

COURT OF APPEAL SITTING

ANTIGUA AND BARBUDA

10th – 12th March 2014

JUDGMENTS

Case Name:

Clive Oliveira

v

The Attorney General

[ANUHCVP2010/0047]

Date:

Monday, 10th March 2014

Coram:

The Hon. Dame Janice M. Pereira, Chief Justice

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

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant:

Dr. David Dorsett

Respondent:

Mr. Justin Simon, Attorney General

Issues:

Civil appeal – Judicial review – Irrationality – Appellant’s entitlement to be registered as citizen of Antigua and Barbuda pursuant to s. 114(1)(b) of Antigua and Barbuda Constitution Order 1981 – Appellant’s citizenship application appointment scheduled some 19 months after application made – Whether delay in being registered constitutes breach of appellant’s constitutional rights as provided by ss. 111 and 114(1)(b) of Constitution – Whether learned trial judge erred in holding that delay not inordinate – Whether learned trial judge erred in finding that there was no abuse of discretion by officials or agencies of Government of Antigua and Barbuda – Challenge to findings of fact made by learned trial judge

**Result &
Reason:**

Held: dismissing the appeal, and affirming the judgment of the trial judge, that:

- 1. The trial judge’s reasoning that, on a scale of general human experience, the well over one year**

period from application to interview was not out of the realm of international experience cannot be faulted. There is probably not a country in the world where a person not native to the country – whether by being born in the country or being the offspring of a native of the country – who has acquired certain qualifications for citizenship of the country will immediately and automatically upon application be registered as a citizen of the country. There will invariably be some delay, whether specifically stipulated or naturally arising, before a country confers its citizenship upon persons not native to the country. If the trial judge took this view and concluded that a nineteen month delay is not of such magnitude as to amount to a denial of the appellant's right to registration, then he cannot be faulted for so doing.

2. The judgment of a court on an application for judicial review, especially one grounded on abuse of process or irrationality, is a judgment given in the exercise of a judicial discretion which ought only to be upset by a court of appeal if the appellate court is satisfied that: (i) in exercising his or her judicial discretion, the trial judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (ii) as a result of the error or the degree of the error, in principle the trial judge's discretion exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. It cannot be said that the trial judge's exercise of discretion in the instant case was flawed in any of these respects. He was entitled to make the findings of fact that he made based on the evidence that was before him. In particular, he was entitled to accept the respondent's evidence on various aspects of the citizenship application process – the resources available to the Immigration Department for the processing of citizenship applications; the department's workload; and the extent to which

these factors would impact on the department's ability to process applications at a faster rate. There is accordingly no basis for overturning the trial judge's decision on the issues raised by the appellant on appeal.

Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 followed.

STATUS HEARING

Case Name: [1] The Proprietors, Condominium Plan No. 2/1989
[2] John Firth
[3] Tom Kepler
[4] John Greaves
[5] Sal Rosa
v
[1] Trinity Investments Company Limited consolidated with Trinity Investment Company Limited
[2] Orest Bedrij
[3] Oksana Bedrij
[4] Chrystyhna Bedrij
[5] Rokssana Bedrij
[ANUHC VAP2008/0009]

Date: Monday, 10th March 2014

Before: The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant:	No appearance
Respondent:	Mr. Kendrickson Kentish with him Ms. Amaya Athill

Issues: Status of the matter – Directions

**Result / Order
/ Reason:**

[Oral delivery]

- 1. Counsel representing the parties in the court below namely Clement Bird and Kendrickson Kentish are to meet to make their notes taken at the trial available to each other and to use the notes along with the partial notes of evidence for preparation of the transcript of proceedings of the court below to be used in the appeal.**
- 2. Once the transcript is prepared and filed the parties shall comply with the provisions of rules 62.11 and 62.12 of the CPR.**
- 3. Further status hearing of the appeal is set for the next sitting of the Court of Appeal during the week commencing the 7th July 2014.**
- 4. Counsel for the respondent shall file a draft of this order for settling by the court and shall cause the settled draft to be served on the appellant.**

Case Name:

Paulette Matthew

v

**Antigua and Barbuda Port Authority Board of
Commissioners**

[ANUHCVP2008/0020]

Date:

Monday, 10th March 2014

Before:

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant: Mr. Steadroy Benjamin with him Ms. Janice Young

Respondent: No appearance

Issues:

Status of the matter – Directions

Result / Order:

[Oral delivery]

1. Counsel representing parties in the court below namely Mr. Steadroy Benjamin for the appellant and Mr. Dexter Wason for the respondent shall meet within one month to make the notes taken at the trial available to each other and to be used for the construction of the transcript of the proceedings on the court below.
2. The appellant shall then file a record of appeal within one month of the preparation and filing of the transcript of proceedings.
3. The parties shall thereafter comply with the provisions of rule 62.11 and 62.12 of the CPR.
4. Further status hearing of the appeal is set for the next sitting of the Court of Appeal in Antigua and Barbuda during the week commencing the 7th July 2014.
5. Counsel for the appellant shall file a draft of this order for settling by the court and shall cause copies of the settled draft to be served on the respondent and on Mr. Dexter Wason.

Case Name:

[1] Vere Bird Jr.
[2] Lester Bryant Bird
[3] Gaston Browne
[4] Mary Claire Hurst
[5] Molywn Joseph
[6] Sharon Kentish
[7] Jim Galloway

v

[1] The Commissioner of Police

[ANUMCRAP2010/0015]

Date:

Monday, 10th March 2014

Before:

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant:

Mr. Steadroy Benjamin with him Ms. Janice Young

Respondent: Ms. Shannon Jones

Issue: Status of the matter

Result / Order:

[Oral delivery]

- 1. The court office shall cause a copy of the transcript of proceedings in the court below to be filed and made available to parties to this appeal.**
- 2. Within 28 days of receipt of the notice of availability of the transcript the appellant shall file at the court office six copies of the record of appeal.**
- 3. The parties shall thereafter comply with the provisions of rules 62.11 and 62.12 of the CPR.**
- 4. The appellant is directed to draft this order and file three (3) copies of the draft in the court office within 7 days of today's date.**
- 5. After receipt of the order by the court office, the appellant shall serve a copy of the order on the respondent.**
- 6. Further status hearing of this matter is set down for the next sitting of the Court of Appeal in Antigua and Barbuda during the week commencing the 7th July 2014.**

APPLICATIONS AND APPEALS

Case Name:

Dexter Joseph

v

The Queen

[ANUHCRA2009/0021]

Date:

Monday, 10th March 2014

Coram:

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

Appearances:

Appellant: Dr. David Dorsett with him Mr. Jarid Hewlett
Respondent: Mr. Anthony Armstrong, Director of Public Prosecutions with him Ms. Shannon Jones

Issues: Criminal appeal against sentence – Receiving

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

Reason: The appellant has served already served his sentence.

Case Name:

Clayton Davis

v

The Queen

[ANUHCRA2009/0004]

Date: Monday, 10th March 2014

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

Appearances:

Appellant: Mr. Steadroy Benjamin with him Ms. Janice Young
Respondent: Mr. Anthony Armstrong, Director of Public Prosecutions with him Ms. Shannon Jones

Issues: Criminal appeal against conviction and sentence – Attempted murder

Result / Order: [Oral delivery]
1. The appeal against conviction is withdrawn and

therefore dismissed.

2. The appeal against sentence is dismissed.

Reason:

No basis having been shown for interfering with the discretion exercised by the learned trial judge in passing sentence upon the appellant, the Court held that there was no reason for disturbing the sentence imposed by the learned judge. The crime was gruesome and heinous.

Case Name:

Wilbert Paul

v

The Queen

[ANUHCRAP2008/0020]

Date:

Monday, 10th March 2014

Coram:

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

Appearances:

Appellant: Mr. John Fuller

**Respondent: Mr. Anthony Armstrong, Director of Public
Prosecutions with him Ms. Shannon Jones**

Issue:

Criminal appeal against sentence

Result / Order:

[Oral delivery]

- 1. The appeal against sentence is dismissed.**
- 2. The sentence of fourteen (14) years is affirmed.**

Reason:

The Court found that the sentence was on the low side of the scale having regard to the circumstances of the case.

Case Name:

Rudy Monelle

v

The Queen

[ANUHCRA2008/0017]

Date:

Monday, 10th March 2014

Coram:

The Hon. Dame Janice M. Pereira, Chief Justice

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

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

Appearances:

Appellant:

Mr. Cosbert Cumberbatch

Respondent:

Mr. Anthony Armstrong, Director of Public Prosecutions with him Ms. Shannon Jones

Issues:

Criminal appeal against conviction – Murder

Result / Order:

[Oral delivery]

- 1. The appeal against conviction is dismissed.**
- 2. The sentence of life is affirmed but the minimum period that the appellant must serve is 25 years before review of that sentence.**
- 3. Time spent will be taken into consideration.**

Reason:

The Court found that the learned trial judge did adequately direct the jury where there were inconsistencies between conflicting witness statements and drawing the jury's attention to what explanation had been given by Ms. Charles, a witness in the case. It was indicated to the jury that it was a matter for them to decide. The case did not stand or fall on the evidence of Ms. Charles. Further, there was considerable evidence to show the link between the appellant and the victim.

In relation to the account of the earlier threat, it was

evident that while it was prejudicial it was highly probative to the facts of this case. Therefore, it was not wrong of the trial judge to admit that evidence.

In addition, the learned trial correctly directed the jury on how to use the expert evidence which evidence revealed that there was an accelerant used.

The Court did not consider that this was a verdict that was unsafe or unsound.

In relation to sentence, the Court had regard to the fact that there had recently been legislation in relation to fixed term sentences and was prepared to substitute a fixed term of imprisonment. The Court affirmed the sentence of life imprisonment and held that the minimum period that the appellant must serve is 25 years before review of that sentence. Time spent will be taken into consideration.

Case Name:

Atiba Francis

v

The Queen

[ANUHCRA2008/0009]

Date:

Monday, 10th March 2014

Coram:

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

Appearances:

Appellant:

No appearance

Respondent:

Mr. Anthony Armstrong, Director of Public Prosecutions with him Ms. Shannon Jones

Issues:

Criminal appeal against conviction – Wounding with intent to do grievous bodily harm

Result / Order: [Oral delivery]
The hearing of this appeal is adjourned to the next sitting of the Court of Appeal in Antigua in the week of 7th July 2014.

Case Name: Rashid A. Pigott
v
The Queen

[ANUHCRA2009/0009]

Date: Monday, 10th March 2014

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

Appearances:
Appellant: No appearance
Respondent: Mr. Anthony Armstrong, Director of Public Prosecutions with him Ms. Shannon Jones

Issues: Criminal appeal against conviction – Breaking and entering a building – Larceny

Result / Order: [Oral delivery]
The hearing of this appeal is adjourned to the next sitting of the Court of Appeal in Antigua in the week of 7th July 2014.

Case Name: Dexter Joseph
v
The Queen

[ANUHCRAP2010/0007]

Date: Monday, 10th March 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: Dr. David Dorsett with him Mr. Jarid Hewlett

Respondent: Mr. Anthony Armstrong, Director of Public Prosecutions with him Ms. Shannon Jones

Issues: Criminal appeal against conviction – Wounding with intent

Result / Order: [Oral delivery]
1. The respondent is to file submissions and authorities on or before 30th May 2014.
2. Hearing of the appeal is adjourned to the sitting of the Court of Appeal during the week of 7th July 2014.

Case Name: Michael Crooks
v
The Queen

[ANUHCRAP2011/0002]

Date: Monday, 10th March 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: Mr. Steadroy Benjamin

Respondent: Mr. Anthony Armstrong, Director of Public Prosecutions with him Ms. Shannon Jones

Issues: Criminal appeal against conviction and sentence – Sexual intercourse with a female under the age of 14

Result / Order: [Oral delivery]
1. The application to amend the notice of appeal is granted.
2. Grounds 1 and 2 of the appeal against having been withdrawn are accordingly dismissed.
3. The sentence of 15 years is varied to a sentence of 10 years imprisonment.

Reason: The Court found that the correct principles were not observed and applied in sentencing the appellant.

Case Name: Noble Mayne
v
The Queen

[ANUHCRA2011/0005]

Date: Monday, 10th March 2014

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

Appearances:
Appellant: No appearance
Respondent: Mr. Anthony Armstrong, Director of Public Prosecutions with him Ms. Shannon Jones

Issues: Criminal appeal against conviction – Indecent assault

Result / Order: [Oral delivery]
The appeal is dismissed for want of prosecution.

Reason: The appellant has served his time and is no longer in the country.

Case Name: Geary Andrew Joseph
v
Zephepha Rose Mae Joseph
[ANUHCVP2013/0003]

Date: Monday, 10th March 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:	Mr. David Dorsett with him Mr. Jarid Hewlett
Respondent:	Mr. Steadroy Benjamin with him Ms. Janice Young

Issues: Civil appeal – Discharge order of single judge – Whether judge erred in finding that an application for setting aside an order for spousal support was an appeal and not an application

Result / Order: [Oral delivery]
The appeal is allowed and the order of the single judge is reversed.

Reason: The order was not an interlocutory order and therefore permission to appeal was not required.

Case Name:

**Randy Josiah
v
AMW Welding & Industrial Supplies Limited
[ANUHCVAP2014/0004]**

Date:

Tuesday, 11th March 2014

Coram:

**The Hon. Dame Janice M. Pereira, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. Ralph Francis

Respondent:

Mr. Kelvin John with him Mr. Loy West and Ms. Lisa John-West

Issues:

Application for leave to appeal – Application was filed 3 days after the time limit

Result / Order:

[Oral delivery]

- 1. Leave to appeal is granted and the appeal will be heard.**
- 2. The matter is to proceed in accordance with the CPR.**
- 3. The appeal is allowed**
- 4. Costs to the appellant in the sum of \$1,500.00.**

Reason:

The court has a number of case management powers and an application to strike out is a draconian step and the court must decide if that is the obvious course or the only course that can be taken. Section 13 of the Limitation Act, Cap. 456, is qualified by section 16. Section 16 allows for a factual ventilation of the issues for the purposes of reckoning the period of limitation. The Court relied on Real Time Systems Limited v Renraw Investments Limited et al [2014] UKPC 6.

Case Name:

Joseph W. Horsford

v

Geoffrey Croft

[ANUHCVP2014/0006]

Date:

Tuesday, 11th March 2014

Coram:

The Hon. Dame Janice M. Pereira, Chief Justice

The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mde. Gertel Thom, Justice of Appeal [Ag.]

Appearances:

Appellant:

In person

Respondent:

No appearance

Issue:

Application for leave to appeal

Result / Order:

[Oral delivery]

1. Leave to appeal is hereby granted.

2. The appeal is to proceed in accordance with the CPR.

Case Name:

Austin Martin, Executor of the Estate of Mary

Edith Doreen Grason, deceased suing herein

by his Attorney Winston Derrick

v

The Attorney General of Antigua and Barbuda

[ANUHCVP2009/0015]

Date:

Tuesday, 11th March 2014

Coram: The Hon. Dame Janice M. Pereira, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal [Ag.]

Appearances:
Appellant: Mr. Dane Hamilton, QC
Respondent: Mr. Justin Simon, Attorney General, with him Ms. Rose-Ann Kim

Issues: Civil appeal – Land dispute

Result / Order: [Oral delivery]
1. The appeal is dismissed.
2. The respondent shall have its costs fixed at 2/3 of that ordered in the court below.
3. Written reasons for the decision to be furnished at a later date.

Case Name: Gene B. Samuel
v
Sheron Whinfield

[ANUHCVP2009/0005]

Date: Tuesday, 11th March 2014

Coram: The Hon. Dame Janice M. Pereira, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal [Ag.]

Appearances:
Appellant: Mr. John Fuller
Respondent: No appearance

Issues: Civil appeal – Whether the learned trial judge erred in finding that the agreement was frustrated

Result / Order: [Oral delivery]
The matter is to be removed from the list to be restored upon application by either party.

Reason: The legal representative of the respondent has died.
Further, the respondent cannot be located.

Case Name: [1] Asot Michael
[2] Josette Michael
[3] Teresa-Anne Michael
v
[1] The Attorney General
[2] The Commissioner of Police
[3] The Magistrate for District A (Ivan Walters)
[ANUHCVP2009/0020]

Date: Tuesday, 11th March 2014

Coram: The Hon. Dame Janice M. Pereira, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal [Ag.]

Appearances:
Appellant: No appearance
Respondent: Mr. Justin Simon

Issue: Civil appeal

Result / Order: [Oral delivery]
The hearing of the appeal is adjourned to the next sitting of the Court of Appeal in Antigua and Barbuda.

Case Name:

**[1] Winston Derrick
[2] Observer Publications Limited
v
[1] Rolston Potter**

[ANUHCVAP2012/0029]

Date:

Wednesday, 12th March 2014

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal**

Appearances:

Appellant:

Mr. Dane Hamilton, QC

Respondent:

Mr. Anthony Astaphan with him Ms. Saska Diamond

Issues:

Civil appeal – Defamation – Fair comment – Qualified privilege – Appeal against cost order – Whether master failed to address the sole issue that was purported on the claim

Result / Order:

[Oral delivery]

- 1. The appeal is allowed in part.**
- 2. The order of the master striking out paragraph 6 sub paragraph 1-7 is set aside.**
- 3. The order of the master striking out qualified privilege is upheld.**
- 4. Each party to bear its own costs.**

Reason:

The master erred in striking out paragraph 6 and the particulars in respect of the defence of fair comment. The comments must indicate at least in general terms the facts on which it is based. The matter ought to be tried in respect of the defence of fair comment.

The Court further held that it could not find any error

on the part of the master in striking out paragraph 7 in respect of the defence of qualified privilege. The defence was not capable of showing the Court that it (the appellant) acted responsible and had a duty to publish the allegations made against the respondent, to the public. No basis was found to upset the judgment and order of the master in respect of the plea of qualified privilege.

Case Name: [1] Verbin Bowen
[2] Javantia Bowen (by her next friend Verbin Bowen)
[3] Joshua Bowen (by his next friend Verbin Bowen)
v
[1] The Attorney General of Antigua and Barbuda
[2] The Chief Immigration Officer
[ANUHCVP2013/0016]

Date: Wednesday, 12th March 2014

Coram: The Hon. Dame Janice M. Pereira, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal [Ag.]

Appearances:
Appellant: Dr. David Dorsett with him Mr. Jarid Hewlett
Respondent: Mr. Justin Simon with him Ms. Rose-Ann Kim

Issues: Civil appeal – Removal order of the appellant is a violation of a constitutional right

Result / Order: [Oral delivery]
1. The appeal is dismissed.
2. No order as to costs.

Reason: The Court held that there was no reason which had been advanced by counsel for disturbing the discretion exercised by the trial judge wherein she refused to issue an order of mandamus to the immigration authority which would, in essence, have created a greater right than what would have persisted prior to the order of removal by the magistrate.

Case Name: Andy Nicholas
v
Radcliffe Rawlins Sr.
[ANUHCVP2013/0029]

Date: Wednesday, 12th March 2014

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:
Appellant: Dr. David Dorsett with him Mr. Jarid Hewlett
Respondent: Mr. Steadroy Benjamin with him Ms. Janice Young

Issues: Civil appeal – Whether the learned judge erred in dismissing an application to discharge an injunction

Result / Order: [Oral delivery]
1. The appeal is allowed and the order of Justice Cottle is discharged.
2. The matter is remitted to the court below to be heard by a different judge.
3. No order as to costs.

Reason: The Court was of the view that the justice of the case required that the court below hear the application to

dismiss the injunction.

Case Name: [1] Glenroy Francis
[2] Acres Stowe
v
[1] Illuminat (Antigua) Limited
[ANUHCVP2013/0022]

Date: Wednesday, 12th March 2014

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:
Appellant: Dr. David Dorsett with him Mr. Jarid Hewlett
Respondent: Ms. Deborah Burnett with her Ms. Stacy Ann Saunders

Issues: Civil appeal – Whether judge erred in granting order for sale of land – Application to suspend writ of execution

Result / Order: [Oral delivery]
1. The appeal is allowed in part.
2. The application of Acres Stowe for the writ of execution to be suspended until further order in respect of the motor vehicle is upheld.
3. The appeal in relation to the application for the sale of land is dismissed.
4. The application of Glenroy Francis for the writ of execution to be suspended until further order in respect of the motor cycle is dismissed.
5. Two of the three issues having been dismissed, costs to the respondents agreed in the amount of \$1,500.00.

Reason:

On the application regarding the land, the Court found no fault with the order of the learned judge. It was clear from the application what portion of land was to be sold. The use of the wrong form ought to not stand in the way of achieving the just result. The Court ultimately found no basis to upset the order for sale of the land.

The Court however had an issue with the judge's order to sell the chattels. The only evidence before the judge with respect of the use of the vehicle came from the appellant himself. The respondent put in no evidence to controvert the assertions made. The learned judge erred when he did not accede to the application of the appellant to treat that vehicle as not being amenable to the sale.

Case Name:

Oleskii Ostrovkov

v

Yano Holdings Ltd.

[BVIHCVAP2014/0012]

Territory of the Virgin Islands

Date:

Tuesday, 11th March 2014

Coram:

The Hon. Dame Janice M. Pereira, Chief Justice

The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mde. Gertel Thom, Justice of Appeal [Ag.]

Appearances:

Appellant:

Mr. Andrew Willins with him Mr. Jonathan Ward

Issues:

Civil appeal – Ex parte application to extend the powers of the court appointed receiver – Ex parte application for injunction

Result / Order:

[Oral delivery]

- 1. The hearing of the appellant's application and notice of appeal is hereby expedited and heard without notice to the respondent.**
- 2. In addition to the powers conferred upon Mr. Hill by the order of Justice Bannister, QC dated 7th March 2014, Mr. Chris Hill and Mr. Scott Clout of Ernst & Young be and are hereby appointed Receivers and Managers over:**
 - (i) The assets and goodwill of Yano Holdings ("Yano") to include Yano's shareholding in Dream Industries Limited, a company incorporated in Cyprus;**
 - (ii) The powers conferred upon the directors and officers of Yano by the provisions of the Memorandum and Articles of Association of Yano and the provisions of the BVI Business Companies Act 2004, with the consequence that the powers of the directors of Yano are suspended so long as the receivership remains in place;**

With all the powers set out in Schedule 3 to this Order, until the return date of this application.

- 3. Until the return date of this application, Mr. Hill and Mr. Clout be further appointed to act as a litigation receiver with power to direct the defence and response of Yano (under the supervision of the Court, but subject to the permission of the Cyprus Court where required) to any attempt by Koshigi Limited, its directors, shareholders, beneficial owners, employees or assigns, to enforce the terms of its notice dated 7th February 2014 or any similar notice, by way of legal or arbitral proceedings or otherwise.**
- 4. The requirement for security under CPR 51.4 is dispensed with.**
- 5. Any questions of fortification be remitted to the Commercial Court judge, to be considered on the return date or earlier application.**
- 6. Yano and/or its directors and/or officers and/or agents and/or representatives and/or employees shall be restrained and prohibited from effecting and/or approving and/or authorising and/or ratifying and/or implementing and/or causing any transfer and/or alienation and/or sale and/or gifting and/or pledging and/or encumbering of**

any asset of Yano and/or Dream Industries Limited ("dream Cyprus") and/or of the subsidiaries thereof, without the prior written approval of all of the applicant, Mr. Simon Dunlop, Mr. Victor Frumkin, until the return date of this application or until further order.

7. Paragraph 6 applies to all of Yano's and Dream Cyprus' and their subsidiaries' assets whether or not they are in those companies' names and whether they are solely or jointly owned. For the purpose of this order those assets include any asset which the relevant entity has the power, directly or indirectly to dispose of or deal with as if it were its own. The relevant entity is to be regarded as having such power if a third party holds or controls the asset in accordance with that entity's direct or indirect instructions.
8. Until the return date of this application, Yano and/or its directors and/or officers and/or agents and/or representatives and/or employees shall be restrained and prohibited from registering any changes to the ownership of Yano's share capital or to the composition of Yano's board of directors (save for those directed by any receiver appointed under paragraph (i) above acting within the scope of his powers and with the leave of the competent court in Cyprus where required) or allotting any further shares in Yano.
9. Until the return date of this application, Yano and/or its directors and/or officers and/or agents and/or representatives and/or employees shall be restrained and prohibited from passing any resolution changing the directors appointed by Yano to the board of Dream Cyprus; save for changes directed by any receiver appointed under paragraph (i) above acting within the scope of his powers and with the leave of the competent court in Cyprus.
10. Until the return date of this application, Yano shall be restrained and prohibited from dealing with, disposing of, transferring or encumbering the shares held by Yano in Dream Cyprus.
11. The return date will take place in the Commercial Division within 28 days of the date of this order on a date to be notified to the respondent by the High Court Registrar or by Appleby.

- 12. There be liberty to the respondent and to any person served with this order to apply to discharge or vary this order on written notice to the applicant's legal advisors in the British Virgin islands. If any evidence is to be relied upon in support of the application the substance of it must be communicated in writing to the applicant's solicitors in advance.**
- 13. The appellant's costs of this appeal are to be treated as costs in the application before Bannister J.**
- 14. Subject to any further or other orders of the Court, the appellant is to pay the costs and expenses and remuneration of the Receivers in the first instance.**