

COURT OF APPEAL SITTING

**SAINT LUCIA
16th – 20th December 2013**

JUDGMENTS

Case Name: **Fire Service Association
v
[1] Public Service Commission
[2] Chief Fire Officer
[3] Attorney General**

**[SLUHCVAP2010/0013]
(Saint Lucia)**

Date: **Monday, 16th December 2013**

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. Dexter Theodore holding papers for Ms. Cynthia Hinkson-Ouhla, counsel for the appellant**

Respondents: **Mr. Wauneen Louis-Harris holding papers for Ms. Grace Ward-Glasgow, counsel for the 1st respondent
Mr. Dwight Lay for the 2nd and 3rd respondents**

Issues: **Whether article 28 of the Code of Civil Procedure, Cap. 243, applies to judicial review proceedings – Limitations to protection afforded to public officers by article 28 – Whether Chief Fire Officer acted ultra vires in making recommendation to Public Service Commission to fill vacant post in Fire Service – Judicial review proceedings brought challenging appointment – Failure to give notice of suit as required by article 28**

Result and **Held: allowing the appeal and awarding costs to the**

Reason:

appellant which are to be assessed pursuant to the Court Procedure Rules 2000 and paid by the Attorney General, that:

1. It is only where a public officer acting in the legal exercise of his functions is sued for damages that he can rely on article 28 for protection. In the present claim, declaratory relief was sought as well as certiorari, mandamus and prohibition. Absent a suit for damages, no question of prohibition of rendering judgment unless notice of such suit is given can arise. The learned judge erred in dismissing the appellant's claim for judicial review.

Quorum Island (BVI) Limited et al v Virgin Islands Environmental Council British Virgin Islands High Court Civil Appeal No. BVIHCVAP2008/004 (delivered 27th October 2008, unreported) distinguished.

2. There is nothing in the context of article 28 to suggest that it applies to judicial review proceedings.

Castillo v Corozal Town Board v Another (1983) 37 WR 86 distinguished.

3. A public officer acting outside of his statutory functions cannot rely on the absence of notice (which notice article 28 stipulates is a requirement) for protection from an action brought against him or her.

Roncarelli v Duplessis [1959] SCR 121 (Supreme Court of Canada) applied.

STATUS HEARING

Case Name:

Tanzanite International Limited

V
The Attorney General of Saint Lucia

[SLUHCVAP2008/0039]

Date: Monday, 16th December 2013

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

Appearances:

Appellant:	Ms. Renee St. Rose
Respondent:	Ms. Cagina Foster-Lubrin

Issue: Status of matter

Result / Order: [Oral delivery]
IT IS HEREBY ORDERED THAT:

1. Counsel for the parties shall exchange their notes of the proceedings and seek to agree those notes for the purpose of the record of appeal.
2. The appellant shall report in writing to the court by Friday, 10th January 2014 as to whether agreement has been reached on the use of the notes as the record of appeal.
3. The matter is adjourned to the next status hearing in Saint Lucia scheduled for the week commencing 7th April 2014.

Reason: The Court had previously ordered the parties to exchange their notes of the proceedings and to agree on them for the purpose of putting together the record of appeal. This had not been done as yet.

Case Name: Josephat Mathurin
V
Saint Lucia National Housing Corporation

[SLUHCVAP2010/0014]

Date: Monday, 16th December 2013

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

Appearances:

Appellant: Mr. Shawn Innocent holding papers for Mr. Vern Gill

Respondent: No appearance

Issues: For report – Status of matter

Result / Order: [Oral delivery]
IT IS HEREBY ORDERED THAT:
The appeal is discontinued and dismissed.

Reason: The appellant had filed a notice of discontinuance.

Case Name: The Attorney General
v
Josephat Small

[SLUHCVAP2011/0027]

Date: Monday, 16th December 2013

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

Appearances:

Appellant: Ms. Brender Portland-Reynolds

Respondent: In person

Issues: For report – Status of matter

Result / Order: [Oral delivery]
IT IS HEREBY ORDERED THAT:
The parties are guided by rule 62.7 of Civil Procedure Rules.

Reason: No affidavit of service (proving service of the notice of appeal on the respondent) had been presented to the Court.

Case Name: Martin Devaux
v
Mark Goddard
[SLUHCVP2010/0028]

Date: Monday, 16th December 2013

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

Appearances:
Appellant: No appearance
Respondent: No appearance

Issues: Status of matter – Counsel on both sides served with notice of hearing for the day

Result / Order & Reason: [Oral delivery]
IT IS HEREBY ORDERED THAT:
The notice of appeal filed on 8th October 2010 is hereby struck out for want of prosecution.

Case Name: Randa Prospere
v

The Queen

[SLUHCRAP2009/0001]

Date: Monday, 16th December 2013

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

Appearances:

Appellant: In person

Respondent: Ms. Victoria Charles-Clarke, Director of Public Prosecutions

Issue: Status of matter

Result / Order: [Oral delivery]
IT IS HEREBY ORDERED THAT:

1. The learned magistrate is to prepare and submit to the Court a transcript of the proceedings in this matter without delay.
2. The matter is adjourned to the next status hearing date in Saint Lucia scheduled for the week commencing 7th April 2014.

Reason: The transcript of proceedings had not been provided to the parties by the magistrate as yet.

Case Name: Boniface Christophe
v
The Queen

[SLUHCRAP2010/0002]

Date: Monday, 16th December 2013

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

Appearances:

Appellant: Mr. Colin Foster (as amicus curiae)

Respondent: Ms. Victoria Charles-Clarke, Director of Public Prosecutions

Issues: Status of matter – Cost of transcript to be waived

Result / Order: [Oral delivery]
IT IS HEREBY ORDERED THAT:

1. The matter is adjourned to the next status hearing date in Saint Lucia scheduled for the week commencing 7th April 2014.
2. The costs of the transcript shall be waived and the transcript shall be provided to counsel for the appellant who acts amicus free of charge.

Reason: The transcript of proceedings had not been completed as yet.

Case Name: Kim Florent
v
The Queen

[SLUHCRA2012/0001]

Date: Monday, 16th December 2013

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

Appearances:

Appellant: In person (the appellant indicated that Mr. Alberton Richelieu was his attorney)

Respondent: Ms. Victoria Charles-Clarke, Director of Public Prosecutions

Issue: Status of matter – Transcript of proceedings

complete

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED THAT:

- 1. The appellant shall file and serve written submissions in support of the grounds of appeal no later than Friday, 7th February 2014.**
- 2. The respondent shall file and serve written submissions no later than Friday, 21st March 2014.**
- 3. The appeal shall be fixed for hearing at the next sitting of the Court of Appeal in Saint Lucia scheduled for the week commencing 7th April 2014.**

Reason:

The transcript of proceedings was complete, and so the Court was in a position to give directions for the filing of submissions and the hearing of the appeal.

Case Name:

Peter Solomon

v

The Queen

[SLUHCRA2005/0004]

Date:

Monday, 16th December 2013

Before:

The Hon. Dame Janice M. Pereira, Chief Justice

Appearances:

Appellant:

Ms. Wauneen Louis-Harris

Respondent:

Ms. Victoria Charles-Clarke, Director of Public Prosecutions

Issue:

Status of matter

Result / Order:

[No order made]

Reason: The Court was informed that the matter was before a High Court judge pursuant to an order made on 8th July 2013.

Case Name: Bernard Andre
v
The Queen

[SLUHCRA2009/0006]

Date: Monday, 16th December 2013

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

Appearances:

Appellant: Mr. Shawn Innocent, with him, Ms. Ernette Kangal

Respondent: Ms. Victoria Charles-Clarke, Director of Public Prosecutions

Issue: Status of matter

Result / Order: [Oral delivery]
IT IS HEREBY ORDERED THAT:
1. The respondent shall file and serve written submissions no later than Friday, 31st January 2014.
2. The appeal shall be fixed for hearing at the next sitting of the Court of Appeal in Saint Lucia scheduled for the week commencing 7th April 2014.

Reason: The Court was under the impression that the transcript of trial proceedings was still pending. However, this was not the correct position since Mr. Innocent indicated that he already had a copy of the transcript in his possession. The Court gave the necessary directions for the hearing of the appeal.

Case Name: Cameron Wayne Ernest
v
[1] The Director of Public Prosecutions
[2] PC490 George Leopold
[no magisterial appeal number]

Date: Monday, 16th December 2013

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

Appearances:
Appellant: Mr. Andie George
Respondent: Ms. Victoria Charles-Clarke, Director of Public Prosecutions

Issues: Status of matter – For mention

Result / Order: [Oral delivery]
IT IS HEREBY ORDERED THAT:
1. The learned Senior Magistrate is hereby directed to produce to the Registrar of the Court a certificate under his/her hand stating whether or not the record of the proceedings, in relation to complaints 148 of 2002 and 147 of 2002 is available.
2. The said certificate to be furnished by Friday, 31st January 2014.
3. The Registrar shall serve a copy of this order on the learned Senior Magistrate no later Friday, 7th January 2014.
4. Thereafter the matter shall be placed before the court for further consideration.

Reason: The parties had been told by the learned Senior Magistrate that there was no record of the

proceedings available in relation to complaints 148 and 147 of 2002.

Case Name:

**William Gerald
v
The Police**

[no magisterial appeal number]

Date:

Monday, 16th December 2013

Before:

The Hon. Dame Janice M. Pereira, Chief Justice

Appearances:

Appellant:

In person (counsel on record for Mr. Gerald was Mr. Jeannot-Michel Walters)

Respondent:

Ms. Victoria Charles-Clarke, Director of Public Prosecutions

Issues:

Status of matter – For mention

Result / Order:

[Oral delivery]

IT IS HEREBY ORDERED THAT:

- 1. The learned Senior Magistrate is hereby directed to produce to the Registrar of the Court a certificate under his/her hand stating whether or not the record of the proceedings, in relation to complaints 3851 to 3853 of 2005 is available.**
- 2. The said certificate to be furnished by Friday, 31st January 2014.**
- 3. The Registrar shall serve a copy of this order on the learned Senior Magistrate no later Friday, 7th January 2014.**
- 4. Thereafter the matter shall be placed before the court for further consideration.**

Reason:

There was no record of the proceedings available in relation to complaints 3851 to 3853 of 2005.

APPLICATIONS AND APPEALS

Case Name:

Richard Frederick

v

Kenny D. Anthony

[SLUHCVAP2013/0002]

Date:

Monday, 16th December 2013

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:

Applicant:

Mr. Horace Fraser

Respondent:

Mr. Peter I. Foster, QC, with him, Ms. Alana-J Joseph

Issues:

Application to set aside decision of single judge of Court of Appeal – Whether appeal judge erred in dismissing applicant’s appeal on basis that learned trial judge had properly exercised her discretion in granting respondent’s application for relief from sanctions – Whether learned trial judge fell into error in holding that respondent’s explanation for failure to file witness statements in accordance with directions of master was reasonable – Whether delay in filing witness statements was inordinate – Whether respondent’s conduct (not applying sooner for relief from sanctions) was intentional

Result / Order:

Decision is reserved, to be delivered tomorrow morning.

Case Name:

**Kimran Gaston
v
West Indies General Insurance Company
Limited**

[SLUHCVAP2013/0020]

Date:

Monday, 16th December 2013

Coram:

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

Appearances:

Applicant:

Ms. Lydia Faisal

Respondent:

Mr. Eghan Modeste

Issues:

**Application for leave to appeal and stay of execution
– Whether learned judge ruled on issues which had
been already dealt with by Court of Appeal**

Result / Order:

[Oral delivery]

BY CONSENT:

- 1. The application for leave to appeal is allowed and is treated as the appeal itself**
- 2. The appeal is allowed and the order of the learned trial judge dated 26th June 2013 is set aside and the matter is remitted to the High Court for any pending applications to be dealt with.**
- 3. No order as to costs.**

Reason:

The learned trial judge did not have all the necessary documents available to her before making the order dated 26th June 2013 and thus fell into error by determining matters which had already been dealt with by the Court of Appeal.

Case Name: **Jada Construction Caribbean Limited**
v
The Landing Limited
[SLUHCVAP2009/0011]

Date: **Monday, 16th December 2013**

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

Appearances: **Applicant:** **Mr. Hilford Deterville, QC, with him, Ms. Shan Greer**
(for the applicant Tie Property Limited)

Appellant: **Mr. Peter I. Foster, QC (for the appellant Jada**
Construction Caribbean Limited)

Respondent: **Mr. Duane Jean Baptiste (for the respondent The**
Landing Limited)

Issues: **Application to add party to proceedings – Oral**
application to withdraw application before the Court

Result / Order: **[Oral delivery]**
1. Leave to withdraw is granted and accordingly the
application stands dismissed.
2. By consent there is no order as to costs.

Reason: **The parties agreed that the best course of action**
would be to withdraw the application before the
Court.

Case Name: **Urban St. Brice**
v
The Attorney General

[SLUHCVAP2012/0027]

Date: Monday, 16th December 2013

Coram: The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Martinus Francois

Respondent: Mr. Dwight Lay, with him, Ms. Cagina Foster-Lubrin

Issues: Application for stay of all proceedings and for appeal to be heard summarily – Constitutional redress in accordance with s. 16(1) of the Saint Lucia Constitution Order 1978 – Whether fundamental rights and freedoms guaranteed by ss. 8(1), 8(2)(a), 5 and 3(5) of the Saint Lucia Constitution Order 1978 contravened or likely to be contravened

Result / Order: [Oral delivery]
BY CONSENT:

1. Leave is granted to the applicant to discontinue the application and accordingly the application stands dismissed.
2. No order as to costs.

Reason: The applicant made an oral application to discontinue the applications before the Court.

Case Name: Bernard Piltie
v
The Attorney General of Saint Lucia

[SLUHCVAP2013/0016]

Date: Monday, 16th December 2013

Coram: The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

Appearances:

Applicant: Ms. Lydia Faisal

Respondent: Ms. Brender Portland-Reynolds, with her, Ms. Jan Drysdale

Issues: Application for leave to appeal – Challenges to judge’s decision to refuse applicant’s application for judicial review

Result / Order: [Oral delivery]

1. Leave is granted to the applicant to file and serve the reasons for the decision and or the transcript of the lower court together with the order of the learned trial judge within 28 days of the date of this order.
2. The respondent is granted 28 days leave thereafter to file and serve further affidavit in answer to the amended application which was filed on 9th December 2013.
3. The parties are to file and exchange further submissions, if necessary, on or before 17th March 2014.
4. The matter is traversed to the next sitting of the Court in Saint Lucia during the week of 7th April 2014.

Reason: The reasons for the decision being appealed did not form a part of the application for leave to appeal.

Case Name: Fire Service Association
v
Attorney General

[SLUHCVAP2013/0011]

Date:

Coram:

**The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Ms. Esther Greene-Ernest holding papers for Ms. Cynthia Hinkson-Ouhla

Respondent:

Mr. Dwight Lay, with him, Ms. Jan Drysdale

Issues:

Application for extension of time to file notice of appeal – Application for extension of time to apply for leave to appeal

Result / Order:

[Oral delivery]

The hearing of the application is traversed to the next chamber hearing scheduled for 21st January 2014.

Reason:

Ms. Greene-Ernest indicated that Ms. Hinkson-Ouhla, who had conduct of the matter, was unable to make it to the day's hearing because she was ill.

Case Name:

Richardson Leon

v

Walter Pierre

[SLUHCVAP2013/0018]

Date:

Monday, 16th December 2013

Coram:

**The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]**

Appearances:
Appellant: Mr. Gerard Williams
Respondent: Ms. Wauneen Louis-Harris

Issues: Application for leave to appeal

Result / Order: The matter is stood down.

Reason: To allow the Court to take the lunch adjournment.

Case Name: Richardson Leon
v
Walter Pierre

[SLUHCVAP2013/0018]

Date: Monday, 16th December 2013

Coram: The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

Appearances:
Appellant: Mr. Gerard Williams
Respondent: Ms. Wauneen Louis-Harris

Issues: Application for leave to appeal – Whether the learned judge erred in refusing to set aside the respondent’s judgment obtained in default – Judge’s reasons for decision in court below not before Court of Appeal

Result / Order: [Oral delivery]
1. Leave is granted to the applicant to file and serve the judgment of the learned trial judge on or

before 31st January 2014.

2. The applicant is granted 14 days leave thereafter if necessary to file and serve further submissions.
3. The respondent is thereafter granted 14 days leave if necessary to file and serve further submissions.
4. Costs agreed in the sum of \$750.00.
5. The application is adjourned and traversed to the next sitting of the Court in Saint Lucia during the week of 7th April 2014.

Reason:

No transcript or reasons for the learned judge's decision had been placed before the Court, which reasons were necessary for the determination of the matter.

Case Name:

**William Clerfond
v
Foshlan Incorporated
[SLUHCVP2013/0027]**

Date:

Monday, 16th December 2013

Coram:

The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

Appearances:

Applicant:

Mr. Horace Fraser

Respondent:

Ms. Esther Greene-Ernest holding papers for Ms. Petra Nelson

Issues:

Application for extension of time to file notice of appeal – Learned master struck out claim but not defence – Rule 26.2 of the Civil Procedure Rules 2000 (Court's power to make orders of its own initiative) – Whether breached – Whether matter raised issues which ought to be properly argued at trial

Result / Order: [Oral delivery]
Based on the request of learned counsel Ms. Esther Greene-Ernest holding papers for Ms. Petra Nelson, and there being no objection by learned counsel Mr. Horace Fraser, the matter is adjourned for hearing on Thursday 19th December 2013.

Reason: Ms. Esther Greene-Ernest indicated to Court that Ms. Nelson, who had personal conduct of the matter, fell ill and wasn't able to make it to the day's hearing.

Case Name: Lazarus Paul
v
[1] Raquel Willie-Trotman
[2] Douglas Trotman
[3] Teferi Trotman minor acting herein and represented by his mother Raquel Willie-Trotman

[SLUHCVP2013/0028]

Date: Monday, 16th December 2013

Coram: The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

Appearances:

Applicant: Mr. Gerard Williams

Respondents: Ms. Wauneen Louis-Harris

Issues: Stay of execution of committal proceedings – Proof that applicant satisfies legal test for grant of stay not contained in affidavit – Whether evidential burden satisfied for grant of stay – Insurance claim arising from road traffic accident – Principles of subrogation

Result / Order:

[Oral delivery]

The applicant and respondents are directed to file and exchange skeleton submissions together with authorities no later than 17th December 2013 at 3:00 p.m. and the application for the stay will be heard on Wednesday, 18th December 2013 at 9:00 a.m.

Reason:

Counsel had not filed and exchanged all skeleton submissions that they wished to rely on for the stay application.

JUDGMENTS

Case Name:

Richard Frederick

v

Kenny D. Anthony

[SLUHCVAP2013/0002]

Date:

Tuesday, 17th December 2013

Coram:

**The Hon. Dame Janice M. Pereira, Chief Justice
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. Horace Fraser

Respondent:

Ms. Alana-J Joseph holding papers for Mr. Peter I. Foster, QC

Issues:

Application to set aside decision of single judge of Court of Appeal – Whether appeal judge erred in dismissing applicant’s appeal on basis that learned trial judge had properly exercised her discretion in granting respondent’s application for relief from sanctions – Whether learned judge fell into error in

holding that respondent's explanation for failure to file witness statements in accordance with directions of master was reasonable – Whether delay in filing witness statements was inordinate – Whether respondent's conduct (not applying sooner for relief from sanctions) was intentional

Result / Order:

[Oral delivery]

1. The application to set aside the decision of the single judge of the Court of Appeal is dismissed.
2. Costs assessed in the sum of \$1,000.00.

Reason:

Rule 27.8(1) of the Civil Procedure Rules 2000 sets out the various circumstances (numbered from (a) to (e)) in which a party must apply to the court if he wishes to vary a date in the case management timetable. A date for the filing and service of witness statements in the timetable does not fall under any of those circumstances set out from (a) to (e). There was no suggestion that the case management order in this matter specified any consequence for failure to comply with the date for filing witness statements, and so it is to be accepted that no consequence for such failure was specified therein. CPR 27.8(3) states, in effect, that a party seeking to vary any other date in the timetable without the agreement of the other parties must apply to the court generally before that date.

Based on the combination of CPR 27.8(1) and CPR 27.8(3) it is clear that there is room for legal practitioners to agree to a variation of the dates for filing witness statements *so long as such a variation does not affect any of the dates for the matters listed at (a) to (e) of CPR 27.8(1)*. Here, the respondent sought the appellant's consent but this was refused. It is not suggested that if such a variation had been agreed that it would have affected the matters set out in CPR 27.8(1). In the absence of agreement it was therefore prudent for the respondent to make an application for relief, prior to the trial date. If such an application were not made the defaulter would run the risk of not having a good reason *on the date of trial* as to why relief had not been previously sought and

also, the risk of the consequential refusal at trial (in the absence of a good reason for not previously seeking relief), to permit the witness to be called. It is in this context that failure to comply with the date for filing and serving a witness statement comes into play. It is at this stage that the sanction contained in CPR 29.11 would bite. It is noteworthy that even at that late stage, the court still retains a discretion as to whether the witness may be called or not. This clearly shows that the sanction for failure to file a witness statement by the directed date is not absolute or automatic.

It was in this context and against the background of events as accepted by the trial judge leading to the application for relief, that CPR 26.8 fell to be considered so as to determine whether the learned judge erred in the exercise of her discretion. CPR 1.2 states that the court must seek to give effect to the overriding objective when it exercises any discretion given to it by the rules.

CPR 26.8, captioned 'Relief from sanctions', has two parts. Firstly, it states that the application must be made promptly and be supported by evidence on affidavit. This is the tenor of rule 26.8(1). The second part (26.8(2)) states that the court may grant relief only if it is satisfied that that:

- (a) The failure to comply was not intentional;
- (b) There is a good explanation for the failure; and
- (c) The defaulting party has generally complied with all other relevant rules, practice directions, orders and directions.

Subrule (3) of 26.8 then goes on to set out a number of factors to which the court is to have regard in considering whether to grant relief.

It is important to keep in mind that the two parts of rule 26.8, though related, serve two distinctly different roles. Rule 26.8(1)(a) deals with the promptness of the application for relief. Whether or not an application is prompt, calls for a valuation of the facts and circumstances by the judge and thus forms part of the discretion exercise. CPR 26.8(2), on the other hand, does not speak to promptitude but addresses the question of non-compliance with a rule, direction

or order given, and calls for an investigation so as to determine whether the failure to comply, as distinct from the delay in making application for relief, was intentional, and whether there is a good explanation for the failure to comply, as distinct from a good explanation for the delay in making the application, and to assess whether the defaulter is generally in compliance with other rules, directions and orders.

In relation to the complaint as to lack of promptitude in making the application, the question is whether lack of promptitude in making the application precludes the court from exercising its discretion. In the case of *Irma Paulette Robert v Cyrus Faulkner et al* (Saint Lucia High Court Civil Appeal SLUHCVP2007/0029 (delivered 25th October 2007, unreported)), Edwards JA opined at paragraph 34 of her judgment that CPR 26.8(1)(a) establishes no criterion for granting an application for relief from sanctions, unlike rule 2.9(1)(b) of the English CPR. CPR 26.8(1) does not create a sanction for failing to make an application for relief from sanctions promptly. Any such sanction would have to be created by a court order or other rule. CPR 26.8(1) does not preclude the court from hearing an application for relief from sanctions that has not been made promptly. To the same effect is the case of *Robin Mark Darby v LIAT (1974) Limited* (Antigua and Barbuda High Court Civil Appeal HCVAP2012/0002 (delivered 5th June 2012, unreported)).

The Court made reference to the Trinidad and Tobago case of *The Attorney General of Trinidad and Tobago v Miguel Regis* (Civ. App. No. 79 of 2011, delivered 13th June 2011) in which Gregory Smith JA said, at paragraph 46, in relation to CPR 26.7 of the Trinidad & Tobago rules which correspond to CPR 26.8 of our rules, that:

“Nothing is further from the truth than to assert that Part 26.7 somehow removes judicial discretion. Such a suggestion is rather disingenuous. In fact ... at every level of consideration in Part 26.7 there is the necessity for the exercise of judicial evaluation, analysis and discretion. The fact of a threshold does not remove judicial discretion or force judges to

‘mechanistically apply rules to shut litigants out’. All that a threshold does is to structure the weighing and balancing of values and consequently the exercise of judicial discretion. This structuring (weighing and balancing) of values is a normative act designed to assign to values their appropriate place at this time in the scheme of Part 26.7. It is purposeful. It does not negate the exercise of judicial discretion, though it does regulate it.”

The Court opined that this was a correct statement of principle in relation to CPR 26.8 and approved the dictum of by Edwards JA in the case of *Irma Paulette Robert*. Accordingly, the Court concluded that CPR 26.8(1)(a) which provides for promptitude does not preclude the exercise of the court’s discretion. It is merely a factor to be weighed in terms of sifting and balancing the values.

The Court held that applying those principles to the case at bar, even if it were to conclude that the application was not made promptly, this factor without more, would not have precluded the learned trial judge from seeking to exercise her discretion in accordance with CPR 26.8(2). In relation to CPR 26.8(2), the learned trial judge would have had to consider not necessarily the promptness of the application, but in seeking to give effect to the overriding objective, whether the failure to file the witness statements by the date stipulated in the case management order was intentional. She had material before her from which she could have concluded and did conclude that the failure was not intentional.

The next consideration as it related to this appeal, was whether or not there was a good explanation for the failure to file by the directed date. Again the learned trial judge had ample material before her by which she could reasonably conclude, which she did, that the explanation was a good one. She had evidence on affidavit that counsel for the respondent was ill when filing ought to have taken place; that when counsel returned to office after illness, she had instructed her legal clerk to file the witness statements albeit out of time by then; that the clerk, it

appears, rather than filing them in the court office, filed them in the client's file; that she only became aware that the witness statements had not been filed when she was preparing the pre-trial memorandum some 7 months later when counsel for the appellant drew her attention to it; that she immediately searched for the witness statements and found them appended to the client's file; that she relayed this to the appellant's counsel, and sought their consent to their late filing; that the appellant did not agree to this course, whereupon she immediately filed the application for relief from sanctions.

The third consideration (whether there was general compliance with other rules, directions and orders) was never in issue in the matter, and was not in issue on the appeal, and accordingly there was no need to address it.

The Court held that there was no reason to find that the explanation given and accepted by the learned trial judge was not a good explanation and thus, there was no basis warranting the disturbance of the exercise of the judge's discretion. The applicant, following the principle in the case of *Dufour and Others v Helenair Corporation Ltd and Others* (1996) 52 WIR 188, was unable to show that the learned trial judge exceeded the generous ambit of her discretion within which reasonable disagreement is possible.

Case Name:

**Yone Camchon
v
Dale Harris**

[SLUHCVP2013/0017]

Date:

Tuesday, 17th December 2013

Coram:

**The Hon. Dame Janice M. Pereira, Chief Justice
The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]**

Appearances:

Applicant: Mr. Gerard Williams

Respondent: Ms. Wauneen Louis-Harris

Issues:

Whether order of single judge of Court of Appeal refusing leave to appeal should be set aside –
Whether leave to appeal should be granted

Result / Order:

[Oral delivery]

1. The order of a single judge of the Court of Appeal of 24th September 2014 refusing leave to appeal is set aside;
2. The application for leave to appeal is stood down by consent for the parties to attempt to arrive at an order by consent.

Reason:

The order of 24th September 2014 was in error as the learned judge had been misdirected by an error in the statement of the date of the order being appealed. The parties requested time to discuss the application for leave to appeal.

Case Name:

Lenzie Polmis alias Ponney

v

The Queen

[SLUHCRA2011/0002]

Date:

Tuesday, 17th December 2013

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. Daarsrean Greene

Respondent: Ms. Tina Mensah, with her, Ms. Tamara Foster-

Calderon

Issues: Appeal against sentence – Grievous bodily harm – Custodial sentence imposed in addition to compensation order – Appellant has no means to comply with compensation order before deadline because imprisoned and hence bound to default – Penalty for defaulting on compensation order is further imprisonment – Whether excessive in the circumstances – Appellant had no previous convictions for that kind of offence – Whether current custodial sentence ought to be reduced

Result / Order: The matter is stood down.

Reason: The appellant had not arrived from the prison as yet. His counsel informed the Court that he (the appellant) had already been sent for.

Case Name: Coecilia St. Romaine
v
The Attorney General
[SLUHCVAP2012/0019]

Date: Tuesday, 17th December 2013

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. Martinus Francois
Respondent: Mr. Raulston Glasgow, with him, Ms. Cagina Foster-Lubrin

Issues: Case management – Constitutional redress pursuant

to s. 16(1) of the Saint Lucia Constitution Order 1978 – Permanent stay of High Court criminal proceedings involving virtual appellant (the appellant's son) sought in court below – Whether virtual appellant's right to be afforded fair trial within reasonable time breached – Whether ss. 3(5), 5, 8(1), 8(2)(a), 8(10) and 8(11)(a) and (b) of the Saint Lucia Constitution Order 1978 contravened – Whether learned judge erred in denying appellant's prayer in court below for permanent stay of proceedings and/or that charge against virtual appellant be dismissed

Result / Order:

[Oral delivery]

- 1. The appellant shall file and serve the record of appeal properly paginated and indexed in respect of this appeal on or before Friday, 27th December 2013, failing which the appeal herein shall stand dismissed.**
- 2. The appellant, having filed submissions in this appeal on 25th July 2013, dealing with one ground of appeal is to serve notice on the respondent on or before 27th December 2013, stating whether or not his additional grounds of appeal are abandoned.**

Reason:

Counsel for the appellant had not been present at the case management hearing for this sitting of the Court. No record of appeal had been filed as yet by the appellant, notwithstanding that he had been notified of the availability of the transcript of proceedings over a year ago.

Case Name:

[1] Alexis Alcide as Heir to the Estate of Gerald Alcide aka Gerald Alcide Jn Marie aka George Alcide

[2] Alexis Alcide as Administrator of the Estate of Emilienne Alcide (nee Gilbert)

v

[1] Josephine Lansiquot as Executrix of the

**Estate of Joseph Alcide c/o Monica Alcide of
Bagatelle, Castries**

**[2] John Cherubin as Administrator of the
Estate of Veronica Alcide of Monchy**

[3] Monica Alcide of Bagatelle, Castries

[SLUHCVAP2012/0007]

Date: Tuesday, 17th December 2013

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:

Appellants:	Mr. Alexis Alcide in person
Respondents:	Mr. Vern Gill

Issues: Property dispute – Subdivision of land

Result / Order: [Oral delivery]

1. The appeal herein is dismissed.
2. Parcel 781 Block 1453B in the Registration Quarter Dauphin (being formerly part of parcel 104) is hereby vested in the name of Alice Duchen.
3. Parcel 783, Block 1453B in the Registration Quarter Dauphin (being formerly part of parcel 104) is hereby vested in the name of Marie Sonson.
4. The Land Register in respect of Parcel 784 registered in the names of John Cherubin (as administrator of the estate of Veronique Alcide), Josephine Lansiquot (as executrix of the estate of Joseph Alcide) and Alexis Alcide (as administrator of estate of Emilienne Alcide), be further corrected by adding to the proprietorship section of the Land Register, a notation of Alexis Alcide as administrator of the Estate of Emilienne Alcide's 5/27th share therein.
5. The costs of the appeal shall be in the sum of \$800.00 to be paid by the appellant.

Reason: The Court found that the substantive issues in this matter had already been properly determined and there was nothing really left for the Court of Appeal to adjudicate on save to clarify the orders in this matter.

Case Name: Yone Camchon
v
Dale Harris

[SLUHCVP2013/0017]

Date: Tuesday, 17th December 2013

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. Gerard Williams
Respondent: Ms. Wauneen Louis-Harris

Issues: Whether order of single judge of Court of Appeal refusing leave to appeal should be set aside –
Whether leave to appeal should be granted

Result / Order: [Oral delivery]
BY CONSENT:
1. The appellant hereby withdraws his request for entry of judgment in default.
2. The parties agree to a mediation, and to the appointment of Mr. Francis Compton as mediator and Mr. Oswald Wilkinson Larcher as the alternate.
3. The mediation hearing is to take place within 45 days of the date of this order.
4. The parties shall report to the court below on the result of the mediation within 60 days of the date of this order.
5. Costs of the application and appeal is agreed in

the sum of \$750.00.

Case Name:

Lenzie Polmis alias Ponney

v

The Queen

[SLUHCRA2011/0002]

Date:

Tuesday, 17th December 2013

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. Daarsrean Greene

Respondent:

Ms. Tina Mensah, with her, Ms. Tamara Foster-Calderon

Issues:

Appeal against sentence – Grievous bodily harm – Custodial sentence imposed in addition to compensation order – Appellant has no means to comply with compensation order before deadline because imprisoned and hence bound to default – Penalty for defaulting on compensation order is further imprisonment – Whether excessive in the circumstances – Appellant had no previous convictions for that kind of offence – Whether current custodial sentence ought to be reduced

**Result / Order
& Reason:**

[Oral delivery]

- 1. The appeal on sentence is allowed in part.**
- 2. We see no reason to disturb the sentence of 5 years imposed by the learned trial judge, having regard to the circumstances and where the mitigating and aggravating factors balance out each other. However, the period of time spent on remand must be credited to the 5 year term.**
- 3. The order for compensation to the virtual**

complainant is varied: "The appellant shall pay the sum of \$8,000.00 by way of compensation to the virtual complainant, the said sum to be paid within five years from the date of sentence, i.e. that the payment is to be made by 29th July 2016. In default of payment of the said sum the appellant shall be imprisoned for a period of one year."

Case Name: **The Attorney General of Saint Lucia**
v
Kaim Sexius

[SLUHCVAP2012/0034]

Date: **Tuesday, 17th December 2013**

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. Deale Lee**

Respondents: **Mr. Andie George, with him, Mr. Ermin Moise**

Issues: **Summary appeal – Whether sections 909 and 912 of the Criminal Code 2004 and rule 11.1(3)(c) of the Criminal Procedure Rules 2008 are incompatible with ss. 8(1) of the Saint Lucia Constitution Order 1978 – Right to a fair trial – Right to silence – Adverse inferences to be drawn from defendant choosing to remain silent – Whether distinction ought to be made between pre-trial silence and silence at trial – Whether respondent ought not to be mandated to file a defence before trial in keeping with constitutional right to silence – Right to protection from self-incrimination**

Result / Order: **The judgment is reserved. The parties will be notified of the time of delivery of the judgment.**

Case Name:

**Conrad Charles
v
The Attorney General**

[SLUHCVAP2012/0009]

Date:

Wednesday, 18th December 2013

Coram:

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

Appearances:

Appellant:

Ms. Cynthia Hinkson-Ouhla

Respondent:

**Ms. Brender Portland-Reynolds, with her, Ms. Jan
Drysdale**

Issues:

**Ownership of property – Entitlement to property –
Crown lands – Heirs claiming ownership of property
held by Crown**

Result / Order:

**[Oral delivery]
The hearing of the appeal is traversed to the next
sitting of the Court of Appeal in Saint Lucia during the
week commencing 7th April 2014.**

Reason:

**Counsel for the applicant, Ms. Cynthia Hinkson-Ouhla
requested an adjournment. The respondent had no
objection to the adjournment being granted.**

Case Name:

**Lazarus Paul
v**

**[1] Raquel Willie-Trotman
[2] Douglas Trotman
[3] Teferi Trotman minor acting herein and
represented by his mother Raquel Willie-
Trotman**

[SLUHCVAP2013/0028]

Date: Wednesday, 18th December 2013

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

Appearances:

Applicant: Mr. Gerard Williams

Respondent: Ms. Wauneen Louis-Harris, with her, Ms. Petra Nelson
(the 1st named respondent, Raquel Willie-Trotman
was also present)

Issues: Stay of execution of committal proceedings – Proof
that applicant satisfies legal test for grant of stay not
contained in affidavit – Whether evidential burden
satisfied for grant of stay – Insurance claim arising
from road traffic accident – Principles of subrogation

Result / Order: [Oral delivery]
1. The application for stay of execution is refused.
2. Costs are awarded to the respondent in the sum of
of \$1000.00 to be paid by the applicant.

Reason: The legal test for the grant of a stay of execution of a
judgment below is whether the applicant will suffer
irreparable or irremediable harm if the stay is not
granted or whether the appeal, if successful, will be
rendered nugatory if the stay is not granted. This test
must be satisfied by the applicant evidentially, and
bald assertions contained in an affidavit will not be
sufficient to persuade the Court that the stay ought to
be granted.

The Court held that the applicant in this matter did not meet the threshold requirements for the grant of a stay. He had not demonstrated that the proposed appeal would be rendered nugatory if a stay was not granted. The applicant's affidavit of 10th December 2013 in support of the stay contained, in particular, at paragraph 8, the bald assertion as to the financial position of the applicant without giving any details of this financial position. The Court held that the balance of justice did not justify the grant of a stay.

Case Name:

**Michelle Mingo
v
PC 463 Ronald St. Rose
[SLUMCRAP2013/0005]**

Date:

Wednesday, 18th December 2013

Coram:

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

Appearances:

**Appellant: Mr. Shawn Innocent
Respondent: Mr. Stephen Brette**

Issues:

Criminal appeal against sentence – Attempt to export controlled drug – Consecutive sentences imposed by learned magistrate

**Result / Order
& Reason:**

**[Oral delivery]
1. The appeal against sentence is allowed.
2. The magistrate erred in principle in imposing a custodial sentence on the appellant who had already been fined for the charge of possession. In the particular circumstances, the imposition of a 3 month term of imprisonment is set aside and the appellant is discharged on this count.**

Case Name:

**Terry Charles
v
The Police (PC 56 Prospere)**

[SLUMCRAP2011/0019]

Date:

Wednesday, 18th December 2013

Coram:

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

Appearances:

Appellant: Mr. Colin Foster

Respondent: Ms. Tina Mensah

Issues:

**Possession of unlicensed firearm – Oral application
for adjournment**

Result / Order:

[Oral delivery]

- 1. The appellant is to file and serve skeleton arguments in response to the respondent's submissions if necessary, within 30 days, on or before the 17th day of January 2014.**
- 2. The hearing of the appeal is adjourned to the next sitting of the Court of Appeal in St. Lucia during the week of 7th April 2014.**

Reason:

The adjournment was granted to allow the counsel for the appellant time to respond to the skeleton arguments of the respondent.

Case Name:

Richard Frederick

v

PC 564 Isidore

[SLUMCRAP2013/0002]

Date:

Wednesday, 18th December 2013

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. Horace Fraser

Respondent:

Mr. Leon France, with him, Mr. Stephen Brette

Issues:

**Appeal against conviction and sentence – Driving
without due care and attention – Road traffic accident
– Bias – Lurking doubt**

Result / Order:

[Oral delivery]

- 1. The appeal against conviction is allowed.**
- 2. The conviction is quashed and the sentence is set
aside.**

Reason:

**Though on the facts found by the magistrate it was
open to him to find the appellant guilty, the Court had
a lurking doubt about the safety of the conviction.**

Case Name:

[1] Neville Cenac

[2] Julita Cenac

[3] John Smith

[4] Linda Smith

v

Robert Schaefer

[SLUHCVAP2012/0036]

Date: Wednesday, 18th December 2013

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

Appearances:

Appellants: Mr. Dexter Theodore, with him, Mr. Leslie Prospere and Mr. Seryozha Cenac

Respondent: Mr. Peter I. Foster, QC, with him, Ms. Renee St. Rose

Issues: Ownership of property – Challenge to findings of fact made by learned trial judge – Whether learned judge correct in concluding that 3rd and 4th respondents held property on trust for respondent and that there was a breach of trust – Whether learned trial judge correct in finding that 1st and 2nd appellants procured breach of trust – Whether learned trial judge correct in finding that 1st and 2nd appellants not bona fide purchasers for value without notice – Whether learned trial judge correct in his finding of law that Aliens (Licensing) Act (Cap. 15:37) did not displace respondents' equitable interest and rights in and to the property – Whether learned trial judge wrong to order specific performance of contract when damages would be adequate remedy

Result / Order: [Oral delivery]
1. The appeal is dismissed, and the decision of the learned trial judge is affirmed.
2. Costs of the appeal are awarded to the respondents in the amount of two thirds of the amount awarded in the court below pursuant to Part 65 of the Civil Procedure Rules 2000.

Reason: In relation to the issues which challenged the findings of fact made by the learned trial judge, the Court, after having reviewed the relevant oral and documentary evidence before the judge and the submissions of both learned counsel, took the view that it had no basis to overturn the trial judge's

findings of fact and findings of law in relation to those matters. The learned judge had the benefit of seeing the witnesses, assessing their demeanour and reviewing the documentary evidence, and an appellate court should be very reluctant to overturn a trial judge's findings of fact unless it is apparent that he was blatantly wrong (see *Golfview Development Limited v St. Kitts Development Corporation* (Saint Christopher and Nevis High Court Civil Appeal SKNHCVAP2004/0017 (delivered 20th June 2007, unreported)) and *Jada Construction Caribbean Limited v The Landing Limited* (Saint Lucia High Court Civil Appeal SLUHCVP2009/0011 (dated 8th March 2011, unreported))). In relation to the judge's conclusions of law, the Court was of the view that the he neither misapprehended the applicable legal principles nor did he apply them incorrectly. Accordingly, the Court had no basis to interfere with them in that regard.

Further, the learned judge was correct in finding that any infringement of the Aliens (Licensing) Act (Cap. 15:37, Revised Laws of Saint Lucia 2008) did not displace the respondent's equitable interest and right in and to the property (see *Spiricor of St Lucia Ltd v Attorney-General of St Lucia and Another* (1997) 55 WIR 123 read together with principles enunciated in *Edwin M. Hughes v La Baia Limited* (Anguilla High Court Civil Appeal AXAHCVAP2006/0008 (delivered 11th January 2010, unreported))).

In relation to the appellants' complaint that the learned trial judge was wrong to order specific performance of the contract when damages would have been an adequate remedy (in response to which the respondent argued that the trial judge was correct in granting specific performance), that was a matter for the exercise of the trial judge's discretion, which the Court held it had no basis for interfering with (see *Lehrer v Gordon* (1964) 7 WIR 247. An appellate court will be loath to interfere with a trial judge's exercise of discretion, save in exceptional circumstances. In such circumstances, the general principles to be applied are: (i) whether the trial judge erred in principle, either by failing to take into account, or giving too little or too much weight, to relevant

factors, or by being influenced by irrelevant factors and considerations; and (ii) whether as a result of that error, the judge's decision exceeded the generous ambit within which reasonable disagreement is possible, and may therefore be blatantly wrong (see *Dufour and Others v Helenair Corporation Ltd and Others* (1996) 52 WIR 188). The Court reviewed the manner in which the learned trial judge had exercised his discretion insofar as he awarded specific performance of the contract, and, applying the principles enunciated in *Dufour*, held that it had no basis on which it could properly interfere with his exercise of discretion. The Court held that the principles that apply here were set out by Byron CJ in the case of *Spiricor of St Lucia Ltd* and may be summarised as follows: Even breach of a licence or failure to obtain an Aliens Landholding Licence does not debar an alien from holding the land, subject to government's right to forfeit it. Further, the existence or non-existence of a licence is quite irrelevant to the alien's title or interest in the property.

JUDGMENTS

Case Name:

Derek Cort

v

The Queen

[BVIHCRA2010/0004]

Date:

Thursday, 19th December 2013

Coram:

**The Hon. Dame Janice M. Pereira, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal**

Appearances:

Appellant:

Mr. Duane Jean Baptiste holding papers for Mr. Patrick Thompson

Respondent: Ms. Tina Mensah holding papers for Ms. Tiffany Scatliffe

Issues: Criminal appeal – Rape – Evidence of appellant’s good character raised only at sentencing stage of trial – Whether trial judge erred in failing to give jury good character direction – Whether trial judge erred in referring to previous witness statement – Whether trial judge misdirected jury on how to deal with recent complaint evidence – Whether trial judge erred in permitting Crown to adduce evidence relating to offence not included on indictment

Result and Reason: Held: dismissing the appeal and affirming the appellant’s conviction, that:

1. Even if the jury had been given a direction on the appellant’s good character by the learned trial judge (in relation to propensity only since he gave no evidence at trial), this would have made no difference to the outcome of the verdict.

Bally Sheng Balston v The State [2005] UKPC 2 followed; Nigel Brown v The State [2012] UKPC 2 cited; France and Vassell v The Queen [2012] UKPC 28 cited.

2. The learned judge’s comments on the evidence of recent complaint of Pastor Ricketts and her referral to his previous witness statements did not undermine the fairness of the trial and were not prejudicial in such a manner that would necessitate that the conviction be quashed.
3. In the present case, the appellant was charged with the more serious offence of rape rather than with both the offences of rape and buggery. Evidence of both however, was brought in an effort to give a full account of what transpired. The fact that the prosecution chose to charge the appellant with only the more serious offence of rape does not make

the part of the story relating to the actions which amounted in law to the commission of buggery so prejudicial as to require expunging it from the evidence. Moreover, given the circumstances of this case, the excision of the evidence showing the commission of the offence of buggery would not have made any difference to the verdict reached by the jury.

APPLICATIONS AND APPEALS

Case Name:

**William Clerfond
v
Foshlan Incorporated**

[SLUHCVAP2013/0027]

Date:

Thursday, 19th December 2013

Coram:

**The Hon. Dame Janice M. Pereira, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal**

Appearances:

Applicant:

Mr. Horace Fraser

Respondent:

Ms. Petra Nelson, with her, Ms. Esther Greene-Ernest

Issues:

Application for extension of time to file notice of appeal – Learned master struck out claim but not defence – Rule 26.2 of the Civil Procedure Rules 2000 (Court's power to make orders of its own initiative) – Whether breached – Whether matter raised issues which ought to be properly argued at trial

**Result / Order
& Reason:**

[Oral delivery]

1. The application for extension of time to appeal is treated as the appeal and the Court being satisfied

that the learned master's decision was made without prior regard to CPR 26.2 and based on the triable issues raised on the claim and the defence, the appeal is allowed.

2. The matter is remitted to the court below to be proceeded with in accordance with the rules of court.
3. The appellant shall have the costs of the appeal fixed in the sum of \$1,000.00.

Case Name:

Rhona Cox aka Lorna Mary Cox

V

[1] Cecile Beryl Ryan-Cox

[2] Theobald Cox

[SLUHCVAP2013/0003]

Date:

Thursday, 19th December 2013

Coram:

The Hon. Dame Janice M. Pereira, Chief Justice

The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mr. Don Mitchell, Justice of Appeal

Appearances:

Appellant:

**Mr. Leslie Prospere, with him, Mr. Jahn Sifflet
(The sons of the appellant, Mr. Christopher Cox, Mr. Owen Cox and Mr. Norbert Cox, were also present)**

Respondents:

**Mr. Winston Hinkson
(All respondents present)**

Issues:

**Probate – Article 1344 of the Civil Code of 1879 –
Dower – Expressly excluded by marriage covenant –
Whether this precluded testator from disposing of
estate in manner similar to which it would have been
disposed of had dower not been excluded**

Result / Order:

[Oral delivery]

- 1. The appeal is allowed.**

2. The orders at paragraph 30 of the judgment of Wilkinson J delivered 4th February 2013 are set aside.
3. The respondent shall bear the prescribed costs of this appeal based on a value of \$50,000.00 pursuant to CPR 65.5(2)(b) and thus fixed at 2/3 of such an award in accordance with CPR 65.13(1).

Reason:

This appeal concerned the single issue as to whether the learned trial judge was right in holding that when the deceased Richardson Cox and his future wife Rhona Cox excluded dower under a marriage contract governed as accepted by the provisions of the 1879 Civil Code of Saint Lucia that he had thereby precluded his freedom to make a will disposing of his property in favour of his wife and her children. The Civil Code of 1879 makes it clear at article 1344 that it is lawful to stipulate in such a marriage contract that there shall be no dower and such a stipulation binds children as well as mother. This is precisely what the deceased did in clause 4 of the marriage contract. Accordingly, the deceased, by expressly excluding dower, contracted out of legal dower which would have applied by operation of law pursuant to article 1430 of the 1879 Civil Code, in the absence of this express exclusion. This left the deceased with complete freedom to dispose of his property by will as he saw fit, which is what he did.

The learned trial judge accordingly erred in holding as she did at paragraph 25 of her judgment that, in summary, the marriage contract would be the law governing disposal of the property, and the net effect of clause 4 was that neither the defendant nor her children by Richardson Cox could benefit under his will, and he could not devise Champaign estate to her and her children, and that the gift to them was void. That was a wrong conclusion.

Case Name:

**[1] Planviron (Caribbean Practice) Limited
[2] Rodney Bay Marina Limited**

V
Ferdinand James

[SLUHCVAP2013/0005]

Date: Thursday, 19th December 2013

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

Appearances:

Appellants: Mr. Geoffrey DuBoulay, with him, Ms. Sardia Cenac-Prospere
Mr. Simon Bryan, representing both appellants, was also present

Respondent: Ms. Petra Nelson, with her Ms. Esther Greene-Ernest

Issues: Property – Prescriptive title – Whether rules 8 and 9 of the Supreme Court Prescription by 30 Years (Declaration of Title) Rules (SI 7/1970 – Chap. 2.01) breached – Whether learned judge erred in issuing declaration of title to respondent – Objection taken by appellants to title obtained by respondent by prescription – Application made by appellants rather than petition in opposing order granting respondent title – Procedural breach of article 381 of the Code of Civil Procedure, Cap. 243, Revised Laws of Saint Lucia 1957 – Whether learned judge erred in dismissing appellant’s notice of application on that basis – Whether mere fact that appellants utilised wrong procedure in challenging order made in their absence and without due notice and in breach of principles of natural justice ought to shut them out

Result / Order: The decision is reserved until 5:00 p.m.

Case Name: [1] Planviron (Caribbean Practice) Limited

[2] Rodney Bay Marina Limited

v

Ferdinand James

[SLUHCVAP2013/0005]

Date: Thursday, 19th December 2013

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

Appearances:

Appellants: Mr. Geoffrey DuBoulay, with him, Ms. Sardia Cenac-Prospere

Respondent: Ms. Antonia Auguste holding papers for Ms. Petra Nelson

Issues: Property – Prescriptive title – Whether rules 8 and 9 of the Supreme Court Prescription by 30 Years (Declaration of Title) Rules (SI 7/1970 – Chap. 2.01) breached – Whether learned judge erred in issuing declaration of title to respondent – Objection taken by appellants to title obtained by respondent by prescription – Application made by appellants rather than petition in opposing order granting respondent title – Procedural breach of article 381 of the Code of Civil Procedure, Cap. 243, Revised Laws of Saint Lucia 1957 – Whether learned judge erred in dismissing appellant’s notice of application on that basis – Whether mere fact that appellants utilised wrong procedure in challenging order made in their absence and without due notice and in breach of principles of natural justice ought to shut them out

Result / Order: [Oral delivery]

1. The appeal is allowed.
2. The order of the trial judge is set aside and it is directed that the application be treated as a petition and determined on its merits, the said petition to be dealt with by a different judge.
3. The costs in the court below and on this appeal shall be the appellants’, to be assessed, with the

costs in the appeal to be two thirds of the amount assessed below.

Reason:

The appellants, who were occupiers of land adjoining the property which the respondent obtained title to by prescription, were never served with any copy of a summons (the purpose of which would be to indicate that any person claiming an interest in the property which was the subject of this appeal, should enter an appearance within 2 months from the last publication of the summons in the Gazette). When the declaration of title was issued in the respondent's favour, the appellants were not made a party to the petition. They learned informally of the declaration of title only after it had been granted and then applied to the court by way of application under the inherent jurisdiction of the court to set aside the orders made by the judge, on the basis that they had not been duly notified in accordance with the provisions of the Code of Civil Procedure, Cap. 243, Revised Laws of Saint Lucia 1957, specifically, Rules 8 and 9 of the Supreme Court – Prescription by 30 Years (Declaration of Title) Rules (Chap. 2.01, Revised Laws of Saint Lucia 2008) ("the Prescription Rules"). They complained that they were not given an opportunity to be heard on the question whether or not the respondent had made out a title by prescription. They contended that because the rules had not been complied with, the judgment or order granting the respondent title was irregular and improper. The learned trial judge ruled, in respect of the appellants' application to set the order aside, that the appellant had used the wrong procedure for moving the Court, in coming by way of application under the inherent jurisdiction, instead of by way of a petition under the Code of Civil Procedure, articles 381 and 382, and he dismissed their application with costs. He held that the appellants could not rely on the inherent jurisdiction of the court as article 381 applied.

Articles 381 and 382 conjointly set out a procedure for moving the Court to challenge a judgment where a party's interest has been affected by the judgment, in a situation where the party's representative was not made a party to the original petition. This procedure

involves the filing of a petition within a year and a day after the judgment, and sets out no further procedure after that. It says that the proceedings, once the petition is filed, proceeds in essence as if it was an ordinary suit. In the appellants' application they sought an order setting aside the order made by the judge on 31st January 2011 in which he made the declaration and in which he ordered rectification of the Land Register.

The Court noted that it was a bit disturbing that the decision of the learned judge, dated 13th February 2013 was delivered some 19 months after the hearing on 5th July 2011. If the appellants could only address the injustice of the earlier breach of natural justice done to them by bringing a petition, according to article 382, within a year and a day after the judgment, which would have been the judgment declaring title of 31st January 2011, then the delay in the delivery of the judgment by over 19 months would have deprived the appellants of the possibility of filing the required petition in opposition. So, that fundamental breach of the principles of natural justice could never be redressed – the appellants would forever be shut out.

The learned judge did not deal with the substance of the appellants' complaint, but rather dismissed the application on the basis that they had utilised the wrong procedure. They ought to have come by way of petition under article 381, rather than by application under the Civil Procedure Rules 2000, seeking to set aside the order under the court's inherent jurisdiction. The learned judge did not therefore, evaluate in any manner whatsoever, the complaints of the procedural non-compliance alleged by the appellants.

The Court opined that the question was whether or not such an action, with consequences which amount basically to a taking away of the appellants' property without any notification, and therefore, an opportunity to be heard, can be met by the fact that the appellant failed to follow the right procedure without more. The learned trial judge was required not to issue a declaration of title until he was satisfied with proof of

service on the appellants of the summons, and there was nothing before the Court to indicate that he had any such evidence before him. This raises the real question whether the judge could have exercised the power given to him under article 2103A of the Civil Code to declare title. The Court was satisfied that he could not.

Furthermore, as a matter of procedure, it would be going far, and, in the view of the Court, was not intended by the Prescription Rules (which sought to ensure that the principles of natural justice, best encapsulated by the maxim “audi alterem partem”, are adhered to) to adversely affect the rights of a proprietor and a neighbouring landowner, particularly a right to property, without giving him a chance to be heard, and to say that because they had come by the wrong procedure, that they could not be heard. Section 24 of the Interpretation Act (Chap. 1:06, Revised Laws of Saint Lucia 2008), rule 26.9 of the Civil Procedure Rules 2000 and article 34 of the Code of Civil Procedure, all provide a discretion to permit a court or judge to allow any amendment of any writ, declaration, pleading or other document at any time and on such terms as justice requires, for the curing of a defect or form.

In the case of *Cropper v Smith* (1884) 26 Ch D. 700, Bowen LJ said (at p. 710) that it is a well-established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their case by deciding otherwise than in accordance with their rights. He went on to say that he knew of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for discipline, but for the sake of deciding matters in controversy, and granting the necessary amendment is not a matter of favour or grace. The same principle is encapsulated in the case of *Intrust Trustees (Nevis) Limited et al v Naomi Darren* (Saint Christopher and Nevis High Court Civil Appeal SKNHCVAP2009/001A (delivered 9th June 2009, unreported)) and the Privy Council decision of *Texan Management Limited v Pacific Electric Wire & Cable*

Company Limited [2009] UKPC 46, which both make it clear that rules of procedure ought to be the servant rather than the master in determining a party's rights, unless there is good reason to do otherwise.

In the Court of Appeal case of *Tombstone Limited v Raja and Another* [2008] EWCA Civ 1444, where it was accepted that the application ought to have been made under rule 23.10 but was not, at paragraph 84, the Court held that since the introduction of the Civil Procedure Rules the position was that applications for the setting aside of orders made without notice were governed by rule 23.10. The Court stated further that such applications are determined by the Court exercising its discretion given by that rule in accordance with the overriding objective. Where the order is one which affects the rights of a party in an important respect (and a judgment is the most obvious example) it will only be in exceptional circumstances that the discretion will not be exercised to set aside the order. This principle is no more than the recognition and enforcement of the need to ensure adherence to basic principles of natural justice. And, at paragraph 85 of the judgment, the Court also said that if, contrary to the view they had expressed above, the application to set aside fell outside the scope of the Civil Procedure Rules, and had to be dealt with under the inherent jurisdiction of the court, they would have held that the jurisdiction should be exercised conformably with the CPR.

For all the above reasons, the Court held that the learned trial judge was wrong to dismiss the appellants' application opposing the issuance of prescriptive title to the respondent.