

COURT OF APPEAL SITTING
TERRITORY OF THE VIRGIN ISLANDS
1st – 5th October 2012

JUDGMENTS

Case Name: National Insurance Board
v
[1] Ann Marie Duncan-Mason
[2] Peter Mason

**[High Court Civil Appeal No. 2 of 2009]
(Grenada)**

Date: Monday, 1st October, 2012

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

Appearances:

Appellant: Mr. Andrew Willins holding papers for Mr. Gregory Delzin

Respondent: Mr. Robert Nader holding papers for Ms. Celia Edwards, QC

Issues: Contract under seal – Mortgage deed in respect of land securing the principal sum of \$100,000.00 – Letter to mortgagor from mortgagee agreeing to sale of property for \$35,000.00 to be paid towards loan – Whether letter amounted to agreement – Whether letter varied terms of mortgage deed – Damages for breach of contract

Result and Reason: Held: Allowing the appeal and making no order as to costs, that:

1. The learned trial judge erred in concluding that the letter of 6th May 2005 amounted to a binding

contract and one which varied the covenants in the mortgage deed, as it lacked an essential ingredient, namely consideration.

2. The learned trial judge overlooked the nature and legal effect of the mortgage deed by which the legal estate in the property was held by the appellant and not by the respondents who held only the equitable right of redemption which could only be exercised pursuant the terms of the mortgage deed. Accordingly, the respondents could only be acting as the appellant's agents in respect of the proposed sale of the mortgaged property and thus there was no agreement as between the appellant and the respondents which may be said to have been breached by the appellant.
3. The letter, not being an instrument under seal and lacking consideration, did not attract equitable considerations which would permit it to override the covenants contained in the mortgage deed.

Berry v Berry [1929] 2 KB 316 applied.

APPLICATIONS AND APPEALS

Case Name:

Winston Molyneaux

v

[1] Hugh Smith

[2] Leroy Smith

[3] John Smith

[High Court Civil Appeal No. 22 of 2009]

Date:

Monday, 1st October 2012

Coram:

The Hon. Mde. Janice M. Pereira, Chief Justice

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

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Intended Appellants / Applicants: Mr. Andrew Willins, with him, Ms. Asha Johnson (for Hugh Smith, Leroy Smith and John Smith)

Respondent: Ms. Anthea Smith (for Winston Molyneaux)

Issues: Conditional leave to appeal to Her Majesty in Council

Result / Order: [Oral delivery]

By consent:

1. Leave to Appeal to Her Majesty in Council is hereby granted upon condition that:

(i) the Applicants within 90 days of the date hereof do enter into good and sufficient security in the sum of five hundred pounds sterling for the due prosecution of the appeal, such security to consist of a deposit of the said amount at the Court Office;

(ii) within 90 days of the date hereof, the applicants do take the necessary steps for the purposes of procuring the preparation of the records, the settling of such records with the Solicitors for the Respondent to this application, and the certification of the record by the Registrar of the Court of Appeal;

(iii) the record shall be prepared in accordance with rules 18 to 20 of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 and its Practice Direction 4.2.1 to 4.3.2 and Practice Direction 5; and shall be transmitted to the registrar of the Judicial Committee of the Privy Council without delay where final permission to appeal has been granted.

2. The Applicants shall make an application to the Court for final permission to appeal to Her Majesty in Council, supported by the certificate of the Registrar that the security for cost ordered herein has been given within the time prescribed by this Order to the satisfaction of the Registrar;

3. The costs of the application for conditional leave to appeal be reserved.

Reason: Leave to appeal is as of right.

Case Name: [1] Light Year Partners LLC
[2] Elliot Friedman
v
Echina Cash Inc.

[High Court Civil Appeal No. 32 of 2010]

Date: Monday, 1st October 2012

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

Appearances:
Intended Appellants / Applicants: Mr. Richard Evans

Respondent: Mr. Robert Nader

Issues: Final leave to appeal to Her Majesty in Council

Result / Order: [Oral delivery]
Referring to the Order of the Court made on 17th January 2012, granting conditional leave to appeal to Her Majesty in Council, and those conditions having been satisfied, final leave to appeal to Her Majesty in Council is hereby granted. The costs in the application shall be costs in the appeal to the Privy Council.

Reason: The application was unopposed. The conditions imposed were fulfilled.

Case Name:

Grand Pacific Holdings Limited

v

Pacific China Holdings Limited

[High Court Civil Appeal No. 39 of 2010]

Date:

Monday, 1st October 2012

Coram:

The Hon. Mde. Janice M. Pereira, Chief Justice

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

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

**Intended Appellant /
Applicant: Mr. Jack Husbands**

Respondent: Mr. Mark Forte and Ms. Tameka Davis

Issues:

Conditional leave to appeal Her Majesty in Council

Result / Order:

[Oral delivery]

- 1. The appellant is granted conditional leave to appeal to Her Most Excellency Majesty in Council in respect of the order made by the Court of Appeal on 14 May 2012 on the question relating to the incidence of the liability for the Joint Liquidators' fees and expenses;**
- 2. There is a stay of execution of the order of the Court of Appeal on 14 May 2012 pending the determination of the appellant's intended appeal to Her majesty in Council;**
- 3. Grand Pacific Holdings Limited shall within 90 days lodge with the Court the US dollar equivalent of GBP500 as security for the prosecution of the appeal to Her Majesty in Council and the payment of all such costs as may be payable by it in the event of it not obtaining an order granting it final leave to appeal or the appeal being dismissed for non-prosecution or the Judicial Committee ordering it to pay the costs of the appeal (as the case may be);**

4. The Record shall be prepared in accordance with Rule 20 of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 and its Practice Direction 5; the same to be transmitted to the Registrar of the Judicial Committee of the Privy Council without delay when final permission to appeal has been granted;
5. Grand Pacific China Holdings Limited shall make an application to the Court for final leave to appeal to Her Majesty in Council, supported by the Certificate of the Registrar that the security for costs for the prosecution of the appeal ordered herein has been given within the time frame prescribed by this order to the satisfaction of the Registrar; and
6. The cost of and occasioned by this application be the costs in the appeal to Her Majesty in Council.

Reason:

Conditional leave was granted pursuant to section 3(2)(a) of The Virgin Islands (Appeals to Privy Council) Order 1967 (S.I. No. 234 of 1967).

Case Name:

**Liao Chen Toh
v
Liao Hwang Hasaing**

[High Court Civil Appeal No. 21 of 2012]

Date:

Monday, 1st October 2012

Coram:

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

Appearances:

**Appellant /
Applicant:**

Mr. Jeremy Child

Respondent:

No appearance

Issues: Interlocutory appeal – Application for stay of execution

Result / Order & Reason: [Oral delivery]
The hearing of the matter is adjourned to Thursday, 4th October 2012 for transcript to be obtained.

Case Name: Ivane Chkhartishvili
v
[1] Inna Gudavadze
[2] Liana Zhmotova
[3] Iya Patarkatsishvili
[4] Natela Patarkatsishvili

[High Court Civil Appeal No. 18 of 2012]

Date: Monday, 1st October 2012

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

Appearances:
Appellant: Mr. Robert Nader
Respondents: Mr. Jeremy Child

Issues: Interlocutory appeal – Refusal of claim for anti-suit injunction

Result / Order: By Consent:
1. Paragraph 5 and 10 of the Order be set aside;
2. Paragraph 9 of the Order be varied so as to remove the words “save for the costs of the application for an anti-suit injunction”;
3. The Respondents do pay the Appellant’s costs in the Court below of the anti-suit injunction application in a sum to be assessed if not agreed,

provided that:

- a. The Appellant's entitlement to costs (once agreed or assessed) under this paragraph shall be reduced by US\$15,200.00;
- b. The Respondents' liability under this paragraph shall not exceed US\$90,250.00;
4. The Respondents do forthwith make an interim payment to the Appellant of US\$46,000.00 on account of their liability under the foregoing paragraph;
5. There be no order as to costs in respect of this appeal.

Reason: The parties consented to the above order.

Case Name: Rudolph Clyne
v
The Queen

[Magisterial Criminal Appeal No. 11 of 2010]

Date: Monday, 1st October 2012

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

Appearances:
Appellant: Mr. Herbert McKenzie
Respondent: Ms. Tiffany Scatliffe

Issues: Appeal against conviction – Criminal trespass –
Appeal filed in 2010 – Notes of evidence not received

Result / Order: [Oral delivery]
1. Court hereby directs that the magistrate produces the to the Registrar of the High Court the transcript of the proceedings including all notes of

evidence in relation to Magisterial Criminal Appeal No. 11 filed on 16th December 2010 no later than 31st October 2012.

2. The appellant shall file skeleton arguments with authorities relied on no later than Friday 23rd November 2012.
3. The Respondent to file and serve skeleton arguments with authorities by Friday, 14th December 2012.
4. The hearing of the appeal shall take place at the next sitting of the Court of Appeal in the territory in January 2013.

Reason:

The magistrate's notes of evidence were necessary for the prosecution of the appeal.

Case Name:

[1] Michael Callwood
[2] Richard Callwood
v
[1] Tyrone Phillips
[2] Lenise Phillips

[Magisterial Civil Appeal No. 2 of 2009]

Date:

Tuesday, 2nd October, 2012

Coram:

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

Appearances:

Appellants: Mr. Lewis Hunte, QC, with him, Ms. Shelly Bend

Respondents: Ms. Tamara Cameron

Issues:

Whether the decision was unreasonable and cannot be supported having regard to the evidence –
Whether the court exceeded its jurisdiction in the case –
Whether the decision is erroneous in point of

law

Result / Order:

[Oral delivery]

- 1. The appeal is allowed.**
- 2. The decision of the magistrate is set aside.**

Reason:

The magistrate acted without jurisdiction by purporting to decide the matter of beneficial interests in the property and seeking to protect the beneficial interest when these matters are solely within the province of the High Court.

On the issue of costs, the Court was of the view that in the circumstances of this case, and in particular taking into account the posture of the appellant in the court below, on the question of jurisdiction, there ought to be no order as to costs.

Case Name:

**Courtney Meade
v
The Queen**

[High Court Criminal Appeal No. 4 of 2012]

Date:

Tuesday, 2nd October 2012

Coram:

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

Appearances:

Appellant:

Mr. Patrick Thompson

Respondent:

Ms. Tiffany Scatliffe

Issues:

**Appeal against sentence – Aggravated burglary –
Whether sentence of 20 years was excessive in the
circumstances**

Result / Order: [Oral delivery]
The appeal is allowed to the extent that the sentence imposed by the learned trial judge is varied from that of 20 years to a sentence of 15 years imprisonment to take effect from the date of the remand of the prisoners, 24th November 2010.

Reason: If the learned trial judge had started with a notional sentence of 15 years, and then done a balancing act between the aggravating factors and the mitigating factors, he would have arrived at an appropriate sentence of 15 years.

Case Name: Ramon George
v
The Queen

[High Court Criminal Appeal No. 5 of 2012]

Date: Tuesday, 2nd October 2012

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

Appearances:
Appellant: Mr. Patrick Thompson
Respondent: Ms. Tiffany Scatliffe

Issues: Appeal against sentence – Aggravated burglary – Possession of firearm – Whether sentence of 20 years was excessive in the circumstances

Result / Order: [Oral delivery]
The appeal is allowed to the extent that the sentence imposed by the learned trial judge is varied from that of 20 years to a sentence of 15 years imprisonment to

take effect from the date of the remand of the prisoners, 24th November 2010.

Reason:

If the learned trial judge had started with a notional sentence of 15 years, and then done a balancing act between the aggravating factors and the mitigating factors, he would have arrived at an appropriate sentence of 15 years.

Case Name:

**Glen Henley (Trading as Cane Garden Bay
Pleasure and Water Sports Equipment)**

v

**Poco Loco Enterprises Incorporated (A
Delaware Corporation)**

[High Court Civil Appeal No. 26 of 2011]

Date:

Tuesday, 2nd October 2012

Coram:

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

Appearances:

Intended Appellant / Applicant: Mr. John Carrington

Respondent: Mr. William Hare

Issues:

Leave to appeal to Her Majesty in Council

Result / Order:

[Oral delivery]

- 1. Conditional leave is granted to the applicants to appeal to Her Majesty in Council.**
- 2. Costs of the application for leave to be costs in the appeal.**
- 3. Proceedings in the High Court are stayed pending determination of the appeal to Her Majesty in**

Council.

- 4. Leave given to the applicant to withdraw the Application to Reverse the Order of the Court of Appeal, with costs to the respondent to be assessed if not agreed.**

Reason: The court was satisfied that the order appealed against was an interlocutory order appeal from which required leave.

Case Name: Calvin Todman (as Exceutor of the Estate of Edward Todman, deceased)
V
Marguerite Hodge

[High Court Civil Appeal No. 2 of 2012]

Date: Tuesday, 2nd October 2012

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

Appearances:
Appellant: Mr. Robert Nader
Respondent: Ms. Tamara Cameron

Issues: Probate – Contested will – No case submission test in a civil case – Claimant to establish his claim on a balance of probabilities – Prima facie case – Whether trial judge ought to have drawn adverse inferences from the respondent’s election to remain silent

Result / Order: Decision to be given on Thursday, 4th October at 2:30 p.m.

Case Name: [1] Sheikh Mohamed Ali M. Alhamrani
[2] Sheikh Siraj Ali M. Alhamrani
[3] Sheikh Khalid Ali M. Alhamrani
[4] Sheikh Abdulaziz Ali M. Alhamrani
[5] Sheikh Ahmed Ali M. Alhamrani
[6] Sheikh Fahad Ali M. Alhamrani
v
Sheikh Abdullah Ali Alhamrani
[High Court Civil Appeal No. 26 of 2012]

Date: Wednesday, 3rd October 2012

Coram: The Hon. Mde. Janice M. Pereira, Chief Justice
The Hon. Mde. Louise Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellants: Mr. Victor Joffe, QC, with him, Mr. Lynton Tucker and
Ms. Colleen Farrington

Respondent: Mr. Simon Hattan

Issues: Appeal against the order of single judge of the Court

Result / Order: [Oral delivery with written reasons to follow]
1. The appeal against the single judge's decision is allowed.
2. The decision of Mitchell JA [Ag.] delivered on 10th September 2012 is revoked and the orders at paragraphs (5) and (6) of the order of Bannister J dated 25th July 2012 are hereby set aside.

Case Name: Emirates International Investment Company
v

[1] Slim Malouche
[2] Registrar of Corporate Affairs

[High Court Civil Appeal No. 32 of 2011]

Date: Wednesday, 3rd October 2012

Coram: The Hon. Mde. Janice M. Pereira, Chief Justice
The Hon. Mde. Louise Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant: Mr. Michael Black, QC, with him, Mr. Andrew Gilliland

Respondents: Mr. Stephen Moverly Smith, QC, with him, Mr. Kissock Laing

Issues: Leave to appeal to Her Majesty in Council

Result / Order: [Oral delivery]
1. The motion for leave to appeal to Her Majesty in Council is dismissed.
2. Costs of this application should be the respondents to be assessed unless agreed within 14 days.

Reason: The Court was of the view that the grounds of appeal advanced did not satisfy the test in section 3(2) of the Virgin Islands (Appeals to Privy Council) Order 1967 (S.I. No. 234 of 1967), as they did not give rise to any matter of great general or public importance. There was no difficult question of law to answer.

Martinus Francois v The Attorney General, Saint Lucia High Court Civil Appeal No. 37 of 2003 (delivered 7th June 2004, unreported) followed.

Case Name: Quilvest Finance Limited et al

V
Fairfield Sentry Limited (In Liquidation)

**[High Court Civil Appeals Nos. 41-52 , 54-56 &
58-62 of 2011]**

Date: **Wednesday, 3rd October 2012**

Coram: **The Hon. Mde. Janice M. Pereira, Chief Justice
The Hon. Mde. Louise Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal**

Appearances:

Appellants / Applicants / Respondents:	Mr. Mark Hapgood, QC, with him, Mr. Kissock Laing (for the Harneys appellants) Mr. Paul Webster, QC, with him, Ms. Nadine Whyte (for the O'Neal Webster appellants) Mr. Robert Foote, with him, Ms. Claire Goldstein (for Ogier appellants) Ms. Arabella di Iorio, with her, Ms. Victoria Lord and Mr. Brian Lacy (for the Maples and Calder appellants)
Respondent / Applicant:	Mr. Jonathan Crow, QC, with him, Mr. Andrew Westwood (for Fairfield Sentry Limited)

Issues: **Civil appeal – Conditional appeal for leave to appeal
to Her Majesty in Council – Whether leave of court is
a prerequisite where an appeal lies as of right –
Whether court has an inherent jurisdiction to extend
time for filing application for conditional leave to
appeal**

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

The Court makes the following order:

- 1. That Sentry's application for conditional leave to
appeal to Her Majesty in Council is hereby
dismissed. Sentry shall bear one set of costs in
respect of the PI defendants on the application.
Costs to be assessed unless agreed within
fourteen days.**

It also ordered that:

- 2. The applications of the appellants in civil appeals**

41-52, 54-56 and 58-61 of 2011 (PI Defendants) for conditional leave to appeal to Her Majesty in Council are hereby granted and the appeals be consolidated. Leave is hereby granted by way of a single order, on the following conditions:

- a) The appellants do collectively pay into court the sum equivalent to £500.00 sterling pursuant to section 5(a) of the Virgin Islands (Appeals to Privy Council) Order 1967 (Statutory Instrument 1967 No. 234) such payment to be made within 90 days from today's date for the due prosecution of the appeals and the payment of all such costs may become payable by the appellants in the event of their not obtaining an order granting them final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee of the Privy Council ordering the appellants to pay costs of the appeal (as the case may be);
 - b) The appellants shall apply to this Court within thirty (30) days of receipt of the Certificate of the Registrar that the security for costs ordered herein has been given within the time prescribed to the satisfaction of the Registrar and that the appellants have otherwise complied with this order, for an order for final leave to appeal to Her Majesty in Council.
 - c) The appellants shall prepare the record of appeal and shall transmit the same to the Registrar of the Supreme Court of the Virgin Islands within sixty (60) days of the determination by Her Majesty in Council of Sentry's application to Her Majesty in Council for special leave to appeal, or of Sentry abandoning its application (whichever happens later) upon final leave to appeal being granted and shall include a copy of the orders granting conditional leave and final leave.
3. The costs in the applications shall be costs in the appeals to Her Majesty in Council.

Reason:

1. Article 4 of the 1967 Order stipulates that leave to appeal shall be made within twenty one days of the date of the decision appealed from and that the applicant shall give all other parties concerned notice of his intended application. The PI Defendants complied with this two-stage requirement. There is nothing in Article 4 which makes the validity of the application for leave to appeal dependant on the service of the application within twenty one days. Accordingly the PI Defendants' application for leave to appeal, it being an appeal as of right and timely, is valid.

Texan Management Limited et al v Pacific Electric Wire & Cable Company Limited [2009] UKPC 46 followed; John Goddard v National Development Corporation St. Lucia High Court Civil Appeal No. 17 of 1988 (delivered 25th October 1990, unreported) not followed.

2. Although the appeal is an appeal as of right, leave of the Court of Appeal is still obligatory. The purpose of the application for leave to appeal is to confirm that the appeal is 'as of right' and to impose such limited conditions as are permitted by law.

E. Anthony Ross v Bank of Commerce (Saint Kitts Nevis) Trust and Savings Association Limited [2010] UKPC 28 applied.

3. While the inherent jurisdiction may supplement rules of court, it cannot be used to lay down procedure which is contrary to or inconsistent with them, and therefore where the subject matter of an application is governed by a rule it should be dealt with in accordance with that rule and not by exercising the court's inherent jurisdiction. In light of this, Article 4 gave specific directions regarding the time line for making an application for leave to appeal. As such the Court cannot invoke its inherent jurisdiction so as to arrogate to itself a power to extend the time as limited in Article 4. The application for leave to appeal must be dealt with in accordance with the terms and conditions of Article 4 of the 1967 Order.

Case Name: Calvin Todman (as Exceutor of the Estate of
Edward Todman, deceased)
V
Marguerite Hodge

[High Court Civil Appeal No. 2 of 2012]

Date: Thursday, 4th October 2012

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

Appearances:
Appellant: Mr. William Hare holding papers for Mr. Robert Nader
Respondent: Ms. Tamara Cameron

Issues: Probate – Contested will – No case submission test in
a civil case – Claimant to establish his claim on a
balance of probabilities – Prima facie case – Whether
trial judge ought to have drawn adverse inferences
from the respondent's election to remain silent

Result / Order: [Oral delivery]
It is therefore ordered as follows:
a) The Grant of Probate dated 22nd July 2005 of the
Will to Marguerite Dian Hodge is revoked;
b) The will of the late Mr. Wellington Todman dated
5th March, 2000 is declared invalid;
c) The late Mr. Wellington Todman is found to have
died intestate;
d) The estate of the late Mr. Wellington Todman is to
be distributed in accordance with sections 4(1)(e)
and 5 of the Intestates Estates Act, Cap. 34 of the
Revised Laws of the Virgin Islands 1991;
e) Mr. Calvin Todman is entitled to his costs in the
court below on the prescribed costs basis

established by the learned trial judge and to two-thirds of those costs on the appeal in accordance with rule 65.13 of the Civil Procedure Rules 2000.

Reason:

1. The test by which a no case submission falls to be considered is whether or not the claimant has established his claim on the balance of probabilities. He may do so by establishing no more than a weak *prima facie* case which has then been strengthened to the necessary standard of proof by the adverse inferences to be drawn from the defendant's election. Such adverse inferences can tip the probability in the claimant's favour.

Miller (t/a Waterloo Plant) v Cawley 2002] All ER (D) 452 applied; Benham Limited v Kythira Investments Ltd & Another 2003] EWCA Civ 1764 applied.

2. A court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in action. If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness. There must have been some evidence, however weak, adduced by the claimant, before the court is entitled to draw the desired inference. Ms. Hodge, when put to her election, chose not to call any witnesses and remained silent. The evidence given by Ms. John was that Ms. Hodge was present when she witnessed the Will. This piece of evidence was never challenged, neither by counsel for Ms. Hodge during Ms. John's cross-examination nor in Ms. Hodge's witness statement. Ms. Hodge was a witness who might be expected to have material evidence to give on the issue in action. Therefore, her failure to give any evidence and to rely instead on a no-case submission deserved the drawing by the judge of an adverse inference. This adverse inference strengthened the case of Mr. Todman to the status

of a very strong *prima facie* case.

Elena Collongues v Andrew Lynch et al Territory
of the Virgin Islands High Court Civil Appeal No. 1
of 2007 (delivered 14th July 2008, unreported)
followed.

Case Name:

**Keon Edwards
v
The Queen**

[High Court Criminal Appeal No. 4 of 2011]

Date:

Thursday, 4th October 2012

Coram:

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

Appearances:

Appellant:

Mr. Stephen Daniels

Respondent:

Ms. Tiffany Scatliffe

Issues:

Murder – Appeal against sentence

Result / Order:

[Oral delivery]

**The appeal against sentence is allowed. The
sentence imposed is varied from 20 years to 15 years
to commence from date of remand.**

Reason:

**The sentence imposed was excessive, taking into
consideration the mitigating factors.**

Case Name:

**Liao Chen Toh
v
Liao Hwan Hsiang**

[High Court Civil Appeal No. 21 of 2012]

Date:

Thursday 4th October, 2012

Coram:

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

Appearances:

Applicant:

Mr. Jeremy Child

Respondent:

Mr. Paul Dennis, with him, Ms. Nadine Whyte

Issues:

Application for stay of execution

Result / Order:

[Oral delivery]

The application is dismissed with costs to the respondent in the sum of \$5,000.00 as agreed.

Reason:

The substantial issues between the parties were scheduled for trial in the Virgin Islands later in the month, the outcome of which would have likely effectively disposed of the appeal one way or the other. Also, this Court had already upheld the learned trial judge's decision that the appellant's conduct, including the transfer of the promissory note to Ms. Chou without consideration flowing to Triple Dragon Ltd., endangered the assets of Mr. Liao's BVI estate. Furthermore, the stay of the injunction sought by the appellant would have permitted the appellant to take just the type of action that the learned trial judge was concerned to prevent. For these reasons, the Court was satisfied that they should refuse to order a stay of the injunction granted by the learned trial judge, as there was a risk that the granting of the stay would allow the appellant to carry out what had been claimed to be his plan to transfer assets from the company to his nominee.

Case Name:

**[1] Kenneth M. Kryś
[2] Joanna Lau
(as joint Liquidators of Fairfield Sentry
Limited, in Liquidation)**

V

Stichting Shell Pensioenfonds

[High Court Civil Appeal No. 36 of 2011]

Date:

Thursday, 4th October 2012

Coram:

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

Appearances:

Appellants:

Mr. Andrew Westwood

Respondent:

Ms. Arabella di Iorio

Issues:

Settling of the Order of the Court following delivery of judgment

Result / Order:

[Oral delivery]

It is ordered that:

- 1. The appeal be allowed and the said Order of the Court below dated 9th August 2011 be set aside.**
- 2. Shell be restrained from taking any further steps in proceedings commenced on 19th March 2010 in the District Court of Amsterdam, the Netherlands against Sentry, or from issuing or otherwise commencing any proceedings against Sentry in the District Court of Amsterdam or elsewhere in the Netherlands.**
- 3. Shell do pay the Appellants' costs of and incidental to the Appeal and the said Application dated 8th March 2011, such costs to be assessed if not agreed and to include the costs of and incidental to the Appellants' applications to the**

Court below on 17th March 2011 and to this Court on 23rd March 2011 and 5th April 2011.

Reason:

The parties agreed on the above Order which reflected the Order of the Court of Appeal contained in its judgment. The above order was approved by the Court.