

COURT OF APPEAL SITTING
TERRITORY OF THE VIRGIN ISLANDS
16th – 20th April 2012

JUDGMENTS

Case Name:

**Rudolph Lewis
v
The Queen**

**[High Court Criminal Appeal No. 16 of 2009]
(Saint Vincent and the Grenadines)**

Date:

Monday, 16th April 2012

Coram:

**The Hon. Sir Hugh A. Rawlins, Chief Justice
The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]**

Appearances:

Appellant:

**Ms. Tiffany Scatliffe holding papers for counsel for
the appellant**

Respondent:

**Mr. John Carrington holding papers for counsel for
the respondent**

Issues:

**Criminal appeal against sentence – Murder – Guilty
plea entered at first opportunity – Learned trial judge
refusing to accept appellant's guilty plea and entering
plea of not guilty instead on his behalf – Whether
sentence imposed excessive and reflected early
guilty plea – Whether murder being a crime of
passion to be taken into account**

**Result and
Reason:**

**Held: allowing the appeal against sentence, setting
aside the sentence of life imprisonment and
substituting a sentence of 25 years imprisonment to
run from the date of the appellant's arrest, that:**

1. Provided that a defendant's plea of guilty to a

charge of murder is unequivocal and the proper procedure is followed, a High Court judge may accept it. The trial judge has the discretion to accept a defendant's guilty plea even where the Director of Public Prosecutions has served on the defendant a notice of his intention to seek the death penalty upon conviction.

2. Before a defendant's guilty plea is accepted when arraigned on an indictment for murder, the trial judge is under a duty to ensure that: (a) the defendant has competent legal representation; (b) the defendant has been examined by a medical officer in order to determine whether he is fit to plead; (c) the medical officer attends court and testifies as to his opinion concerning the defendant's fitness to plead; (d) the defendant has not been coerced by his counsel or anyone else to plead guilty and no one has promised him anything to plead guilty; (e) the defendant understands the nature of the offence, the elements of the offence, and that he has the right to plead not guilty, the right to be tried by a jury, and the right to state his defence, give evidence, remain silent, call witnesses, and address the jury; (f) the defendant is made aware of the sentencing process and that in determining sentence, the court has an obligation to apply the sentencing guidelines, consider a psychiatrist and social inquiry report, his antecedents and other sentencing factors; and (g) the defendant is made aware of the maximum possible penalty, as well as the minimum possible penalty.
3. It is unnecessary to empanel a jury to try the issue of whether or not the defendant is fit to plead. The procedure for determining fitness to plead under section 115(3) of the Criminal Procedure Code is not applicable.

James Robert Vent v R (1936) 25 Cr. App. R. 55 applied; section 115(3) of the Criminal Procedure Code Cap. 172, Revised Laws of Saint Vincent and the Grenadines 2009 cited.

- 4. The learned judge failed to take into account that the appellant acted under circumstances of domestic emotional stress which is a significant mitigating factor.**

D. A. Thomas' treatise Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division considered and applied.

- 5. The appellant had unusually strong mitigating factors in his favour and the sentence of life imprisonment did not sufficiently take into account his personal circumstances leading up to the offence. These personal circumstances which the learned judge omitted to consider would justify the Court abandoning or placing less emphasis on the objective of deterrence.**

Mervyn Moise v The Queen Saint Lucia Criminal Appeal No. 8 of 2003 (delivered 15th July 2005, unreported) followed.

Case Name:

**Veda Doyle
v
Agnes Deane**

**[High Court Civil Appeal No. 20 of 2011]
(Grenada)**

Date:

Monday, 16th April 2012

Coram:

**The Hon. Sir Hugh A. Rawlins, Chief Justice
The Hon. Mde. Janice M. Pereira, Justice of Appeal**

The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. John Carrington holding papers for counsel for the appellant

Respondent: Mr. Jack Husbands holding papers for counsel for the respondent

Issues:

Civil appeal – Post - judgment interest – Whether post-judgment interest automatically accrued on a judgment debt prior to the enactment of the West Indies Associated States Supreme Court (Grenada) (Amendment) Act, No. 7 of 2009 – Section 11(1) of the West Indies Associated States Supreme Court (Grenada) Act, Cap. 336 – Whether section 11(1) of the Supreme Court Act permits the reception of substantive English law into the law of Grenada

Result and Reason:

Held: allowing the appeal, setting aside the order of the trial judge made on 28th July 2011, and awarding costs to the appellant in the court below in the sum of \$300.00 and costs of \$200.00 on this appeal in accordance with CPR 65.13, that:

1. Post-judgment interest did not automatically attach to the judgment debt as there was no law in the State of Grenada which permitted this at the time the judgment debt became payable. Also, post-judgment interest not having been expressly awarded by the court, none could accrue and become payable by the judgment debtor or be claimed against the judgment debtor by way of Judgment Summons. The trial judge therefore erred in awarding post-judgment interest on the Judgment Summons.
2. Section 27A of the Supreme Court Act, inserted by the West Indies Associated States Supreme Court (Grenada) (Amendment) Act, 2009, now provides for the automatic attachment of post-judgment interest in the State of Grenada.

Section 27A of the West Indies Associated States Supreme Court (Grenada) Act, Cap. 336, Revised Laws of Grenada 2010 cited.

- 3. The English law intended to be imported by section 11(1) of the Supreme Court Act is the procedural law administered in the High Court of Justice in England and not English substantive law, nor English procedural law which is adjectival and purely ancillary to English substantive law. The wording of section 11(1) indicates that the focus on the importation of any law, rule or practice from England is in respect of the exercise of the jurisdiction as distinct from the importation of English law so as to give jurisdiction.**

Panacom International Inc. v Sunset Investments Ltd. and Another (1994) 47 WIR 139 followed; Dominica Agricultural and Industrial Development Bank v Mavis Williams Commonwealth of Dominica Civil Appeal No. 20 of 2005 (delivered 29th January 2007, unreported) distinguished.

Case Name:

Marlon Ho-Tack

v

[1] British American Insurance Company Limited

(In Judicial Management)

[2] Cleveland Seaforth (Judicial Manager)

**[High Court Civil Appeal No. 10 of 2010]
(Antigua and Barbuda)**

[1] British American Insurance Company Limited

(In Judicial Management)

[2] Cleveland Seaforth (Judicial Manager)

v

**[1] Marlon Ho-Tack
[2] Alice Ho-Tack**

**[High Court Civil Appeal 13 of 2010]
(Antigua and Barbuda)**

Date: Monday, 16th April 2012

Coram: The Hon. Sir Hugh A. Rawlins, Chief Justice
The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Jack Husbands holding papers for Mr. Hugh Marshall

Respondent: Mr. John Carrington holding papers for Dr. David Dorsett

Issues:

Civil Appeal – Insolvent Insurance Company judgment debtor – Appointment of judicial manager – Terms of order and section 61 (4) Insurance Act 2007 staying all actions and other processes against insolvent company – Default judgments obtained before judicial management order – Enforcing judgment after judgment debtor placed under judicial management – Judgment creditor's application for attachment of debts order naming judicial manager as garnishee dismissed by master – Judicial Manager's application to set aside default judgments – Whether Judicial Manager's application to be made directly to the Judge and be heard in public – Jurisdiction of master to hear the application – Section 217 Insurance Act 2007 – Section 11 Eastern Caribbean Supreme Court Act Cap. 143 – Applicability of English Insolvency Rules and Practice Directions made under the Insolvency Act 1986

Result and Reason:

Held: allowing the appeal on the issue raised by the court, setting aside paragraph 2 of the master's order which dismissed the Judicial Manager's application to set aside the default judgments, and making no order as to costs.

1. That in the absence of any regulations for the effective implementation of Judicial Management of an insolvent insurance company made pursuant to section 217 of the Insurance Act 2007 of the Laws of Antigua and Barbuda, section 11 of the Eastern Caribbean Supreme Court Act Cap.143 provides for the jurisdiction relating to judicial management of BAICO to be exercised as nearly as may be in conformity with the law and practice for the time being administered by the High Court of Justice in England.

Hugh C. Marshall Snr v Antigua Aggregates Limited and Others Civ. App. No. 23 of 1999 at paras 15-16 applied.

2. The regime or procedure which is employed legally to rehabilitate insolvent insurance companies in England is known as "Administration" which is comparable to the regime of Judicial Management under the Insurance Act 2007; and the statutory regime for administration of insolvent companies in England exists in the Insolvency Act 1986 Schedule B1 and the new Part 2 of the Insolvency Rules 1986 and the Practice Direction for Insolvency Proceedings.
3. Part Two paragraph 5 of that Practice Direction is applicable as it governs the DISTRIBUTION OF BUSINESS for the Companies Court and provides for applications relating to the administration of insolvent companies before and after an administration order to be made directly to the Judge and unless otherwise ordered are to be heard in public.
4. There are Rules governing applications made during the currency or pendency of judicial management proceedings under the English Insolvency Rules and Practice Directions. The rules in CPR 2000 do not apply to insolvency proceedings save for where other enactments specifically state that they should apply. Rule 7.2 to 7.9 provide for the specific form, content,

making, filing and service of insolvency applications, and the application of BAICO's Judicial Manager like the applications of the Ho-Tacks was made in keeping with Part 11 of CPR 2000, when it ought to have been made by way of an "ordinary application" in Form 7.2 properly headed or titled in accordance with Rule 7.26 of the English Insolvency Rules and Practice Direction.

5. The application to set aside the default judgments, notwithstanding its procedural defects, formed part of the judicial management proceedings which a master had no jurisdiction to determine under the English Insolvency Practice Direction paragraph 5: Distribution of Business; and the learned master ought to have referred the application to be heard by a Judge in public.

APPLICATIONS AND APPEALS

Case Name:

Euro Industries Ltd.

v

[1] Dr. Wolfgang Hertel

[2] Visoka Energy Corporation

[High Court Civil Appeal No. 2 of 2011]

Date:

Monday, 16th April 2012

Coram:

**The Hon. Sir Hugh A. Rawlins, Chief Justice
The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]**

Appearances:

Appellant:

Mr. John Carrington

Respondents:

Mr. Jack Husbands

Issues: Application for permission to dispense with transcript

Result / Order: [Oral delivery]
The application for permission to dispense with the transcript is adjourned, to be heard at the next sitting of the Court of Appeal in the Territory of the British Virgin Islands in October, 2012.

Reason: The application for an adjournment was supported by both the appellant and the respondents, being of the view that the substantive appeal will be ready for hearing.

Case Name: Attorney General
v
Loretta Frett

[High Court Civil Appeal No. 41 of 2010]

Date: Monday, 16th April 2012

Coram: The Hon. Sir Hugh A. Rawlins, Chief Justice
The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

Appearances:
Appellant: Ms. Vareen Vanterpool
Respondent: Dr. J.S Archibald, QC, with him, Ms. Anthea Smith

Issues: Application for an extension of time to apply for leave to appeal – Application for leave to appeal order of master

Result / Order: [Oral delivery]
1. The application to extend time and accordingly the application for leave to appeal are dismissed.

2. The applicant shall pay the sum of \$2,500.00 costs to the respondent.

Reason:

This was an application made out of time for permission to appeal against the decision of the master to dismiss a Public Authority Protection defence raised by the Attorney General on a claim for damages for personal injury brought by a hospital nurse who alleged faulty construction work at a public hospital. The master applied the correct principles in holding that the cutting of a hospital wall by an employee of the hospital was not work done in performance of a public or statutory duty under the Public Health Act (Cap. 194, Revised Laws of the Virgin Islands 1991) as would impose a six-month limitation period for suit.

The Court further opined that even if the application for permission to appeal had not been made out of time, the appeal would have been dismissed.

Case Name:

[1] Royal Westminster Investments S.A.

[2] Bhagwan Mahtani

[3] Sunder Dalamal

[4] Nari Dalamal

v

[1] Nilon Limited

[2] Manmohan Varma

**[High Court Civil Appeals No. 34 of 2010 and
No. 1 of 2011]**

Date:

Monday, 16th April, 2012

Coram:

The Hon. Sir Hugh A. Rawlins, Chief Justice

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

The Hon. Mr. Gerard Farara, QC, Justice of Appeal

[Ag.]

Appearances:

Appellants: Mr. John Carrington

Respondents: Mr. Scott Cruickshank, with him, Ms. Fiona Forbes
(for the 1st respondent)
Mr. Matthew Collings, QC, with him, Mr. Ray Ng (for
the 2nd respondent)

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

Result / Order: [Oral delivery]
Application for leave to appeal to Her Majesty in Council is dismissed with costs to the respondent, Royal Westminster, to be assessed if not agreed within 21 days of today's date.

Reason: The Court was of the opinion that the matter raised no difficult issue of law to necessitate a referral to the Privy Council.

Case Name:

Tawney Assets Limited
v
[1] East Pine Management Limited
[2] Guildron Trading Limited
[3] SI Capital Partners Limited
[4] Rudy Amirkhanian
[5] Elena Lokteva

[High Court Civil Appeal No. 7 of 2012]

Date: Tuesday, 17th April 2012

Coram: The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Gerard Farara, QC, Justice of Appeal
[Ag.]
The Hon. Mr. Geoffrey Bell, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Stephen Moverly Smith, QC, with him, Ms. Keisha Durham

Respondents: No appearance

Issues: Application for leave to appeal

Result / Order: [Oral delivery]
Application for leave to appeal is granted. Costs of this application be costs in the appeal.

Reason: The Court was satisfied that the appellant had a realistic prospect of success on appeal.

Case Name: Spectrum Galaxy Fund Ltd.
v
Xena Investments Ltd.

[High Court Civil Appeal No. 40 of 2011]

Date: Tuesday, 17th April 2012

Coram: The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Gerard Farara, QC, Justice of Appeal [Ag.]
The Hon. Mr. Geoffrey Bell, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Richard Evans, with him, Mr. Jerry Samuel

Respondent: Mr. Stephen Moverly Smith, QC, with him, Ms. Keisha Durham

Issues: Commercial law – Assignment of redemption proceeds – Whether assignee a creditor with standing to apply for appointment of liquidators

Result / Order:

**[Oral delivery with written reasons to follow]
The appeal is allowed. Written reasons to follow.
Draft order to be submitted for court's approval on
Thursday, 19th April 2012.**

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:

Tuesday, 17th April 2012

Coram:

**The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]
The Hon. Mr. Geoffrey Bell, Justice of Appeal [Ag.]**

Appearances:

Appellants:

**Mr. Paul Girolami, QC, with him, Mr. Andrew
Westwood and Mr. Robert Nader**

Respondent:

**Ms. Catherine Newman, QC, with her, Ms. Arabella Di
Iorio**

Issues:

**Commercial appeal – Anti-suit injunction – Whether
the judge was wrong in his application of principles
on which an anti-suit injunction is granted**

Result / Order:

Judgment reserved.

JUDGMENTS

Case Name:

Ocean Conversion (BVI) Limited

v

Attorney General

**[High Court Civil Appeal No. 19 of 2009]
(Territory of the Virgin Islands)**

Attorney General

v

Ocean Conversion (BVI) Limited

**[High Court Civil Appeal No. 20 of 2009]
(Territory of the Virgin Islands)**

Date:

Wednesday, 18th April 2012

Coram:

**The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]
The Hon. Mr. Geoffrey Bell, Justice of Appeal [Ag.]**

Appearances:

**Appellant /
Respondent:**

**Mr. Sydney Bennett, QC (for Ocean Conversion (BVI)
Limited)**

**Respondent /
Appellant:**

**Ms. Sarah Potter holding papers for the Attorney
General**

Issues:

**Civil appeal – Contract – Construction of contracts –
Exercise of option – Meaning of the words “prepared
to exercise the option” - Failure to tender purchase
price – Trade fixtures – Plant expanded beyond
originally agreed size – Expenditure encouraged by
one party – Expectation of compensation by other
party – Estoppel – Unjust enrichment – Illegal
contracts – Trial judge’s primary findings of fact –
Function of appellate court**

**Result and
Reason:**

**Held: dismissing the company’s appeal challenging
the order of the trial judge giving Government
immediate possession of the plant; allowing the**

company's appeal against the trial judge's dismissal of its counterclaim for compensation for the monies spent in replacing the old plant by a new one and directing an inquiry as to the value of the plant as at the date when the company gave up delivery to Government and further directing that the initial purchase price of \$1.42 million be offset against that value as found; dismissing Government's appeal against the various findings of fact of the trial judge; and ordering that Government pay the company its costs in the High Court to be assessed if not agreed and two thirds of that amount in the Court of Appeal, that:

1. The construction of a disputed contract is a matter for the court and does not depend on the understanding of the parties. The test applied by the court in constructing a disputed contract is that of the reasonable man.

Bahamas International Trust Company Limited and Another v Threadgold [1974] 3 All E.R. 881 applied; Investors Compensation Scheme Ltd. v West Bromwich Building Society [1998] 1 All E.R. 98 applied.

2. An appellate court will not easily interfere with a trial judge's primary findings of fact, especially where such findings derived from seeing and hearing the witnesses. However, where a finding was an inference drawn from primary facts and depended on the value to be given to the evidence, the appellate court is as well placed to determine proper inferences to be drawn.

Janice Reynolds-Greene v Community First Co-operative Credit Union Antigua and Barbuda HCVAP 2008/027 (delivered 25th October 2010, unreported) followed.

3. The desalinisation plant was not a landlord's fixture as found by the learned trial judge but a trade fixture. Furthermore, the agreement between the parties expressly stated that ownership of the plant was in the company

until purchased or acquired by Government in accordance with the terms of the agreement. As such, it remained the property of the company as agreed until it was either paid for at the end of the first 7-year term or vested in government at the end of the second 7-year term.

4. The trial judge's finding that the words in Government's letter, "prepared to exercise" its option, was a valid exercise of the option was justified for the reasons he gave. The only reason government had to send the letter to the company was to give notice of its election to purchase the plant. If Government wanted to do otherwise it would simply have done nothing and the plant would vest in the Government at the end of the second 7-year term without payment for it.
5. Government had exercised the option to purchase the plant at the end of the first 7-year term. By electing to purchase the plant, Government had foreclosed on the possibility of acquiring it by any means other than purchase.
6. The plant that was eventually turned over to Government more than 7 years after the exercise of the option, was not the original plant subject to the agreement. Government had requested the company to incur expense of \$4.765 million in expanding the plant on Government's land for Government's benefit, to a size in excess of that contracted for. The old plant for which Government had agreed to pay the sum of \$1.42 million was entirely replaced. The company's expectation for an extended tenure or for an allowance for the expenditure had been created or encouraged by Government. It could not have been the common intention of the parties that Government could demand immediate possession of the newly expanded plant without compensation: It would be inequitable for Government to expect

ownership of the new plant to be transferred to it without compensation.

Plimmer and Another v The Mayor, Councillors and Citizens of the City of Wellington [1884] 9 App. Cas. 699 (P.C.) applied; Cobbe v Yeoman's Row Management Limited and Another [2008] 1 W.L.R. 1752 cited.

7. It had always been the intention of the parties that the company would both make a profit on the sale of water and be paid for the capital investment unless the company was permitted to supply water for a sufficient period of time to compensate it for its capital investment. Government took possession of the new plant a few years after it had been completed. The profit made by the company in selling water to Government during the extended period did not amount to double dipping in the event Government was ordered to pay compensation.
8. Government's assertion that the production of water in excess of the quantity mentioned in the written agreement was illegal was misconceived. The company had been approved as a producer of water for supply to Government by the Governor in Council. The Water Supply Ordinance was directed to the identity of the supplier, not to the quantity of water manufactured.
9. The trial judge was right in finding that the company was not a trespasser operating an illegal water supply plant. The company had been encouraged at all times by Government to expand its plant and to remain in possession of the property until the filing of Government's claim finally brought the licence to occupy the property to an end.

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:**

Wednesday, 18th April 2012

Coram:

The Hon. Mde. Janice M. Pereira, Justice of Appeal

The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

The Hon. Mr. Geoffrey Bell, Justice of Appeal [Ag.]

Appearances:

Appellant:

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

Respondents:

Ms. Asha Johnson

Issues:

**Civil appeal – Property dispute – Whether action for
eviction statute barred – Dispossession**

☐ **Result / Order:**

[Oral delivery]

**Appeal is allowed. Costs to the appellant in the court
below based on a value of \$50,000.00; and in the
Court of Appeal, two-thirds based on that sum.**

Reason:

**The learned trial judge did not apply the law to the
facts of the case. Had he done so, he would have
concluded that the action was statute barred under
section 6(3) of the Limitation Act (Cap. 43, Revised
Laws of the Virgin Islands 1991). The finding of the
learned trial judge was accordingly reversed.**

Case Name:

Pitkin Group Limited

v

**[1] William Tacon
[2] Alastaire Beveridge
(in their capacity as Joint Liquidators of
Ortland Equities Corporation (in Liquidation))**

[High Court Civil Appeal No. 64 of 2011]

Date: Thursday, 19th April 2012

Coram: The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]
The Hon. Mr. Geoffrey Bell, Justice of Appeal [Ag.]

Appearances:

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

Respondents: Mr. Jonathan Russell, QC, with him, Ms. Arabella Di
lorio and Ms. Victoria Lord

Issues: Commercial appeal – Whether the learned trial judge
erred in finding that the transfer of an asset from
Ortland Equities Corporation was an “undervalue
transaction” within the meaning of section 246 of the
Insolvency Act 2003 and thus liable to be set aside

Result / Order: [Oral delivery]
Appeal dismissed with costs in this appeal to be two-
thirds of the costs in the High Court, such costs to be
assessed, or agreed within 21 days.

Reason: In relation to the issue of Ortland’s interest in the
CD&R fund as of 1st October 2008, the Court noted
that the learned trial judge fully considered the
evidence of both the appellant’s expert witness (Mr.
Ryan) and the respondent’s expert witness (Ms.
O’Neill) and preferred the evidence of Ms. O’Neill. He
was perfectly entitled to do this. The Court opined
that the principles governing an appellate court
upsetting findings of fact were well settled – even
were this court disposed to come to a different view,
interference would only be justified if there was no

evidential basis supporting the trial judge's conclusion, or if, on the evidence accepted, the judge came to a fully erroneous conclusion which, on any view, it was not reasonable for him to have arrived at. Accordingly, it was held that there was no basis for overturning the learned judge's finding that the value of Ortland's interest in the fund as of 1st October 2008 was \$12.75m, without giving any further discount.

On appeal, learned counsel for the appellant, Mr. Collings, QC, raised the issue of the transaction date, and its consequent effect on valuation. He urged that it should have been 9th January 2009, the date of final execution of the document, instead of 1st October 2008, its effective date. He pointed out that there was some evidence from Mr. Ryan that this would have made a considerable difference to the valuation. At trial, both parties proceeded on the basis that the correct date for the valuation was 1st October 2008. Furthermore, the appellant pleaded in its defence that the valuation date was 1st October 2008. The learned trial judge could not therefore be faulted for choosing this date as the valuation date, even in the face of the appellant raising the question of a possible error in the date chosen. It was too late to attempt to raise the issue on appeal; there was no cogent evidence on the subject at trial. The Court held that to send the matter back on that point would not do justice to the case.

The Court further opined that even were it to accept the proper valuation date as 9th January 2009, the evidence given by Mr. Ryan showed that in these circumstances the value would be in the region of approximately \$6m, and, so still significantly above the figure of \$3.2m. Thus, section 246(1)(b) of the Insolvency Act, 2003 would still apply. The difference between the outgoing value of \$12.75m which the judge accepted and the ingoing value of \$3.2m which Mr. Collings, QC accepted, clearly fell within the parameters of section 246(1)(b), as a transaction significantly less than its value in money or money's worth. On that basis there was no need for the Court to address the question of section 246(1)(a) which related to the treatment of the transaction as being a gift or otherwise affording the company no

consideration. However, having concluded that the ingoing value would at the highest have been \$3.2m, it then followed that the transaction would not have been a gratuitous transaction or one for no consideration under section 246(1)(a). The Court did not agree with the learned judge in that respect.

 Case Name:

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

[Magisterial Civil Appeal No. 2 of 2009]

Date:

Thursday, 19th April 2012

Coram:

The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Gerard Farara, QC, Justice of Appeal
[Ag.]
The Hon. Mr. Geoffrey Bell, Justice of Appeal [Ag.]

 **Appearances:**

Appellants:

Mr. Lewis Hunte, QC

Respondents:

Mr. John Carrington, holding papers for Ms. Tamara Cameron

Issues:

Adjournment of matter

**Result / Order
& Reason:**

[Oral delivery]
Appeal adjourned to the next sitting of the Court in the Territory of the Virgin Islands in October 2012, by consent of the parties.

Case Name:

Spectrum Galaxy Fund Ltd.

v

Xena Investments Ltd.

[High Court Civil Appeal No. 40 of 2011]

Date:

Thursday, 19th April 2012

Coram:

**The Hon. Mde. Janice M. Periera, Justice of Appeal
The Hon. Mr. Gerard Farara, QC, Justice of Appeal
[Ag.]**

The Hon. Mr. Geoffrey Bell, Justice of Appeal [Ag.]

Appearances:

Appellant:

Mr. Richard Evans, with him, Mr. Jerry Samuel

Respondent:

Ms. Keisha Durham

Issues:

**Consideration of order on appeal being allowed –
Draft order submitted – Issue on costs: whether Court
should depart from the two-thirds rule on appeal in
awarding costs on the appeal**

Result / Order:

[Oral delivery]

**Appeal allowed. Costs of the appeal set at two-thirds
of the assessed or agreed costs of the application
below. Draft order approved by the court in the
following terms:**

**I HEREBY CERTIFY that an Order was made as
follows:**

- 1. That the Appeal is allowed and the Order of the
Hon. Justice Bannister, dated 27 July 2010,
appointing joint liquidators over the Appellant is
forthwith discharged.**
- 2. That the Liquidator shall be immediately
discharged from their office and relieved of the
powers and discretions incidental to that office,
whether conferred by paragraphs 4 and 5 of the
said Order of the Hon. Justice Bannister or
otherwise by law.**
- 3. The Liquidator shall take all necessary steps to
give effect to paragraph 2 above.**

4. The Liquidator's remuneration, costs and expenses, including the costs and expenses of complying with this Order, shall, until fixed by the Court and paid, operate as a lien on the assets of the Appellant regardless of any change in the assets of the Appellant.
5. The issue as to which of the parties is liable to pay the Liquidator's remuneration, costs and expenses shall be adjourned pending the judgment of this Court in *Pacific China Holdings Limited v Grand Pacific Holdings Limited* High Court Civil Appeal No. 7 of 2010. There shall be liberty to all parties and the Liquidator to apply in respect of this adjournment.
6. Within fourteen days of the date of this Order, the liquidator shall provide a full and complete written account to the Appellant's legal practitioners of all or any other dealings or disposals of the assets of the Appellant undertaken by the Liquidator, including for the avoidance of doubt and without limitation all sums paid to the Liquidator in respect of their professional fees, expenses and disbursements. The Liquidator shall provide a copy of all supporting documents, including any orders of the Court made in the liquidation, with liberty to the Appellant to apply to the Commercial Judge in respect of any such dealing.
7. That the Liquidator does within 21 days of the date of this order deliver up to the Appellant's legal practitioners all the books and records of the liquidation. The books and records shall constitute any statutory books held by the Liquidators, investor records and changes thereto, an account of the Liquidator's receipts and payments, copies of all reports to the court and creditors, copies of any agreements entered into with third parties, including lenders and advisers, and any other books and records evidencing transactions or agreements entered into by the Liquidators on behalf of the Appellant.
8. That each of the Respondent and the Liquidator do within seven days of this Order produce to the Appellant's legal practitioners a list of all those persons, whether natural or legal, to whom, they notified the Order dated 29 July 2010.
9. The Respondent shall pay the Appellant's costs of

the application below and the costs of the Appeal. Such costs are to be agreed within 30 days failing which they are to be remitted for assessment by the Commercial Court Judge, together with the costs entitlement of the Appellant pursuant to the Order of this Court dated 27th September 2011. With respect to the costs of the Appeal these will be set at two thirds of the assessed (or agreed) costs of the application below.

10. For the avoidance of doubt, nothing in this order shall operate to prejudice the Appellant's rights or remedies which it may lawfully have against either the Respondent or the Liquidator arising out of the appointment of the Liquidator or the conduct of the liquidation.

Reason:

(for the decision on costs)

The Court did not consider that any exceptional circumstances had arisen to justify a departure from the general principle under rule 65.13 of the Civil Procedure Rules 2000.

Case Name:

Franklyn Huggins

v

The Queen

[High Court Criminal Appeal No. 5 of 2010]

Date:

Thursday, 19th April 2012

Coram:

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

Appearances:

Appellant:

Mr. Patrick Thompson

Respondent:

Ms. Tiffany Scatliffe, with her, Mr. Valston Graham

Issues:

Criminal appeal against conviction and sentence – Failure to give good character direction to jury – Whether summation was unbalanced – Whether trial judge allowed evidence which was prejudicial to appellant to be left to jury – Whether trial judge erred in principle in imposing 12 year sentence on appellant

Result / Order:

[Oral delivery]

Appeal against conviction and sentence is dismissed. Conviction and sentence are affirmed.

Reason:

Appeal against conviction

The Court was not of the view that the trial judge's failure to give a good character direction would vitiate the conviction. Further, it was held that the judge's summation was not unfair; it was quite balanced and the appellant's defence was adequately and fairly put before the jury. In relation to the issue of evidence of inappropriate conduct of the appellant towards the complainant being left to the jury, the trial judge, in the Court's view, appropriately exercised her discretion in allowing the evidence; there was no unfairness to the appellant.

Appeal against sentence

The Court could not discern any error in principle on the part of the trial judge in imposing a sentence of 12 years imprisonment on the appellant.

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:

Thursday, 19th April 2012

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]
The Hon. Mr. Gerard Farara, QC, Justice of Appeal [Ag.]

Appearances:
Appellant: Mr. John Carrington
Respondent: Mr. William Hare

Issues: Assessment of Damages

Result / Order: [Oral delivery]
Appeal is allowed with costs to the appellant to be assessed if not agreed within 21 days.
Matter is remitted to the court below for a proper assessment before a different master or High Court judge.

Reason: The master's assessment of special damages was the quantum contractually agreed for insurance purposes between the respondent and its insurer. Such evidence was not admissible against the appellant on the basis of the hearsay rule. The assessment not having been properly carried out, it should be sent back to the court below.