya Barry, Crown Counsel and Ms. Isis Potter, Crown Counsel
Respondent:	In person

Issues: **Judicial review – Application (by respondent) for adjournment – Whether there was still any live issue between the parties**

Result / Order: **The matter is stood down until 2:00 p.m.**

Reason: **The parties were invited to review the case of *Ainsbury v Millington* [1987] 1 All ER 929 to determine whether, in light of the fact that the respondent was no longer in the employ of the appellants, there was still any live issue to be tried by the Court, or whether the events had effectively disposed of the list of issues.**

Case Name:

Joseph Rosan

v

Valerie Stephens

[BVIHCVAP2013/0009]

Date: **Monday, 13th January 2014**

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

Appearances:

Applicant:	Ms. Charmaine Rosan-Bunbury
Respondent:	Ms. Tamara Cameron

Issues: Application for 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 adjournment to September/October 2014 sitting of the Court in Territory of the Virgin Islands

Result / Order: [Oral delivery]
The Court granted the adjournment to one sitting only and determined that the appeal would be heard during the next sitting of the Court in the Virgin Islands in the week commencing 28th April 2014, and no later.

Reason: The Court opined that when a party makes an application for an adjournment, the Court should be provided with materials which will assist it in dealing with that application. In such circumstances, the applicant is really seeking to have Court exercise its discretion in his/her favour.

The Court is the body responsible for managing and processing the cases which come before it. It must be concerned with the allocation of the time and resources available for the hearing and conduct of matters. The Court must seek to balance those interests as well as the interests of the applicant and those of the respondent. It will not look favourably on applications for adjournments which are made at the last minute with regard to any matter merely because it may be convenient for counsel to do so. Adjournments created a backlog in the system for which there was no good and just reason.

The Court stated that nonetheless, it had to be aware that behind every matter there is a party. Accordingly, it granted one adjournment.

Case Name:

**[1] The Attorney General
[2] Chairman, Public Service Commission
[3] Director of Human Resources
v
Julian Willock**

[BVIHCVAP2011/0027]

Date:

Monday, 13th January 2014

Coram:

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

Appearances:

Appellant:

**Ms. Maya Barry (Crown Counsel) holding papers for
Dr. Christopher Malcolm (Attorney General), with her,
Ms. Isis Potter (Crown Counsel)**

**Respondent /
Applicant:**

Mr. Stephen Daniels

Issues:

**Judicial review – Application (by respondent) for
adjournment – Whether there was still any live issue
between the parties**

Result / Order:

[Oral delivery]

- 1. The appellant shall file and serve submissions with authorities by Wednesday, 29th January 2014, on the question whether this appeal should proceed to a full hearing notwithstanding the fact that there is no longer a list to be decided directly between the parties to this appeal on the basis that it raises a matter of public interest and if so, on what terms as to costs in respect of the respondent's participation.**
- 2. Further hearing of this matter shall be during the week of the sitting of the Court in the Territory of the Virgin Islands commencing 28th April 2014.**
- 3. Should there be agreement between the parties**

before the matter comes up for hearing, the necessary notice should be filed in the court.

Case Name: **Delta Petroleum Caribbean Ltd**
v
Michael Smith

[BVIHCVAP2012/0031]

Date: **Monday, 13th January 2014**

Coram: **The Hon. Mr. Davidson K. Baptiste, Justice of Appeal**
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Ola Mae Edwards, Justice of Appeal
[Ag.]

Appearances:

Appellant / Respondent:	Mr. Terrance Neale
Respondent / Applicant:	Mr. Robert Nader

Issues: **Application for conditional leave to appeal to Her Majesty in Council – Personal injury – Accident at workplace – Quantum of damages for past and future loss of earnings**

Result and Reason: **[Oral delivery]**
The application is granted for the matter to be stood down until 2:00 p.m. to facilitate the continuation of the parties' discussions.

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

Commissioner of Customs

[BVIHCVAP2013/0008]

Date: Monday, 13th January 2014

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Ola Mae Edwards, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. Terrance Neale

Respondent: Dr. Christopher Malcolm, Attorney General, with him,
Ms. Kaidia Edwards-Alister, Senior Crown Counsel,
and Ms. Sarah Potter, Crown Counsel

Issues: Whether appellant acted improperly in discharging fuel into bonded storage tank – Whether directives of Commissioner of Customs disregarded – Whether learned judge erred in holding that bonded fuel storage tank and its contents were liable to be forfeited pursuant to s. 30(1)(a) of the Customs Management and Duties Act, 2010 (Act No. 6 of 2010, Laws of the Virgin Islands) – Whether findings made by learned judge against weight of evidence

Result / Order: [Oral delivery]
Matter stood down to 2:00 p.m.

Reason: Lead counsel for the respondent, Dr. Christopher Malcolm, requested that the matter be stood down. The appellant had no objections to this.

Case Name: Gareth McDowell
v
Commissioner of Police

[BVIMCRAP2011/0002]

**Carlos Sutherland
v
The Commissioner of Police**

[BVIMCRAP2011/0003]

**Dexter Chance
v
The Commissioner of Police**

[BVIMCRAP2011/0005]

Date: Monday, 13th January 2014

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Ola Mae Edwards, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. Patrick Thompson (for Gareth McDowell and Carlos Sutherland)
Mr. Stephen Daniels (for Dexter Chance)

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

Issues: Appeals against conviction and sentence – Importation of a controlled drug – Whether there was sufficient evidence to ground convictions – Whether analyst certificate in respect of all three appellants was properly entered into evidence against them – Whether learned senior magistrate erred in law in applying sentencing principles

Result / Order: Judgment is reserved.

Case Name: **Delta Petroleum Caribbean Ltd**
v
Michael Smith
[BVIHCVAP2012/0031]

Date: **Monday, 13th January 2014**

Coram: **The Hon. Mr. Davidson K. Baptiste, Justice of Appeal**
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Ola Mae Edwards, Justice of Appeal
[Ag.]

Appearances:

Appellant /	Mr. Terrance Neale
Respondent:	
Respondent /	Mr. Robert Nader
Applicant:	

Issues: **Application for conditional leave to appeal to Her Majesty in Council – Personal injury – Accident at workplace – Quantum of damages for past and future loss of earnings**

Result / Order: **[Oral delivery]**
BY CONSENT:
The matter is adjourned to the next sitting of the Appeal Court in the Territory of the Virgin Islands.

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

Date: Monday, 13th January 2014

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Ola Mae Edwards, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. Terrance Neale

Respondent: Dr. Christopher Malcolm, Attorney General, with him,
Ms. Kaidia Edwards-Alister, Senior Crown Counsel,
and Ms. Sarah Potter, Crown Counsel

Issues: Whether appellant acted improperly in discharging
fuel into bonded storage tank – Whether directives of
Commissioner of Customs disregarded – Whether
learned judge erred in holding that bonded fuel
storage tank and its contents were liable to be
forfeited pursuant to s. 30(1)(a) of the Customs
Management and Duties Act, 2010 (Act No. 6 of 2010,
Laws of the Virgin Islands) – Whether findings made
by learned judge against weight of evidence

Result / Order: Judgment reserved (to be delivered at 6:30 p.m.).

Case Name: William Samuel
v
Commissioner of Police
[BVIMCRAP2012/0007]

Date: Monday, 13th January 2014

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Ola Mae Edwards, Justice of Appeal
[Ag.]

Appearances:

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

Issues: **Criminal appeal against conviction – Possession of a controlled drug – Appellant not sentenced in Magistrates’ Court**

Result / Order: **[Oral Delivery]
IT IS DIRECTED THAT:
The appellant be sent back to the Magistrate’s Court for sentencing on 30th January 2014.**

Reason: **The appellant had not been sentenced as yet.**

Case Name: **Delta Petroleum (Caribbean) Limited
v
Commissioner of Customs**

[BVIHCVAP2013/0008]

Date: **Monday, 13th January 2014**

Coram: **The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Ola Mae Edwards, Justice of Appeal
[Ag.]**

Appearances:

Appellant:	Mr. Terrance Neale
Respondent:	Dr. Christopher Malcolm, Attorney General, with him, Ms. Kaidia Edwards-Alister, Senior Crown Counsel, and Ms. Sarah Potter, Crown Counsel

Issues: **Whether appellant acted improperly in discharging**

fuel into bonded storage tank – Whether directives of Commissioner of Customs disregarded – Whether learned judge erred in holding that bonded fuel storage tank and its contents were liable to be forfeited pursuant to s. 30(1)(a) of the Customs Management and Duties Act, 2010 (Act No. 6 of 2010, Laws of the Virgin Islands) – Whether findings made by learned judge against weight of evidence

Result / Order:

[Oral delivery]

- 1. The appeal is allowed.**
- 2. The orders made by Madam Justice Ellis are set aside.**
- 3. Costs in respect of this appeal are awarded to the appellant to be taxed if not agreed by the parties within 21 days.**

Reason:

Having regard to a concession by the respondent that the British Virgin Islands Electricity Corporation (BVIEC) was entitled to import fuel duty free, as well as a further concession that the fuel contained in bonded storage tank no. 7 was the property of BVIEC for the use of the Corporation for its operations, the Court held that the learned judge's order declaring that the fuel storage tank and its contents were liable to forfeiture pursuant to section 30(1)(a) of the Customs Management and Duties Act, 2010 (Act No. 6 of 2010, Laws of the Virgin Islands) ("the Act") could not stand.

The Court opined that if the Commissioner of Customs considered that the appellant had acted improperly in discharging the fuel into the bonded storage tank without being specifically authorised (by the Commissioner) to do so, it was open to him to institute proceedings against the appellant in accordance with section 29 of the Act.

The fuel imported on behalf of the BVIEC and stored in the designated bonded fuel storage tank for the use of the BVIEC was therefore not liable to forfeiture due to the failure of the appellant to comply with directions given by the Commissioner of Customs (such directions having been made in accordance

with section 29 of the Act), nor the failure to pay duties under section 30 of the Act (since, as mentioned above, such fuel is in fact exempted from payment of duty).

Case Name:

**Gareth McDowell
v
Commissioner of Police
[BVIMCRAP2011/0002]**

**Carlos Sutherland
v
The Commissioner of Police
[BVIMCRAP2011/0003]**

**Dexter Chance
v
The Commissioner of Police
[BVIMCRAP2011/0005]**

Date: **Monday, 13th January 2014**

Coram: **The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Ola Mae Edwards, Justice of Appeal
[Ag.]**

Appearances:

Appellants:	Mr. Patrick Thompson (for Gareth McDowell and Carlos Sutherland) Mr. Stephen Daniels (for Dexter Chance)
Respondent:	Ms. Tiffany Scatliffe, Principal Crown Counsel, Office of the Director of Public Prosecutions

Issues: Appeals against conviction and sentence – Importation of a controlled drug – Whether there was sufficient evidence to ground convictions – Whether analyst certificate in respect of all three appellants was properly entered into evidence against them – Whether learned senior magistrate erred in law in applying sentencing principles

Result / Order: [Oral delivery]
1. The appeal against conviction in respect of all the appellants is allowed.
2. The convictions are quashed and sentences set aside.
3. The appellants are discharged.

Reasons: The Court was of the view that there was insufficient evidence to ground a conviction of importation of a controlled drug in respect of any of the appellants.

The learned senior magistrate improperly relied on the certificate of the analyst in respect of all three appellants. The certificate was not in evidence against them and was not admissible against them; this would have undoubtedly prejudiced their cases.

Case Name:

[1] Kenneth Krys
[2] John Greenwood
(As Joint Liquidators of
Value Discovery Partners, LP)
Respondents / Claimants
v
[1] New World Value Fund Limited
Appellant / First Defendant
v
[2] KBC Partners LP, by its General Partner,
Salford Capital Partners Inc.

**[3] SCI Partners LP, by its General Partner,
Salford Capital Partners Inc.
[4] Salford Capital Partners Inc.
Respondents / Second
to Fourth Defendants**

[BVIHCMAP2013/0017]

Date: Tuesday, 14th January 2014

Coram: The Hon. Dame Janice M. Pereira, Chief Justice
The Hon. Mde. Gertel Thom, Justice of Appeal [Ag.]
The Hon. Mde. E. Ann Henry, QC, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Christopher Pymont, QC, with him, Mr. Ciaran Keller and Mr. Brian Lacy

Respondents: Mr. Ian Mill, QC (for KBC Partners LP, SCI Partners LP and Salford Capital Partners Inc.)
Ms. Nadine Whyte (for the joint liquidators of Value Discovery Partners LP)

Issues: Partnership in liquidation – Articles of Partnership – Construction – Allocation of assets – Entitlements of partners to assets of Partnership in liquidation – Construction of clauses in Articles of Partnership affecting partners’ entitlements – Meaning to be given to word ‘sale’ in phrase ‘following the sale of all Investments of the Partnership’ – Whether ‘sale’ should be given plain ordinary meaning or alternatively extended meaning so that it is read instead as ‘sale or distribution in specie’ – Whether sale of all Investments of Partnership had to take place during term of Partnership – Whether learned judge erred in holding that word ‘sale’ ought to be given extended meaning

Result / Order: Judgment is reserved.

Case Name:

**Mary Williams
v
The Attorney General
[BVIHCVAP2011/0029]**

Date:

Tuesday, 14th January 2014

Coram:

**The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Ola Mae Edwards, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Mr. Lewis S. Hunte, QC, with him, Mr. René Butcher

Respondent:

**Ms. Natalie Sandiford, Senior Crown Counsel, with
her, Ms. Isis Potter, Crown Counsel**

Issues:

**Judicial review – Certiorari – Appellant dismissed
from post in Public Service – Decision to dismiss
appellant initially taken by Public Service
Commission and approved by Governor but
subsequently revoked due to procedural irregularity –
Order of certiorari sought by appellant in court below
to quash decision which resulted in her dismissal
notwithstanding revocation of decision – Whether
learned trial judge erred in refusing to grant order of
certiorari**

Result / Order:

The matter is stood down.

Reason:

**Lead counsel for the respondent was absent when
the matter was called.**

Case Name:

Yates Associates Construction Company Ltd.

v
Blue Sand Investments Limited

[BVIHCVAP2012/0028]

Date: Tuesday, 14th January 2014

Coram: The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Ola Mae Edwards, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. Terrance Neale

Respondent: Mr. Sydney Bennett, QC, with him, Ms. Anthea Smith

Issues: Breach of contract – Proportions of costs to be paid by parties to remedy defects in roof of house – Whether appellant given reasonable opportunity to remedy defects in house but failed or was unable to do so – Whether appellant responsible for cost of remedying various construction defects in house as outlined in expert report – Whether learned trial judge erred in dismissing appellant's claim for miscellaneous charges on basis that they had not been proven

Result / Order and Reason: The matter is stood down to 2:40 p.m. to allow the lunch break to be taken.

Case Name: Yates Associates Construction Company Ltd.
v
Blue Sand Investments Limited

[BVIHCVAP2012/0028]

Date: Tuesday, 14th January 2014

Coram: The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Ola Mae Edwards, Justice of Appeal
[Ag.]

Appearances:
Appellant: Mr. Terrance Neale
Respondent: Mr. Sydney Bennett, QC, with him, Ms. Anthea Smith

Issues: Breach of contract – Proportions of costs to be paid by parties to remedy defects in roof of house – Whether appellant given reasonable opportunity to remedy defects in house but failed or was unable to do so – Whether appellant responsible for cost of remedying various construction defects in house as outlined in expert report – Whether learned trial judge erred in dismissing appellant's claim for miscellaneous charges on basis that they had not been proven

Result / Order: Judgment reserved.

Case Name: Mary Williams
v
The Attorney General
[BVIHCVAP2011/0029]

Date: Tuesday, 14th January 2014

Coram: The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Ola Mae Edwards, Justice of Appeal
[Ag.]

Appearances:
Appellant: Mr. Lewis S. Hunte, QC, with him, Mr. René Butcher
Respondent: Ms. Natalie Sandiford, Senior Crown Counsel, with

her, Ms. Isis Potter, Crown Counsel

Issues:

Judicial review – Certiorari – Appellant dismissed from post in Public Service – Decision to dismiss appellant initially taken by Public Service Commission and approved by Governor but subsequently revoked due to procedural irregularity – Order of certiorari sought by appellant in court below to quash decision which resulted in her dismissal notwithstanding revocation of decision – Whether learned trial judge erred in refusing to grant order of certiorari

Result / Order:

[Oral Delivery]

- 1. The appeal is dismissed.**
- 2. No order as to costs in the substantive matter but the Crown is to pay the appellant the sum of \$3,000.00 for non-compliance with the Civil Procedure Rules.**

Reason:

The trial judge acted properly by refusing to grant an order of certiorari in circumstances where the relief that the appellant was seeking had been granted from the time the matter had been heard by the Governor (after the initial decision was taken), insofar as they had realised it was a procedural error. The decision which resulted in the appellant's dismissal was revoked and the appellant was reinstated to the position that she would have been in had the dismissal not taken place.

Case Name:

Camillus Parris

v

The Queen

[BVIHCRAP2011/0003]

Date:

Wednesday, 15th January 2014

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Ola Mae Edwards, Justice of Appeal [Ag.]
The Hon. Mde. Gertel Thom, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Patrick Thompson, with him, Ms. Ruthilia Maximea

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

Issues: Appeal against conviction – Rape – Indecent Assault – s. 146 of the Evidence Act, 2006 (Act No. 15 of 2006, Laws of the Virgin Islands) – Special warning to be given to jury – Whether warning given was adequate – Whether conviction was unsafe and unsatisfactory

Result / Order: [Oral Delivery]
1. The appeal is allowed and the conviction is quashed and sentence set aside.
2. The court refrains from ordering a retrial.

Reason: The Court raised the issue of the special warning that ought to be given to the jury in circumstances where the reliability of evidence given may be affected by self interest, age or ill health pursuant to section 146(1)(c) of the Evidence Act, 2006 (Act No. 15 of 2006). The Court was of the view that the directions given by the learned trial judge (on p. 112 et seq of the transcript) were general directions and did not reflect the type of warning contemplated by s. 146.

Having regard to the irregularities in the case, the age of the witnesses and the delay in making reports, the Court found that due to the absence of adequate directions concerning the doctor’s evidence, the trial was conducted in a manner that caused prejudice to the appellant.

The Court decided not to order a retrial, having considered the nature of the offence, the public interest, the time since the offence was committed,

the tenuous evidence and the length of time that the appellant had been in custody (since May 2010).

Case Name:

**John Bally
v
The Queen**

[BVIHCRA2011/0007]

Date:

Wednesday, 15th January 2014

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Ola Mae Edwards, Justice of Appeal
[Ag.]
The Hon. Mde. Gertel Thom, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. Patrick Thompson

Respondent:

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

Issues:

**Appeal against conviction and sentence – Rape –
Indecent assault – Judicial intervention – Failure to
give warning under s. 146 of the Evidence Act, 2006
(Act No. 15 of 2006, Laws of the Virgin Islands)**

Result / Order:

[Oral Delivery]

- 1. The appeal is allowed. The conviction is quashed and the sentence is set aside.**
- 2. The matter is remitted to the court below for the Director of Public Prosecutions to consider whether the appellant should be retried.**

Reasons:

The role of a judge is to hold the reins and not step into the arena of a trial (*R v Hamilton* [1969] Crim LR 486 and *Peter Michel v The Queen* [2009] UKPC 41).

In *R v Hamilton* Lord Parker CJ stated that: ‘it is

wrong for a judge to descend into the arena and give the impression of acting as advocate'. He then went on to set out three grounds (termed "the Hamilton grounds") which would give rise to the quashing of a conviction.

The Court stated that the interventions in the present case were in the nature of a cross-examination and would therefore fall within the first Hamilton ground, which relates to interventions which invite the jury to disbelieve the evidence for the defence which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury.

Furthermore, the trial judge erred in directing jury on issue of lies. The Court found that in such a case a Lucas Direction would have been to the benefit of the appellant.

The Court also held that the issue of whether a section 146 direction (pursuant to section 146 of the Evidence Act, 2006 (Act No. 15 of 2006, Laws of the Virgin Islands)) was required in this matter needed to be addressed. The trial judge gave a general direction to the jury as to how to deal with discrepancies. In the Court's view however, this case would have required a section 146 direction, given the age of the virtual complainant and the fact that her evidence was uncorroborated.

Case Name:

The Attorney General

v

Maureen Peters

[BVIHCVAP2010/0038]

Date:

Wednesday, 15th January 2014

Coram:

The Hon. Mde. Louise E. Blenman, Justice of Appeal

The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mde. E. Ann Henry, QC, Justice of Appeal

[Ag.]

Appearances:

Applicant: Ms. Jo-Ann Williams-Roberts, Solicitor General
Respondent: Mr. William Hare (as amicus curiae)

Issues:

Construction to be given to rule 7(1) of the Prison Rules, 1999 (S.I. No. 25 of 1999) – Whether purposive interpretation of Rules wrong in law – Recommendation for remission to be granted to respondent not made to Governor by Superintendent of Prisons – Whether rule 7(1) ought to be construed to mean that Superintendent of Prisons obliged to make recommendation for remission to Governor provided that prisoner of good conduct – s. 43 of Virgin Islands Constitution Order 2007 – Whether s. 43 ought to be construed to mean that Governor unable to properly refuse to grant full one-third remission to prisoner who was of good conduct while in prison – Full remission not granted to respondent by Governor after consultation with Advisory Committee on the Prerogative of Mercy – Whether learned judge erred in finding that Governor’s discretion was invalidly exercised and that respondent’s continued detention at Her Majesty’s Prison was unlawful – No explanation given as to why full remission not granted to respondent – Whether decision of Superintendent of Prisons to refuse to make recommendation for remission reviewable by the Court – Whether Governor’s exercise of discretion reviewable by the Court – Legitimate expectation

Result and Reason:

[Oral delivery]
Having given consideration to the submissions of the Solicitor General as well as to those of counsel for the respondent, the Court was of the view that the learned trial judge was quite correct in concluding that where a prisoner had committed no infractions while incarcerated, the Superintendent of Prisons has no discretion whether to make a recommendation for remission to the Governor; he is obliged to do so.

The Superintendent of Prisons, being a public officer, is required to act fairly and, in the absence of bad conduct, is obliged to make the recommendations of remission. There was no reason to fault the learned trial judge's conclusions on this point. Furthermore, a Superintendent of Prisons' refusal to make a recommendation for remission is reviewable by the Court. He is performing a public function and the exercise of his powers are clearly reviewable by the Court so that it can be determined whether he has acted illegally, irrationally or in breach of natural justice.

The Court gave consideration to the arguments advanced by both parties and held that it had no doubt about the correctness of those of counsel for the respondent, short of the Court being able to review whether the Superintendent had acted in a capricious or discriminatory manner; this would be in clear violation of the rules.

There seemed to be no contention that the Crown, on several occasions, had indicated to the respondent both directly and through her counsel, that her release date would have been 29th October 2010, which would have given the effect of the remission to which she was entitled. The Court stated that it was trite that legitimate expectation would arise in circumstances where there are no legal rights. Furthermore, where there had undoubtedly been a practice in the BVI of granting a remission to prisoners who were of good conduct even if they had no legal right to the remission, the legitimate expectation would have developed in respect of that remission (*Campbell and Fell v. The United Kingdom* Application no. 7819/77; 7878/77)

For the sake of completeness, the Court considered whether the Governor's exercise of discretion was reviewable, and held that it was, on the basis of the questions of irrationality, legality and procedural fairness. The Governor must act fairly, lawfully and rationally. The Court did not however, in this preliminary hearing, propose to consider whether or not the judge could have properly dealt with the

matter on the basis of a habeas corpus application.

The Court made clear that this was just a preliminary consideration of the matters before it and it should be borne in mind that this was not a disposition or disposal of the entire appeal and that Ms. Peters' rights to be heard on the issues on appeal cannot be overlooked or forgotten.

Case Name: **Nanjing Ocean (BVI) Co. Limited**

v

[1] Gao Chunhe

[2] Nasbulk Limited

[BVIHCVAP2013/0005]

Date: **Wednesday, 15th January 2014**

Coram: **The Hon. Mde. Louise E. Blenman, Justice of Appeal**
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. E. Ann Henry, QC, Justice of Appeal
[Ag.]

Appearances:
Appellant: **Mr. Jonathan Ward**

Respondents: **Mr. Richard Evans**

Issues: **Forum – Stay of proceedings brought by respondents sought by appellant in court below on ground of forum non conveniens – Whether learned judge erred in refusing to grant stay of proceedings – Agreements from which dispute arose between the parties expressly governed by law of People's Republic of China but contained non-exclusive jurisdiction clauses – Whether learned judge erred in finding that case of *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 did not apply to the case at bar – Whether learned judge erred in failing to invite submissions by the parties in circumstances**

where both the appellant and the respondents had submitted to him that that the case of *Spiliada Maritime Corporation* did apply and had also set out the basis on which the application ought to have been determined

Result / Order:

[Oral delivery]

1. The appeal is allowed and the decision of the learned trial judge delivered on 1st May 2013 is set aside.
2. The matter is stayed on the ground of forum non conveniens.
3. By consent, the matter of costs is remitted to the learned trial judge to be assessed insofar in relation to hearing in the High Court and thereafter the costs of this appeal will be 2/3 of the costs as assessed by the trial judge.

Reason:

In this appeal, the appellant challenged the learned trial judge's refusal to apply the case of *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 in view of the issues and available remedies.

The Court, relying on the authority of *Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326, stated that an appellate court should be very slow to interfere with findings of fact made by a trial judge.

The Court will only interfere with the trial judge's exercise of discretion if he/she took into account irrelevant factors or omitted to take into account relevant factors or incorrectly apply principles of law (*Dufour and Others v Helenair Corporation Ltd and Others* (1996) 52 WIR 188). The Court stated that it had reviewed the judgment of the trial judge and could find no basis for interfering with his findings of fact and conclusions on the law in relation to the connecting factors, the natural forum and the available forum as was set out in paragraph 17 of his judgment. However, where the learned trial judge did err, was in paragraph 18 of his judgment. There, he stated:

“In the present case, what is being invoked is a

specific remedy given by the legislature here to members of companies which are incorporated here and which is not, as such, available otherwise than in this jurisdiction. It seems to me that this feature puts this case outside the *Spiliada* line of authority. Lord Goff, in the *Spiliada*, was giving guidance as to the nature of the inquiry and as to the tests to be applied in conducting it, in a case where the parties would, for all practical purposes, obtain the same judicial 'deal' ... wherever it was tried. ... Lord Goff was not considering a case of this sort, where a remedy unknown to the common law (or, so far as I am aware, to civilian law) has been made available exclusively for the benefit of the members of BVI incorporated companies and exclusively [within] this jurisdiction."

In coming to the conclusion that the case of *Spiliada* was inapplicable, the learned trial judge clearly misapplied the law and exercised his discretion incorrectly. The Court held that it was open to it to apply the *Spiliada* principles and determine in what way the learned judge ought to have applied them in this case.

The Court held that the trial judge had applied the first limb of the test in *Spiliada* correctly, so it was only left for them to consider what would have been the proper exercise of discretion under the second limb of the test in the absence of any evidence from the respondents that they would have suffered injustice if they were required to prosecute the claim in the People's Republic of China, and having the regard to the non-exclusive jurisdiction clause.

The Court found that the learned trial judge erred in exercising his discretion in the manner that he did in refusing to grant the stay. The Court stated that the onus was on the respondents to produce evidence to show the court that they would suffer injustice if forced to prosecute their case in the People's Republic of China. They did not do so, and the learned trial judge, in the absence of such evidence, erred in concluding that the BVI was the most appropriate forum.

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

[BVIHCMAP2013/0009]

Date: Thursday, 16th January 2014

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

Appearances:

Appellants / Applicants:	Stephen Atherton, QC, with him, Mr. Oliver Clifton
Respondent:	Mr. Matthew Collings, QC, with him, Mr. Richard Brown

Issues: Application for leave to adduce fresh evidence

Result/Order: Judgment is reserved.

The appellants are to file their reply by 3:00 p.m. on Friday, 17th January 2014.

Case Name:

Liao Chen Toh
v
[1] Liao Hwang Hsaing
[2] Liao Wen Toh

[BVIHCVAP2013/0002]

Date: Thursday, 16th January 2014

Coram: The Hon. Mr. Davidson Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. E. Ann Henry, QC, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. Jeremy Child

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

Issues: Appointment of first respondent as administrator of BVI estate – Whether learned judge erred in holding that first respondent was suitable administrator of estate – Whether first respondent had shown herself to be fit and proper person to act as administrator of estate – Whether learned judge erred in failing to appoint independent person as administrator in accordance with provisions of rule 30(1)(b) of the Non-Contentious Probate Rules 1987 (UK) – Exclusion of BVI estate from first respondent's spousal entitlement – Whether partial waiver of spousal entitlement valid under Taiwanese law – Conflict of interest – Whether first respondent's interests as spouse in conflict with her duties as administrator of estate – Whether learned judge erred in refusing appellant's application to adduce further documents in evidence on basis that they had not been disclosed by appellant at earlier stage of proceedings

Result / Order: [Oral delivery]
1. The appeal is dismissed.
2. The stay of execution is vacated.
3. The appellant is to pay costs to be assessed if not agreed.

Reason: Discretion to appoint administrator / Burden of proof
The Court held that in relation to this issue, the applicable rule was rule 30(1)(b) of the Non-Contentious Probate Rules 1987 (UK) which prescribes that the grant may be made to such

persons as the court directs. The Court then considered the criteria to be taken into account when one is considering the appointment of an administrator from among persons who are equally entitled (*Re Stainton's Goods* (1871) LR 2 P&D 212; *Cordeux v Trasler* (1865) 4 Sw & Tr 48 considered and applied).

Applying the appropriate legal principles, the learned trial judge found on the evidence, that the first respondent was not only the applicant *prior petens*, but that she had the support of the other beneficiary, and should be appointed as administrator unless there was proof that she was an improper person or incapable of carrying out the duties of an administrator. Given that the appellant had objected to the appointment of the first respondent and provided the court with evidence on which his position was based, the trial judge was obliged to consider the objection and decide whether the evidence in that position was sufficiently strong to deny a full grant to first respondent.

The appellant had an evidential burden to discharge, that being to satisfy the court that his evidence was cogent enough to deny the first respondent the full grant to which the trial judge had found that she was generally entitled (based on the evidence and authorities and having exercised her discretion in that manner).

The trial judge here was not reversing the burden of proof, which remained on the appellant throughout the trial. There was therefore no merit in this ground of appeal.

Limited grant

The trial judge considered all the evidence and made her own assessment of all the witnesses. She found both respondents to be witnesses of truth. The judge did not consider the appellant to be truthful and forthright. Therefore, she preferred and accepted the evidence of the respondents over that of the appellant. The judge made her findings on each of the appellant's objections based on the evidence before her and her assessment of the witnesses. The Court accordingly found no basis to disturb those

findings.

The Court, having found that the respondent was the first applicant and that she had the support of the majority interest, had to consider the appellant's evidence in the position and to determine whether it had sufficient weight to militate against the appointed administrator.

Adverse inference about the first respondent's character from injunctions

The Court held that when one considered the circumstances which surrounded the grant of the injunctive orders, no inference of the first respondent's partiality or adverse inference of character could properly be drawn from the injunctive orders.

Whether trial judge failed to appreciate that the injunctions applied after court assessment on the issue of limited grant

An administrator *ad colligenda bona* is an officer of the court. The court has control over its officers and can remove them if it is shown that they are not carrying out their duties as required by law or that they are no longer fit to be officers of the court.

Only one injunction application to control first respondent as administrator *ad colligenda bona* was assessed and pursued by the court

The court heard evidence from both sides at the hearing of the applications for injunctions. As regards the application for accounting, the first respondent had chosen not to file any evidence in opposition to the application. However, certain arguments were filed for the hearing of the applications. The court did hear from both parties at the hearings of all the applications. There was therefore no merit in the argument that the trial judge had drawn incorrect conclusions based on the assertions advanced at paragraph 18 of the appellant's skeleton arguments.

Whether the trial judge failed to acknowledge the first

respondent's partiality

The trial judge considered the appellant's contentions that the first respondent had sided with the second respondent in the corporate power struggle over Loyal HQ Industrial Corp ("Loyal HQ"), and made findings of fact rejecting these allegations.

The Court could find no reason to disturb the findings of the learned trial judge, who saw and assessed all the witnesses during oral examination, and clearly preferred the evidence of the first respondent and her witnesses. She found her to be credible. She found the second respondent to be a witness of truth and described Liao Ming C as unequivocal. On the other hand, the judge found that the appellant's evidence under cross-examination was disappointing and that his responses were at times equivocal and contradictory. The trial judge was not satisfied that the evidence of the appellant in his examination was completely forthright.

The trial judge's findings are adequate to dispose of the allegations of partiality against the first respondent and its effects on her performance as administrator. These are findings of primary fact which turned on the trial judge's assessment of the credibility of witnesses.

In an appeal against findings of primary fact, the burden on the appellant is heavy. The trial judge has had the opportunity of seeing and hearing the witnesses and assessing their demeanour. This is an advantage not held by the appeal court. The appeal court would only interfere where it finds that the court at first instance was clearly and patently wrong.

The trial judge's findings that the respondent and her witnesses were credible, that the appellant was not, and that the first respondent was not partial to the second respondent, are unimpeachable by this Court.

Whether the trial judge should have drawn the inference that the first respondent had sided with the second respondent and was partial

The Court held that the second respondent's evidence in cross-examination that he and the first respondent, as directors of Triple Dragon Limited ("TDL"), had taken the decision to freeze the bank accounts of Loyal HQ in order to compel the appellant to come out to talk, did not come close to the standard to show that the trial judge was patently wrong in her findings that the first respondent was not partial in carrying out the duties as administrator or that the trial judge was misdirected and erroneous in not finding that the first respondent had sided with the second respondent. In any event, the explanation for the freezing order was apparent from the evidence.

The respondents argued, and the Court agreed, that the only inference which the trial judge could properly draw from the fact that the first and second respondents, as directors of TDL, took the decision to freeze Loyal HQ's bank accounts was that the first respondent, with the assistance of the second respondent, was trying to preserve and collect the assets of the estate of Liao Yo-Chang (deceased) ("LYC"), which she was duty bound to do as administrator *ad colligenda bona*.

Whether the trial judge failed to acknowledge the first respondent's partiality from her willingness to relinquish the spousal entitlement on eve of the trial

The Court opined that given the role of an administrator, it could not be said that by waiving her spousal entitlement and being appointed administrator, the first respondent would retain control of the BVI companies. Neither is it clear as to how the judge could have acknowledged or inferred the first respondent's partiality from a waiver of her spousal entitlement to LYC's BVI estate.

Whether the BVI shareholding in TDL, LIE (Loyal International Enterprises Co.) and NSH (New Success House Co. Limited) was subject to a trust

The trial judge had before her evidence from witnesses whom she observed and concluded were witnesses of truth or which she could find that the

trusted shares related to the shareholdings of Loyal HQ and not to the BVI shareholdings. Therefore, the trial judge was correct in concluding that the potential dispute regarding the trusted shares in Loyal HQ was not by itself enough to militate against the full grant of letters of administration in the BVI estate.

Trial judge's refusal to adduce further evidence, grant relief from sanctions and recall the second respondent to be cross-examined

The Court stated that the circumstances under which an appeal court will interfere with the exercise of discretion of a High Court judge are very well known.

The trial judge was correct in dismissing the appellant's application, which clearly did not comply with the compulsory requirements in the Civil Procedure Rules 2000, where the appellant had adequate time within which to file the necessary application and affidavit evidence in support of the applications but chose not to comply with the Rules.

In the circumstances, it could not be advanced that the exercise of the trial judge's discretion in refusing to grant relief from sanctions, refusing to admit documents and to recall the second respondent to be cross-examined was clearly wrong or must have exceeded the generous ambit within which reasonable disagreement is possible. It could not be said that the trial judge misdirected herself with regard to any of the principles in accordance with which the discretion had been exercised.

The judge did not take into account matters which ought not to have been taken into account and did not fail to consider matters which ought to have been considered. This appeal ground therefore also failed.

Whether the trial judge erred in making an assumption that the BVI estate can be exempt from the powers of government

The respondents contended, and the Court agreed, that there was no merit in the appellant's contention

that there was no evidential basis for the judge to make the finding that the first respondent's waiver of the spousal entitlement to the BVI estate was valid.

In the exercise of her discretion, the trial judge referred to the appointment of an independent administrator. The judge considered and applied the principles on which such a discretion should be exercised by the court. She considered the submissions from the parties and in particular, the fact that there had been a serious lack of trust among the heirs which had contributed to the acrimony. However, the Court had regard to the fact that the learned judge had found that: the first respondent qualified to be appointed as administrator of the estate as she had not been shown to be unfit or incapable of performing the duties of administrator; she was the first applicant and the person selected by the majority of the persons interested; the BVI estate was not unwieldy or particularly complex; there were no outstanding debts to delay the distribution of the estate; and the judge also had regard to the nature of the estate shares in the BVI company.

The first respondent had acted as administrator *ad colligenda bona*, had the capacity to do so, had the assets under control and would have had significant knowledge of the estate which presupposed that the administration could be handled in a more cost effective manner. The judge was not satisfied that litigation and expense would be avoided or diminished by appointing an independent administrator. Here again, she was exercising her discretion, which the Court stated, it could find no reason to impugn.

Case Name:

Liao Chen Toh
v
Liao Hwang Hsiang

[BVIHCVAP2012/0021]

Date:

Thursday, 16th January 2014

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. E. Ann Henry, QC, Justice of Appeal
[Ag.]

Appearances:
Appellant: Mr. Jeremy Child
Respondents: Mr. Paul Dennis, QC, with him, Ms. Nadine Whyte

Issues: Whether it was open to learned judge to refuse to allow expert evidence which appellant wished to adduce – Whether it was open to learned judge to find that there was no evidence to support contention that order would enjoin appellant from taking steps that are lawful in Taiwan – Whether it was open to learned judge to find that appellant did not have right to hold himself out as representative of the company Triple Dragon Limited – Balance of convenience – Whether it lay with not granting paragraph 1(a)-(c) of the order of the learned judge

Result / Order & Reason: [Oral Delivery]
The decision in the related case BVIHCVAP2013/0002 having been made, by consent, it is ordered that:
1. the order of the Honourable Madame Justice Rita Olivetti dated 28th June 2012 be continued until the obtaining of a full grant of letters of administration in the estate of Liao Yo-Chang, deceased, by the first respondent; and
2. there be no order as to costs.

Case Name: Harvey Zabusky
v
[1] Viscaya Armadora S.A.
[2] P.M.P. Anguilla Ltd.
[3] Virgtel Limited

[BVIHCVAP2011/0070]

Date: Friday, 17th January 2014

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Ola Mae Edwards, Justice of Appeal
[Ag.]
The Hon. Mde. E. Ann Henry, QC, Justice of Appeal
[Ag.]

Appearances:

Appellant / Applicant:	In person
Respondents:	Mr. Paul Dennis, QC, with him, Ms. Nadine Whyte

Issues: Appeal against decision of learned judge granting permanent injunction on same terms as a previous interim injunction (granted in May 2010) restraining appellant from holding himself out in jurisdiction as being solely entitled to give instructions on behalf of third respondent company – Whether appellant should be only person with authority to give instructions on behalf of third respondent company – Standing of first respondent – Whether skeleton arguments of respondent filed in time – Application to adduce new evidence

**Results /
Orders &
Reasons:** [Oral Delivery]
Preliminary Issues

With respect to the authority of the respondents to appear in this matter, the Court ruled that the death of Mr. Hendrik van Leeuwen, director of the first respondent, cannot revoke the authority of the first respondent to appear in the matter.

On the issue of the objection to the respondents appearing by virtue of having filed late skeleton arguments, the respondents filed their submissions in a timely fashion. The record of appeal was filed on 27th December 2013 and on 10th January 2014, which means the submissions were filed on time.

The preliminary issues of objection are dismissed.

Application to Adduce New Evidence

The Court found that the appellant's application to adduce new evidence could have been made a long time ago and no proper reason was advanced by the appellant/applicant as to why it was not made before, why the appeal should now be adjourned to hear the application or why the application should be heard orally. Section 90 of the Evidence Act, 2006 (Act No. 15 of 2006, Laws of the Virgin Islands) provides a bar to the application and on those grounds, the application to adduce new evidence is denied.

The Substantive Appeal

The appellant is to file submissions in reply to the respondent's amended submissions and serve a filed copy on the respondent by 31st January 2014.