

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

JUDGMENTS

Case Name: Royal Westminster Investments S.A. and
Others v Nilon Limited and Another
[High Court Civil Appeals Nos. 34 of 2010 and
1 of 2011]
(Territory of the Virgin Islands)

Date: Monday, 16th January 2012

Coram: The Hon. Mr. Hugh A. Rawlins, Chief Justice
The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal

Appearances:

Appellants: Mr. John Carrington

Respondents: Mr. Scott Cruickshank (for the 1st respondent)
Mr. Michael Fay (for the 2nd respondent)

Issues: Civil appeal – Oral joint venture agreement made in
another jurisdiction – Rectification of share register –
Section 43 of the BVI Business Companies Act, 2004,
Act No. 16 of 2004, Laws of the Virgin Islands –
Section 359 of the English Companies Act 1985 – The
effect of subsection 3 of section 359 of the
Companies Act 1985 – Whether the appellants’ claim
against the first respondent as pleaded raises a ‘real
issue’ between them which it would be reasonable for
the court to try – Whether the appellants have a viable
cause of action for rectification – Rule 7.3(2)(a) of the
Civil Procedure Rules 2000 – Service of claim form on
another person who is outside the jurisdiction and
who is a necessary and proper party to the claim –
Whether the second respondent is a necessary and
proper party to the claim – Whether rectification
proceedings would be suitable for trial of the

disputes between the appellants and the second respondent – Forum non conveniens – Whether the BVI is the appropriate forum for trial of this matter

Result and Reason:

Held: allowing the appeal; setting aside the order of the trial judge made on 21st December 2010 as well as his decision made on the same date striking out the appellants' claim in this action against the first respondent; deeming the appellants' service of the claim form upon the second respondent in England proper and effective service and restoring the appellants' claim against the first respondent; ordering that the respondents pay the appellants' full costs in this court and the court below, with costs to be assessed unless agreed within twenty one days of the date of this order; and remitting the matter to the Commercial Court for directions for the further conduct of the matter, that:

1. The effect of section 359(3) of the English Companies Act 1985 is to give the court a wide discretion as to the scope of the circumstances in which it can be demonstrated that the inclusion or omission is 'without sufficient cause'. The discretion is broad enough to permit inquiry into the substantive cause for the inclusion or omission.

Re Hoicrest Ltd. [2000] 1 B.C.L.C. 194 applied.

2. In the instant case, the court would have jurisdiction to rectify the register where questions concerning the applicant's right to have his name entered on it have arisen between the members or alleged members inter se without involving the company. It is not necessary for the company to be in breach of any of its obligations to the applicant for the court to exercise its jurisdiction under section 43 of the BVI Act. The Court may rectify the register notwithstanding that the company is not responsible for the relevant omission or inaccurate entry.
3. The discretion conferred on the court by

section 43(2) of the BVI Act, to determine any question relating to the right of a party to rectification proceedings to have his name entered in or omitted from the register of members, even if that question arises between the members or alleged members and does not involve the company, requires the court in such proceedings to have regard to equitable as well as legal rights vested in such a party. If the court finds that the applicant has established a beneficial interest to the shares in question, it is empowered to give effect to that interest by declaration and by rectification of the register to accord with the declared entitlement of the appellant to registration as legal owner of the shares.

4. Although the information required by section 41 of the BVI Act comprises the names and addresses of persons who hold or are immediately entitled to hold legal title to registered shares in the company, the court is not obliged to strike out an application for rectification of the register where the party claiming such relief is unable to assert a present entitlement to registration.

Re Starlight Developers Limited [2007] B.C.C. 929 applied;

5. To obtain a judgment for rectification, the appellants will have to establish their beneficial ownership of the percentages of issued shares in the first respondent company which are the subject of the claim. Although the outcome of the rectification proceedings will turn on the resolution of a question arising between the appellants and the second respondent, those proceedings will involve an issue to be tried between the appellants and the company: a claim for rectification is primarily against the company and the registered holders of the shares whose registration is in question, if not the applicant.

Morgan v Morgan Insurance Brokers Ltd. and

Others [1993] B.C.C. 145 applied.

- 6. Although there may be some evidential and practical difficulties in the way of the appellants in establishing their claim, it cannot be said at this stage that their prospects for obtaining an order for rectification are merely fanciful. There is between the appellants and Nilon a real issue which it is reasonable for the court to try, that issue being the appellants' claim against Nilon for rectification of its register of members.**
- 7. The second respondent is the registered holder of the shares whose registration is in question and is thus, along with the company, the proper defendant on an application to rectify the register. Thus, the second respondent is a necessary and proper party to the claim brought by the appellants against Nilon for rectification of its register.
Morgan v Morgan Insurance Brokers Ltd. and Others [1993] B.C.C. 145 cited.**
- 8. The rectification proceedings would be suitable for trial of the disputes between the appellants and the second respondent. The claim for rectification in this case has from its inception been conducted by the formal procedures provided for in the CPR. It was commenced by claim form and an amended statement of claim has been served. All the facilities of CPR for full and effective trial of all issues of fact and law involved in the case are available in these proceedings.**
- 9. The dispute as to the rectification of Nilon's register of members has its closest and most real connection with the BVI. Thus, the BVI is clearly the appropriate forum for trial as a preliminary issue of the questions arising between the members and alleged members of Nilon, which concern the appellants' rights to registration as holders of shares in Nilon. The interests of the parties and the ends of justice require that those questions should be heard**

and determined in the proceedings commenced and ongoing in the BVI.

10. The appellants are not precluded from obtaining permission to serve out on the basis on which they seek to do so in this appeal. At the time that the second respondent decided how to respond to service of the claim form and statement of case for which permission to serve out was given, he would have been informed by the documents that that the claim against Nilon for rectification was one of the bases on which the appellants sought to have him joined to the suit. He is not, by reason of some late amendment, being faced with that claim as a new and previously unpleaded cause of action asserted for the first time in answer to his challenge to the order for service out.

Metall und Rohstoff A.G. v Donaldson Lufkin & Jenrette Inc. and Another [1990] 1 Q.B. 391 applied.

APPLICATIONS AND APPEALS

Case Name: Alexander Savelyev v Vitaly Arkhangelsky and Others
[High Court Civil Appeal No. 73 of 2011]

Date: Monday, 16th January 2012

Coram: The Hon. Mr. Hugh A. Rawlins, Chief Justice
The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal

Appearances:

Intended Appellant / Applicant:	Ms. Victoria Ann Lord
Respondent:	Mr. Richard Evans with Mr. Jerry Samuel

Issues:	Application for leave to appeal
Result / Order:	The following is ordered by consent: 1. The freezing order made herein on 9th November 2011 and varied on 5th December 2011 is hereby discharged. 2. The appellant's application for leave to appeal; for interim relief and for leave to adduce further evidence, filed on 14th December 2011 be and are withdrawn. 3. The question as to whether the costs ordered by the Hon. Mr. Justice James on 5th December 2011 be reversed be remitted to the Hon. Justice Bannister, QC, for determination. 4. All questions regarding the costs of the applications referred to above be remitted to the Hon. Justice Bannister, QC for determination.
Reason:	(The parties consented to the making of the order)
Case Name:	Upbeat Global Limited v Benjamin Ping-Yao Liao [High Court Civil Appeal No. 34 of 2011]
Date:	Monday, 16th January 2012
Coram:	The Hon. Mr. Hugh A. Rawlins, Chief Justice The Hon. Mde. Janice M. Pereira, Justice of Appeal The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
Appearances:	
Appellant: Respondent:	No appearance Mr. Andrew Willins
Issues:	Application to strike out appeal

Result / Order:

[Oral delivery]

The Draft Order as amended (in the following terms) is to be drawn up and sent to the Court for approval:

IT IS ORDERED that:

- 1. The Notice of Appeal filed on the 12th August 2011 be struck out;**
- 2. Mr. Chen Chih-Chen shall pay the respondent's costs of and incidental to the purported appeal, and to the Application, to be assessed on an application to the Commercial Court judge if not agreed within 21 days;**
- 3. The respondent has permission, if so advised, to serve a copy of this Order together with a notice of application supported by evidence for orders pursuant to CPR 62.10 upon Ms. Shufan Sung;**
- 4. Service of any such application shall be effected upon Ms. Sung personally or in any other manner permissible under the laws of the jurisdictions in which she resides, or by delivery by post, courier or fax to the numbers and addresses given within the Notice of Appeal filed on 12th August 2011;**
- 5. Ms. Sung shall be given no less than 28 days notice of the hearing of any such application, which will be considered by a single judge of the Court of Appeal in Tortola when she may attend to show cause why such an order should not be made.**

Reasons:

- 1. Mr. Chen, a single director of the company, and a minority shareholder, had no legal right to lodge the appeals in the name of the board without the authority of the board.**
- 2. The Court found that there were sufficient grounds on which to permit the respondent to serve a copy of the order together with the notice of application out of the jurisdiction.**

Case Name:

eChinaCash Inc. v Light Year Partners LLC and Another

[High Court Civil Appeal No. 32 of 2010]

Date: Monday, 16th January 2012

Coram: The Hon. Mr. Hugh A. Rawlins, Chief Justice
The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal

Appearances:

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

Respondent: Mr. William Hare

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

Result / Order: [Oral delivery]
1. The application is granted.
2. The order is to be drawn up and sent to the Court for approval.

Reason: The application was unopposed. The appeal to Her Majesty in Council was as of right.

Case Name: Cukurova Finance International Limited and Another v Alfa Telecom Turkey Limited
[High Court Civil Appeal No. 18 of 2010]
[High Court Civil Appeal No. 24 of 2010]

Date: Monday, 16th January 2012

Coram: The Hon. Mr. Hugh A. Rawlins, Chief Justice
The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal

Appearances:

Appellant: Mr. Kenneth MacLean, QC, with him, Ms. Arabella di Iorio and Mr. James Nadin

Respondent: Mr. Stephen Moverly-Smith, QC, with him, Mr. Oliver Clifton

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

Result / Order: [Oral delivery]
1. The application for final leave to appeal to Her Majesty in Council is granted.
2. The application filed herein on behalf of the applicants dated 5th December 2011 is dismissed and consequently the stay application is also dismissed.
3. The appellant /applicant shall pay the costs on this application to be assessed, unless agreed within 21 days of today's date.

Reasons:
1. The application for leave to appeal to Her Majesty in Council was not opposed.
2. The Court was not convinced that there was a serious risk that the monies ordered would not be paid. In any event, Cukurova would only be required to pay if it loses the appeal and the Court was satisfied that an undertaking in damages was adequate. The Court had already exercised its discretion in imposing conditions on the stay earlier granted.

Case Name: Franklyn Huggins v The Queen
[High Court Criminal Appeal No. 5 of 2010]

Date: Monday, 16th December 2012

Coram: The Hon. Mr. Hugh A. Rawlins, Chief Justice
The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal

Appearances:

Appellant / Applicant: Mr. Patrick Thompson

Respondent: Ms. Tiffany Scatliffe

Issues: Application for bail pending appeal – Appeal against conviction

Result / Order: [Oral delivery]
1. The bail application is withdrawn.
2. Counsel for the respondent shall file and serve written submissions on or before 31st January 2012.
3. The hearing of this appeal is scheduled for the sitting of this court in April 2012.

Reason: The Record of Appeal was ready. Counsel for the applicant withdrew the bail application and the Court gave directions for the appeal to be heard.

Case Name: Anna Sircaklus v The Police
[Magisterial Criminal Appeal No. 4 of 2010]

Date: Monday, 16th January 2012

Coram: The Hon. Mr. Hugh A. Rawlins, Chief Justice
The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal

Appearances:
Appellant: Mr. Herbert McKenzie

Respondent: Mr. Herbert Potter

Issues: Whether the learned magistrate had exceeded her jurisdiction – Application for counsel to be removed from the record

Result / Order & Reason:	[Oral delivery] 1. The application by Mr. McKenzie, counsel for the appellant, for leave to be removed from the record is granted; 2. The appeal is struck out for want of prosecution with liberty to the appellant to apply under CPR 62.22 to have it restored.
 Case Name:	 Liao Chen Toh v Liao Hwang Hsiang [High Court Appeal No. 71 of 2011]
Date:	Monday, 16th January 2012
Coram:	The Hon. Mr. Hugh A. Rawlins, Chief Justice The Hon. Mde. Janice M. Pereira, Justice of Appeal The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
Appearances:	
Applicant:	Mr. Jeremy Child
Respondent:	Mr. Paul Dennis with Ms. Glenis Potts and Ms. Nadine Whyte
 Issues:	 Application for leave to appeal – Grant of ad colligenda bona
 Result / Order:	[Oral delivery] The application for leave to appeal is dismissed with \$5,000.00 costs to be paid by the applicant to the respondent within 21 days of today's date.
 Reason:	 The Court found that there was no real risk of dissipation of assets and, additionally, there was no real prospect of success in the appeal.

Case Name: Andre Penn v The Queen
[High Court Criminal Appeal No. 1A of 2011]

Date: Tuesday, 17th January 2012

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

Appearances:

Appellant: Mr. Edward Fitzgerald, QC, with him, Mr. John Benjamin and Mr. Patrick Thompson

Respondent: Ms. Elizabeth Hinds, Director of Public Prosecutions, with her, Mr. Herbert Potter and Ms. Janice Stoutt

Issues: Appeal against conviction – Indecent assault – Unlawful sexual intercourse with a girl under the age of 13 – Buggery – Misdirection to jury

Result / Order: [Oral delivery]
1. The appeal is allowed.
2. The appellant's conviction and sentence are quashed.
3. The matter is remitted to the High Court for retrial.
4. The applicant is free to apply to the High Court for bail.
5. The matter is to be remitted to the High Court for costs to be determined.

Reason: The Court found that the trial judge failed to comply with section 146 of the Evidence Act, 2006 (Act No. 15 of 2006, Laws of the Virgin Islands) and this rendered the verdict unsafe and unsatisfactory.

Case Name: Quilvest Finance Limited and Others v Fairfield Sentry
[High Court Civil Appeal Nos. 41-52 of 2011]

**[High Court Civil Appeal Nos. 54-56 of 2011]
[High Court Civil Appeal Nos. 58-61 of 2011]**

**Fairfield Sentry Limited (In Liquidation) v
Alfred Migani and Others
[High Court Civil Appeal No. 62 of 2011]**

Date: Tuesday, 17th January 2012 – Wednesday, 18th January 2012

Coram: The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Dominic Chambers, QC with Arabella Di Iorio (of Maples and Calder)
Mr. Paul Webster, QC with Nadine Whyte (of O’Neal Webster)

Respondent: Mr. Mark Hapgood, QC with Mr. Phillip Kite, Mr. Kissock Laing and Ms. Colleen Farrington (for the Harneys respondents)
Mr. David Lord, QC with Mr. Robert Foote and Ms. Claire Goldstein (for the Ogier respondents)
Mr. Michael Brindle, QC with Mr. Andrew Westwood and Mr. William Hare (for the Forbes Hare respondents)

Issues: Commercial law – Claw back actions – Whether certificates of Net Asset Value issued by Fairfield Sentry, within the meaning of Article 11 of Fairfield Sentry’s Articles of Association – Calculation of Net Asset Value – Redemption of shares – Whether in any event the redeeming shareholders gave good consideration for the redemption proceeds received

Result / Order: Judgment is reserved. The parties will be notified of the date of delivery.

Case Name: Jonathan Simon v Barnes Bay Development Ltd.
[High Court Civil Appeal No. 8 of 2011]
(Anguilla)

Date: Thursday, 19th January 2012

Coram: The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Davidson Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal [Ag.]

Appearances:

Intended Appellant / Applicant:	Mr. William Hare
Respondent:	No appearance (the respondent company unrepresented and not appearing)

Issues: Commercial law – Winding up proceedings – US Chapter 11 proceedings – Application for leave to appeal – Summary appeal

Result / Order: [Oral delivery]
 1. The appeal is allowed and the findings of the trial judge are set aside.
 2. The appellant should proceed with the application to appoint a liquidator with due diligence.
 3. Costs of the appeal to be in the winding up proceedings.

Reason: The application for leave to appeal was treated as the Appeal. Having noted that the respondent had not participated in the proceedings notwithstanding being served, the Court found that the trial judge erred in concluding that there was a general dispute in respect of the debt. It was held that the debt was not generally disputed. Therefore, there was standing to bring a winding up petition against the respondent.

Case Name: Quorum Island (BVI) Limited v Virgin Islands Environmental Council and Another
[High Court Civil Appeal No. 21 of 2009]

Date: Thursday, 19th January 2012

Coram: The Hon. Mr. Hugh A. Rawlins, Chief Justice
The Hon. Mde. Janice Pereira, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal [Ag.]

Appearances:

Intended Appellant / Applicant: Mr. Gerard Farara, QC with Ms. Tamara Cameron

Respondent: Mr. Mark Beard (for the 1st respondent)
Ms. Jo-Ann Williams-Roberts, Solicitor General (for the 2nd respondent)

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

Result / Order: [Oral delivery]
1. The application is dismissed.
2. The parties are to determine the next steps to be taken in light of the new legislation which was passed with retroactive effect.
3. No order as to costs.

Reason: This was not an appeal as of right. It may have fallen into the category of public interest. However, this issue has been overtaken by events. There is now legislation which appears to have properly declared the area in question, a protected area.

Case Name: Percival Williams v Elihu Rhymer
[High Court Civil Appeal No. 17 of 2009]

Date: Thursday, 19th January 2012

Coram:	The Hon. Mr. Hugh A. Rawlins, Chief Justice The Hon. Mde. Janice M. Pereira, Justice of Appeal The Hon. Mr. Mario Michel, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Mr. Herbert McKenzie
Respondent:	Ms. Anthea Smith
Issues:	Status of matter
Result / Order:	[Oral delivery] This appeal is adjourned and scheduled to be heard at the next sitting of the Court in the territory.
Reason:	The transcript was received.
Case Name:	Emirates International Investment Company v Slim Malouche and Another [High Court Civil Appeal No. 32 of 2011]
Date:	Thursday, 19th January 2012
Coram:	The Hon. Mr. Hugh A. Rawlins, Chief Justice The Hon. Mde. Janice M. Pereira, Justice of Appeal The Hon. Mr. Mario Michel, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Mr. Francis Tregear, QC with Mr. Andrew Gilliland
Respondent:	Mr. Stephen Moverly-Smith, QC with Mr. Kissock Laing and Ms. Collen Farrington
Issues:	Commercial law – Liquidation – Whether the liquidation ought to have been terminated

Result / Order:

Decision reserved.

Case Name:

**Ricky Callwood v The Queen
[High Court Criminal Appeal No. 1 of 2010]**

Date:

Friday, 20th January 2012

Coram:

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

Appearances:

Appellant:

Ms. Anthea Smith

Respondent:

Ms. Christilyn Benjamin

Issues:

Rape – Credibility of virtual complainant

Result / Order:

[Oral delivery]

The appeal is allowed and the appellant's conviction and sentence are accordingly quashed.

Reason:

The Court was of the view that the decision of the trial judge to withdraw from the jury the issue regarding the credibility of the virtual complainant, particularly in light of her actions before and after the alleged rape, materially affected the safety and reliability of the verdict. It was held that the issue ought to have been put to the jury. In the circumstances, the verdict was unsafe.

Case Name:

**Shonovia Thomas v The Queen
[High Court Criminal Appeal No. 6 of 2010]**

Date:

Friday, 20th January 2012

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

Appearances:
Appellant: Ms. Tana'ania Small-Davis with Ms. Tamara Cameron
Respondent: Mr. Valston Graham

Issues: Appeal against conviction – Manslaughter

Result / Order: Judgment is reserved.

Case Name: Andrew Milton v The Queen
[High Court Criminal Appeal No. 6 of 2009]

Dennis Campbell v The Queen
[High Court Criminal Appeal No. 7 of 2009]

Date: Friday, 20th January 2012

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

Appearances:
Appellant: Mr. Patrick Thompson
Respondent: Ms. Tiffany Scatliffe with Mr. Valston Graham

Issues: Appeals against conviction and sentence – Murder –
Conspiracy to murder – Section 146 of the Evidence
Act, 2006 – Whether sentences were excessive

Result / Order: Decision reserved.