

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCVAP2025/0005

BETWEEN:

ULTRAMARINE (ANTIGUA) LTD

Applicant/Appellant

and

**PETER COCHRAN OF TUI/TRAVELOPIA GROUP
(REPRESENTING INTER ALIA SUNSAIL (ANTIGUA) LIMITED, SUNSAIL (UK)
LIMITED,
AND FIRST CHOICE HOLIDAYS AND FLIGHTS LIMITED)**

Respondent

Before:

The Hon. Mde. P. Nicola Byer

Justice of Appeal

The Hon. Mde. Kimberly Cenac-Phulgence

Justice of Appeal

The Hon. Mde. Gertel Thom

Justice of Appeal [Ag.]

Appearances:

Dr. David Dorsett for the Applicant/Appellant

Mr. Septimus Rhudd and Ms. Loreal Wilson for the Respondent

2026: June 30.

Application for conditional leave to appeal to His Majesty in Council – Section 122(2)(a) of the Constitution of Antigua and Barbuda 1981 – Whether the question involved is one of great or general public importance – Independent limbs of the test – Adjournment – Contempt of Court – Sudden illness of lead counsel – Counsel “holding papers” for incapacitated colleague – Exercise of judicial discretion – Want of prosecution – Case management – Bilateral fairness – Whether refusal of adjournment amounted to denial of a fair hearing – Dismissal of application where the applicant fails to discharge the burden of proof due to refusal to tender evidence

REASONS FOR DECISION

- [1] **CENAC-PHULGENCE JA:** Before the Court was a notice of motion for conditional leave to appeal to His Majesty in Council filed by the

applicant/appellant, Ultramarine (Antigua) Limited (“Ultramarine”) on 3rd February 2026 against the judgment of this Court delivered on 13th January 2026 (“the COA judgment”). On 30th June 2026, after hearing the arguments of the parties, the Court dismissed the application for conditional leave and awarded costs to the respondent in the sum of \$1,750.00. The Court had indicated that it would provide written reasons for its decision. These are those reasons.

Background

- [2] By the COA judgment, the Court of Appeal dismissed the appellant’s appeal against the order of the learned judge dated 22nd January 2025 which dismissed the appellant’s application for an adjournment of the contempt of court hearing, which was scheduled for 22nd and 23rd January 2025, and also dismissed the substantive contempt application for want of prosecution.

- [3] The applicant/appellant is a company and, as such, is required pursuant to rule 22.3 of the **Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition)** (“CPR”) to be represented by a legal practitioner in all proceedings before the Court, unless the Court permits it to be represented by an authorised director or other officer.

- [4] The underlying contempt application which is at the heart of the proceedings commenced some fourteen years ago. According to the applicant/appellant, the contempt application has been subject to several applications aimed at having it dismissed on the grounds of res judicata.

- [5] After more than a decade of litigation, the contempt application was finally scheduled for hearing on 22nd and 23rd January 2025. By that date, the documentation in the matter had become quite voluminous, spanning some 7,000 pages and the evidence adduced comprised both documentary and video.

- [6] On 22nd January 2025, Counsel, Mr. Justin Simon KC and Mr. Jarid Hewlett (“Mr. Hewlett”) appeared before the High Court “holding papers” for Dr. David

Dorsett (“Dr. Dorsett”), the counsel on record who had suddenly taken ill. Counsel made an oral application for an adjournment of the hearing, citing as the sole reason the medical unavailability of counsel, Dr. Dorsett. Present at the hearing was the appellant’s sole witness, Mr. Andrew Moleta (“Mr. Moleta”).

[7] The learned judge dismissed the application for the adjournment and simultaneously dismissed the long-outstanding contempt application. The learned judge in his order set out the extensive chronology relating to the matter and indicated that the grant or refusal of an adjournment was discretionary and in exercising that discretion he had to take into account the overriding objective as set out in CPR rule 1.1. He took into account that exercising this discretion required a balancing exercise between, on the one hand, the obvious desirability of retaining a fixed trial date (which promotes certainty) and avoiding any adjournment (which can only add to the costs of the proceedings) and, on the other, the risk of irredeemable prejudice to one party if the case goes ahead in circumstances where that party has not had proper or reasonable time to prepare its case, as set out and considered in **Multibank FX International Corporation v Von der Heydt Invest S.A.**¹

[8] In striking the balance against Ultramarine and dismissing the application for the adjournment and the substantive contempt application, the learned judge took into account the following factors:

- (1) the contempt application was filed in 2012;
- (2) there had been numerous adjournments most of which were at the behest of the applicant/appellant;
- (3) it was the applicant/appellant’s responsibility to pursue its application and there was nothing stopping the appellant’s representative, Mr. Moleta, from giving evidence and being cross-examined the following day;

¹ BVIHCMAP2022/0001 (delivered 29th April 2022, unreported).

- (4) there would have been little prejudice to Mr. Moleta as he had been involved in the proceedings from inception and was most likely familiar with all the material;
- (5) that reasonable proposals had been put to Mr. Moleta to allow the matter to proceed which would not have been prejudicial to the appellant and he refused, which was consistent with the delays which had plagued the matter; and
- (6) this was not a case where a costs award on its own would be sufficient.

[9] Ultramarine appealed the trial judge's exercise of discretion to this Court, and the appeal was dismissed and the trial judge's orders affirmed. The main issue for the Court of Appeal's determination was whether the learned judge, in the circumstances, wrongly exercised his discretion in refusing the adjournment application and simultaneously dismissing the substantive contempt of court application.

[10] In affirming the High Court orders, this Court held that the facts of the case demonstrated that Mr. Simon, KC although having appeared on behalf of Dr. Dorsett, was accompanied by Mr Hewlett. The Court found that Dr. Dorsett had previously appeared in this matter with Mr. Hewlett, who would have been intimately familiar with the history of this matter. The Court found no reason why Mr. Hewlett, with the assistance of Mr. Simon KC, would have been unable to ensure that Mr. Moleta was not unfairly treated during cross examination. Additionally, the learned judge was well aware that the underlying orders allegedly breached by the respondent had long been discharged.

[11] While there is a public interest in ensuring that court orders be obeyed, in the circumstances of this case, it could be said that there was no pressing public interest reason to allow yet another adjournment with the consequent wastage of court resources. In the circumstances, the Court of Appeal was not prepared to say that the refusal to allow the application to vacate was not one of the

possible fair outcomes in this matter, particularly in the light of the overriding objective of the CPR.

[12] The Court further observed that although it is arguable that the respondent did not show inordinate delay nor demonstrate that the delay would carry a substantial risk to the fairness of the trial of the contempt application, the conduct of the applicant/appellant could reasonably have been viewed by the learned judge as an abuse of the court's process. The true issue was not the absence of Dr. Dorsett on account of his illness. The concern of the learned judge was the outright refusal of Mr. Moleta to proceed along the sensible case management lines which had been proposed by the judge.

[13] The Court said the learned judge correctly noted that the burden rested on Ultramarine to satisfy the court beyond reasonable doubt that the respondent was in contempt of orders of the court. Mr. Moleta offered no evidence at all and therefore the learned judge was left with no option but to strike out and dismiss the contempt application for want of prosecution in the absence of any evidence to discharge the burden which rested on Ultramarine.

[14] Further, the argument that the learned trial judge erred in striking out the applications without giving the applicant an opportunity to make representations cannot be sustained. First, the applicant/appellant was represented at all times by legal counsel. Second, the applicant/appellant had opportunity to make representations to prove its case. When offered this opportunity to prove the allegations, the applicant/appellant offered no evidence.

The Applicant/Appellant's Submissions in Support of Leave

[15] The notice of motion is made pursuant to section 122(2)(a) of the **Constitution of Antigua and Barbuda 1981** ("the Constitution") which states as follows:

"(2) Subject to the provision of section 44(8) of this Constitution, an appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases-

(a) decisions in any civil proceedings where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or

otherwise, ought to be submitted to Her Majesty in Council;"
(emphasis added)

[16] Dr. Dorsett, counsel for the applicant/appellant, formulates the central legal question as whether it is fair and consonant with a litigant's constitutional right to a fair hearing to compel counsel "holding papers" to immediately assume full conduct of a highly contentious, 7,000-page matter against leading King's counsel, due to the sudden illness of the counsel on record.

[17] The grounds as stated in the application are as follows:

- (1) The Court of Appeal in its judgment did not point to any evidence that would form the basis of its findings concerning Mr. Hewlett.
- (2) It was an error of law for a court to make findings of fact for which there was no evidence in support, unless the matter was one of which the court was entitled to take judicial notice.
- (3) The adjournment of proceedings is not a matter of discretion but a matter of fairness, which is a well-established common law right and a constitutional right.

[18] In the intended appeal to His Majesty in Council, the applicant/appellant planned to advance the following grounds of appeal inter alia:

- (1) The Court of Appeal erred in holding that the dismissal of the adjournment application was fair in that it erred in law in finding facts for which there was no evidence to support and for which it could not be said that these were matters which the Court of Appeal could take notice of.
- (2) The Court of Appeal erred in dismissing the appellant's appeal as it was simply a denial of justice to dismiss an appeal on the basis of a point which had not been argued or put to counsel for the appellant, so that he could have addressed it prior to a decision being made.

(3) The Court of Appeal erred in holding that the denial of an adjournment was fair as “there was no pressing public interest reason to allow yet another adjournment” when a breach of the right to fairness cannot be justified on the ground of public interest.

[19] The application for leave is supported by two affidavits, one from counsel, Mr. Hewlett and the other from Mr. Moleta. The Court observed that these affidavits contained new evidence which was not before the Court on the appeal and therefore would not have been considered by the Court in coming to its decision. Dr. Dorsett eventually accepted that the evidence of Mr. Hewlett’s involvement in the matter and the nature of his ‘holding papers’ was not before the Court of Appeal in the appeal proceedings. Given the fact that the evidence was now being introduced for the first time on the application for leave, this Court determined that it would have no regard to such evidence.

[20] The applicant/appellant argued that the question of fairness with respect to applications for adjournments in circumstances where counsel has fallen ill and cannot appear, is a question involved in this appeal and is a question of great general or public importance that ought to be submitted to His Majesty in Council. The applicant/appellant was of the view that this is a question which affects not just the applicant/appellant but one that not infrequently affects other litigants throughout the jurisdiction of the Eastern Caribbean Supreme Court where counsel of record has fallen ill and other counsel, in keeping with long and a well-established tradition, “hold papers” for a colleague who is incapacitated or otherwise unable to appear in court.

[21] The applicant/appellant further submitted that resolution of the legal question of fairness in the way that has been determined by the Court of Appeal in the instant case, potentially poses dire consequences for the public and litigants who cannot guarantee that counsel engaged to represent them are immune to bodily infirmity and affliction that would render their timely presence in court an impossibility.

The Respondent's Submissions in Opposition of Leave

- [22] Conversely, the respondent, represented by Mr. Ian Clarke K.C. and Mr. Septimus Rhudd, strongly resisted the application and submitted that the intended appeal raises no genuine question of great general or public importance. The respondent contended that the appellant's grounds represent nothing more than an attempt to cloak a standard, highly fact-sensitive challenge to a trial judge's case management discretion in the language of constitutional law.
- [23] In response to ground 1, the respondent rejected the assertion that this Court made an erroneous finding of fact regarding Mr. Hewlett's familiarity with the matter without any supporting evidence. The respondent countered that the Court of Appeal was fully entitled to look at its own records that were before the court at the hearing of the appeal, specifically a 2017 judgment² involving these identical parties, to observe that Dr. Dorsett had previously led Mr. Hewlett in substantive appellate matters in this very dispute, thereby undermining the claim that the Court made a finding of fact completely unsupported by evidence.
- [24] Addressing ground 2 regarding the alleged reliance on an unargued point, the respondent emphasised that the long-standing contempt application was not dismissed because of the refusal of the adjournment per se, but independent of it, for a total want of prosecution. The respondent pointed out that the applicant/appellant's Managing Director, Mr. Andrew Moleta, had been intimately involved in this 14-year-old litigation from its inception and was familiar with the underlying material. The learned trial judge offered a flexible accommodation to start the trial the following day to allow the applicant's holding counsel and Mr Moleta himself time to organise, a reasonable proposal which Mr. Moleta rejected on his own terms. The respondent submitted that this total refusal to proceed left the trial judge with no option but to dismiss the claim.
- [25] In respect of ground 3, the respondent rejected the suggestion that the Court improperly balanced an "absolute" right to a fair trial against public interest. The

² *Ultramarine (Antigua) Ltd v Sunsail (Antigua) Ltd* ANUHCVP2016/0004 (delivered 7th April 2017, unreported).

respondent adopted the principles from **Bilta (UK) Limited (in liquidation) v Traditional Financial Services Ltd**³ and **Terluk v Berezovsky**⁴ to argue that fairness must be evaluated symmetrically; the respondent had an equal constitutional right to have a 14-year-old application targeting his assets brought to a final, definitive conclusion.

The Law Governing Leave to the Privy Council

- [26] The general approach to applications for conditional leave under section 122(2)(a) of the Constitution is summarised by Carrington JA [Ag.] in paragraph 11 of his judgment in **Pacific Wire & Cable Company Limited v Texan Management Limited et al.**⁵

“The wording of these tests has been framed in wide terms so that this court has a broad discretion to deal with each application and to consider each question of the proposed appeal on its merits. However, this discretion must be exercised judicially and, in our view, this requires that this court should, as a general rule, strive to act consistently in applying the test to grant leave so that it is in accordance with its current practice and that of other courts of appeal whose discretion is exercised under the equivalent rules, bearing in mind that the jurisdiction of our highest court of appeal is being invoked.”

- [27] In determining what amounts to a question which is of “great general or public importance” under the first limb of the test, reference is often made to **Martinus Francois v The Attorney General**⁶ where Saunders JA said at paragraph 13:

“In construing the phrase ‘great general or public importance’, the Court usually looks for matters that involve a serious issue of law; a constitutional provision that has not been settled; an area of law in dispute, or, a legal question the resolution of which poses dire consequences for the public.”

- [28] In **Emmerson International Corporation v Viktor Vekselberg et al.**⁷ this Court confirmed that the phrase “or otherwise” in the constitutional provision constituted a distinct and separate second limb under which an applicant could obtain leave to appeal. At paragraph 12, the Court stated:

³ [2021] EWCA Civ 221.

⁴ [2010] EWCA Civ 1345.

⁵ BVIHCVAP2006/0019 (delivered 6th October 2008, unreported).

⁶ SLUHCVP2003/0037 (delivered 7th June 2004, unreported)

⁷ BVIHCVAP2019/0020 (delivered 27th July 2023, unreported).

“The meaning of the expressions ‘great general or public importance’ and ‘or otherwise’ have been extensively litigated in the courts of the Commonwealth Caribbean. Each expression creates an independent basis for getting conditional leave to appeal and the applicant can succeed on either or both bases.”

[29] At paragraph 16 of **Emerson**, the Court of Appeal expanded on this second limb, stating that: “....to qualify under the ‘or otherwise’ limb of the rule the matter in question must be one that could benefit from guidance by the Privy Council on the law. However, the regional cases have expanded the matters that can qualify under the ‘or otherwise’ limb to include matters that are not strictly on the law.”

[30] Referencing the dictum of Mendonça JA in **Attorney General of Trinidad and Tobago v Lennox Phillip et al**⁸ and Carrington JA [Ag.] in **Texan Management**, Mendes JA in **Renaissance Ventures Ltd et al v Comodo Holdings Limited**⁹ opined:

“But even where an applicant fails to establish that the question he or she wishes to pursue before the Privy Council is of great general or public importance, this Court may yet grant leave if satisfied that there are good grounds which would *otherwise* justify referral to Her Majesty in Council, as for example where there is some reasonable doubt as to the correctness of the decision of court.”

[31] The authorities collectively demonstrate that even where the leave application does not meet the first standard of being a matter of great general or public importance, the Court still retains a wide discretion to grant leave if it is satisfied that otherwise the appeal should be submitted to the Privy Council for guidance, such as where there is reasonable doubt as to the accuracy of its decision. However, when considering the accuracy of the decision of the Court of Appeal, the discretion should be exercised sparingly and with great care. It is not the function of the Court of Appeal to determine the correctness of the matters sought to be appealed. This is the function of the Privy Council (see: **Emmerson**).

⁸ TT Civil Appeal No. 155 of 2006 (delivered 6th June 2007).

⁹ BVIHCMAP2018/0005 and BVIHCMAP2018/0008 (delivered 8th October 2018, unreported).

The First Limb: Great General or Public Importance

- [32] Applying these settled principles to the present application, this Court must determine whether the applicant/appellant has established a basis for leave under either the "great general or public importance" limb or the "or otherwise" limb.
- [33] The applicant/appellant argued forcefully that the issue of an adjournment due to counsel's sudden illness is a recurring problem that engages constitutional rights to a fair trial and carries dire consequences for the wider public. However, this Court cannot see any serious issue of law or any unsettled constitutional provision engaged by this matter.
- [34] The legal principles governing adjournments is not an area of law which is in dispute. Neither is there any legal question which requires resolution because of the consequences for the public. This is a situation which arises very often in the daily operations of the courts, where Counsel seeks an adjournment because of illness either of Counsel himself or a party or witness in the matter. A consideration of such an application for adjournment is no doubt, and always has been, an exercise of the judge's discretion applying the applicable principles relating to adjournments and ultimately ensuring that the decision arrived at does not result in unfairness not only to the applicant but to all parties. As stated earlier, this is a balancing act.
- [35] This is a case where the trial judge, applying the standard principles applicable when considering whether to grant an adjournment or not, and exercising his discretion, and looking at the specific facts of the case before him, came to the conclusion that it was not unfair given the overriding objective to refuse to grant an adjournment. There is nothing novel or groundbreaking in the exercise of that discretion or the application of the principles, including consideration of the overriding objective.
- [36] Therefore, I do not see any basis for the grant of conditional leave to appeal to His Majesty in Council on the first limb-a question of great general or public importance.

The Second Limb: “or Otherwise”

[37] Dr. Dorsett’s submissions, both written and oral, concentrated on the first limb of section 122(2)(a) of the Constitution- “great general or public importance.” However, the section also refers to a second limb- “or otherwise.” For the sake of completeness, I will therefore address the second limb although it was not the focal point of the motion for leave.

[38] On the second limb of “or otherwise,” the appellant has similarly failed to establish a basis for a referral. The applicant/appellant has not shown any ground which requires a definitive or corrective statement of the law on the matter of adjournments nor is there any novel point of law or otherwise which requires a definitive statement by the Board.

[39] As indicated, the grant or refusal of an application for an adjournment is a matter of the application of the settled, relevant legal principles to the factual circumstances, ultimately endeavouring to achieve bilateral fairness in the particular case. These principles are certainly not in dispute. While the applicant/appellant attempts to frame the Court of Appeal's evaluation of the facts regarding Mr. Hewlett or the public interest as errors of law, these do not generate reasonable doubt as to the accuracy of the decision sufficient to invoke the exceptional "or otherwise" jurisdiction. The applicant/appellant's true complaint is with the result of the balancing exercise, not with the legal framework itself. As such, there is nothing to my mind in the circumstances of this case which requires the intervention of His Majesty in Council.

Conclusion

[40] For the foregoing reasons, this Court found that the applicant/appellant failed to satisfy the requirements of section 122(2)(a) of the Constitution of Antigua and Barbuda under either the "great general or public importance" limb or the "or otherwise" limb. The issues raised represent a challenge to a fact-sensitive exercise of judicial discretion regarding case management and the dismissal of an application for want of prosecution following a witness's refusal to tender evidence.

Disposition

[41] In the circumstances, it was ordered that:

- (1) The application for conditional leave to appeal to His Majesty in Council is refused.
- (2) Costs are awarded to the respondent in the application in the sum of \$1,750.00.

I concur.
P. Nicola Byer
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal [Ag.]

By the Court

Chief Registrar