BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2007/0293

IN THE MATTER OF AN INTENDED ARBITRATION

BETWEEN:

VICTOR INTERNATIONAL CORPORATION
VICTOR (BVI) LIMITED

Claimants

-and-

SPANISH TOWN DEVELOPMENT COMPANY LIMITED
CHARLENE O'NEAL HENDERSON
NORMAN O'NEAL HENDERSON

Defendants

Appearances:

Mr Gerard St. C. Farara QC and Ms Tana'ania Small-Davis for the Claimants
Dr Joseph S. Archibald QC and Ms Anthea Smith of JS Archibald & Co for the Defendants.

2008: January 17
2008: February 14

JUDGMENT

[1] **HARIPRASHAD-CHARLES J:** On 20 December 2007, the Claimants applied for an injunction restraining the Defendants, whether by themselves or through their servants and/or agents from interfering with the Claimants' use and possession of the 400 acre freehold property situated on the prized eastern peninsula of prestigious Virgin Gorda registered as Sheet and Parcel number 5744A - 3 ("Oil Nut Bay"). After hearing Mr Farara, Learned Queen's Counsel for the Claimants and Dr Archibald, Learned Queen's Counsel for the Defendants, the Court ordered the parties to the action to preserve the status quo and more specifically, that the Defendants shall not sell Oil Nut Bay until further order of the Court. In addition, the Court ordered that the Claimants are not to continue any works

on Oil Nut Bay after 17 January 2008 or until further order. The return date on the injunction was set for 17 January 2008. In the interim, the substantive matter was given an expedited hearing date for the 6 and 8 February 2008. For reasons not germane to this application, it was not heard but will commence forthwith today.

[2] On 17 January 2008, Dr Archibald QC made an oral application for the discharge of the injunction on the ground that an interlocutory injunction cannot be granted to the Claimants who have no cause of action against the Defendants at the time of the application. According to Dr Archibald, "it is the law that an injunction cannot be granted except if there is a basic cause of action on which it is fastened". He submitted that the Agreement of 4 March 2007 upon which the interlocutory injunction was granted is a nullity in law. On that basis, he forcefully argued that it should be discharged. Quintessentially, Dr Archibald was reverberating the classic speech of Lord Diplock in **Siskina (Cargo Owners) v Distos Compania Naviera S.A. ("the Siskina")**[1] (with whom the other members of the House of Lords agreed). He explained (at 254) that section 45(1) presupposes the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant and to which the interlocutory orders referred to are but ancillary. He enunciated the basic understanding of an interlocutory injunction more generally at 256:

> "A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction".

[3] Indeed, Dr Archibald has correctly expounded the well-established principle of law that an interlocutory injunction will not be granted to an applicant who has no cause of action against the defendant at the time of the application. A right to obtain an injunction is not a cause of action. It cannot stand by itself. It is dependent upon there being a pre-existing

[1] [1979] A.C. 210.

cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction.

The Parties

[4] The First Claimant, Victor International Corporation ("Victor International") is a company incorporated in the State of Michigan in the USA and is the parent company of the Second Claimant, Victor (BVI) Limited ("Victor BVI") (collectively called "the Claimants").Victor International has been engaged either directly or through its subsidiaries and affiliates in various property developments in the USA commencing in 2004. In that same year, it decided to explore the prospects of property development in the British Virgin Islands ("the BVI"). Victor BVI is a company incorporated in the BVI on 14 September 2007 under the BVI Business Companies Act, 2004.

[5] The First Defendant, Spanish Town Development Company Limited ("Spanish Town") is a private, limited liability company incorporated in the BVI on 13 August 1968. Spanish Town was formed as a real estate development company, with the objective of developing Oil Nut Bay. The Second Defendant, Mrs. Charlene O'Neal Henderson ("Mrs. Henderson") is the principal director of Spanish Town. The other director is Norcha Holdings Limited of which the Third Defendant, Mr. Norman O'Neal Henderson ("Mr. Henderson") is the director. Mr Henderson and Mrs Henderson ("the Hendersons") are husband and wife respectively.

The Factual Matrix

[6] During the year 2004, Mr. David Johnson ("Mr Johnson") who is the President and Chairman of Victor International and Victor BVI met with the Hendersons and there were discussions towards a joint development of Oil Nut Bay. These talks did not bear any fruit. Still interested in investing in the BVI, Victor International learned that the owner of an operating resort, Biras Creek Resort, adjacent to Oil Nut Bay was looking for someone to take over the management and operations of that resort. In August 2006, Victor International signed a letter of intent and began due diligence with the owner of Biras

Creek Resort. On 14 September, 2006, Victor International entered into agreements with the owner of Biras Creek Resort and in October 2006, took over the resort.

[7] On 5 December 2006, the representatives of Victor International had discussions with the Hendersons and their daughter Erika Henderson ("Erika") in respect of Oil Nut Bay. The framework for a joint venture between Victor International and the Hendersons was discussed. On 7 December 2006, Victor International, Spanish Town and the Hendersons executed a written agreement ("the Initial Agreement").[2] After the Initial Agreement was signed and pursuant to this agreement, several activities were commenced in respect of Oil Nut Bay.

[8] In February 2007, Mr Henderson expressed the Hendersons' concern over the 50/50 joint venture with representatives of Victor International and Victor BVI and indicated that they wanted a guaranteed buyout price for the land. Discussion ensued between the parties as to the new terms of the Agreement. On 4 March 2007, the parties to the Initial Agreement executed a new agreement that was expressly stated to supersede the Initial Agreement ("the Second Agreement")[3]. It is this agreement that is of fundamental concern to this Court. Learned Queen's Counsel, Dr Archibald stated that the Second Agreement on which the Claimants rely is a nullity in that it was not signed by and on behalf of Victor International and Victor BVI was not in existence as a legal entity at the time when the said agreement was entered into on 4 March 2007.

[9] Subsequently, there have been allegations of breach of contract from both the Claimants and the Defendants. This resulted in the Claimants filing the present claim and seeking injunctive relief, more specifically, an Order enjoining the Defendants, by themselves or their servants or agents from in any way stopping, preventing or hindering the Claimants and their servants and agents access to and entry upon the Oil Nut Bay property and from continuing the execution of works thereon including carrying out road and other building works on the said lands and from showing the said lands to the prospective third party

[2] The terms of this agreement is not germane to the application but for the terms see Tab 2 of the exhibits to the First affidavit of David Johnson.
[3] See Tab 20 of the exhibits to Mr. Johnson's first affidavit

purchasers or from carrying out all other activities thereon in relation to the planning and execution of the development project for the said property as contemplated by the said 4 March 2007 Agreement and as set out in the Master Plan approved by the Government and the Planning Authority; alternatively for the Defendants to post in Court a cash bond in the sum of US$100,000,000.

[10] On 20 December 2007, the Court ordered that: (i) the parties to the action are to preserve the status quo; (ii) the Defendants shall not sell the 400-acre property at Oil Nut Bay and (iii) the Claimants shall not continue any works on the said property after 17 January 2008 until further order of the Court.

[11] It is this injunctive relief that Dr Archibald so ably submitted should be discharged.

Applicable legal principles

[12] The procedure to be adopted by the Court in hearing applications for interlocutory injunctions and the tests to be applied, were laid down by Lord Diplock in the landmark case of **American Cyanamid Co. v Ethicon Limited**.[4] At page 407, Lord Diplock had this to say:

> "*The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried* [emphasis added]. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are questions to be dealt with at the trial…So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory injunction relief that is sought."

[13] According to **American Cyanamid**, when an application is made for an interlocutory injunction, in the exercise of the Court's discretion, an initial question falls for consideration, i.e. whether there is a serious issue to be tried. If the answer to that

[4] [1975] AC 396, H.L.

question is yes, then a further question arise: would damages be an adequate remedy for the party injured by the Court's grant of, or its failure to grant, an injunction? If there is doubt as to whether damages would not be adequate, where does the balance of convenience lie?

[14] Some of the key principles derived from the speech of Lord Diplock in **American Cyanamid** (at pages 406-409) may be listed as follows:

1. The grant of an interlocutory injunction is a matter of discretion and depends on all the facts of the case.

2. There are no fixed rules as to when an interlocutory injunction should or should not be granted. The relief must be kept flexible.

3. The evidence available to the Court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination.

4. It is no part of the Court's function at this stage to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed and mature considerations. These are matters to be dealt with at the trial.

5. The object of the interlocutory injunction is to protect the claimant against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty was resolved in his favour at the trial; but the claimant's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having prevented from exercising his own legal rights for which he could not be adequately compensated under the claimant's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial.

6. Some additional factors that the Court needs to bear in mind are: (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other to pay; (b) the balance of convenience; (c) maintenance of the status quo, and (d) any clear view the court may reach as to the relative strength of the parties' cases.

7. Unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the claimant has any real prospect of succeeding in his claim for a permanent injunction at the trial, the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

8. The Court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious issue to be tried.[5]

Is there a Serious Issue to be tried?

[15] That question is the threshold requirement. Lord Diplock in **American Cyanamid** said it is sufficient if the Court asks itself: is the applicant's action "not frivolous or vexatious"?, is there "a serious question to be tried"?, is there "a real prospect that he will succeed in his claim for a permanent injunction at the trial"? These may appear to be three subtly different questions but they are intended to state the same test.[6] To determine this, the Court has to determine on a prima facie basis the following two questions; (1) whether the Second Agreement was a nullity and (2) whether Victor International should be considered a party to the Second Agreement.

Is the Second Agreement a nullity?

[16] Dr. Archibald QC trenchantly argued that the interlocutory injunction should be discharged on the ground of law that the foundation of the claim is a nullity. He next submitted that the basis of the claim for the injunction is to be found in the second affidavit of Mr Johnson at paragraph 6 where he states:

> "It appears from the said letter that the Defendants may take some action to prevent the Claimants from carrying out the terms of the agreement that has been reached and they have not been responsive to the Notice of Arbitration that has been served on them."

[17] Dr Archibald submitted that the only agreement to which Mr Johnson referred is the Second Agreement and on the face of it, without going into the law, the Agreement is a nullity as it was "to be" an agreement and it was on behalf of a "to be formed company". He argued that no contract made on behalf of a "to be formed company" is valid. He further argued that the Second Agreement was not signed by or on behalf of Victor International, and Victor BVI did not exist as a legal entity on 4 March 2007 as it became registered on

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[5] See also Eton Consultants Holdings Limited et al v Dorot Properties and Holdings Ltd et al, BVIHCV2007/0209 –per Hariprashad-Charles J. (Judgment delivered on 7 January 2008) and Robelco Limited et al v Svoboda Corporation et al, BVIHCV2007/0311 – per Hariprashad-Charles J. (Judgment delivered on 28 January 2008) [unreported].

[6] Smith v Inner London Education Authority [1978] 1 All E.R. 411 at 419, CA *per Browne L.J* See also Seaconsar v Bank Markazi [1994] A.C. 438, H.L., Canada Trust v Stolzenberg (No. 2) [1998] 1 WLR 547.

14 September 2007. He argued that the Second Agreement is a nullity in law and cannot be ratified. He added that there is not a scintilla of evidence of any attempt that was made by Victor BVI to ratify this agreement.

[18] The relevant portion of the Second Agreement is the first paragraph which states that:

> "Victor International Corporation, a Michigan Corporation through a to be formed British Virgin Island subsidiary company entitled Victor BVI Ltd. ("Victor") intends to purchase a portion of the development and enter into a Joint Venture with Spanish Town to develop market and sell the majority of the Development…"

[19] Dr. Archibald QC relied on the following authorities in support of his submission namely: (i) **Kelner v Baxter and Others**[7], (ii) **Re Northumberland Avenue Hotel Company**[8], (iii) the Privy Council decision of **Natal Land Colonization Company Limited v Pauline Colliery and Development Syndicate Limited**[9] and (iv) **Newborne v Sensolid (Great Britain) LD**.[10] Reference is made to two of the quoted cases because they essentially restate the same principle. Lord Davey in **Natal Land Colonization Company Limited** stated:[11]

> "It is clear that a company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence."

[20] In **Newborne v Sensolid,** while the case was in progress, it was discovered that at the time when the contract was signed, the company, Leopold Newborne was not registered and steps were taken to substitute for the name of the company, as plaintiff that of Leopold Newborne. The Court of Appeal held that Leopold Newborne never purported to contract to sell nor sold goods either as principal or agent. It further held that the contract purported to be made by the company, on whose behalf it was signed by a future director, and as the company was non-existent at the material time, the contract was a nullity.

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[7] (1866) TLR Common Pleas 174
[8] (1886) 33 Chancery Division 16
[9] [1904] AC 120
[10] [1953] 1 QB 45
[11] At page 126 of the judgment

[21] Learned Queen's Counsel, Mr Farara was succinct in his arguments. He submitted that the Defendants have confirmed the existence and validity of the Second Agreement in the Second Defendant's First Affidavit and has repeatedly asserted breaches of the said Agreement by both Claimants. He submitted that this position is only consistent with the existence of a valid Agreement and with both Claimants being parties thereto. Accordingly, says Mr Farara, it is not open to the Defendants to now seek to assert that either of the Claimants is not a party to the Second Agreement or that the Agreement is a nullity.

[22] Moreover, Mr Farara, QC correctly submitted that the judicial authorities relied upon by Dr Archibald is not the current law in England nor is it the current law in the BVI.

[23] Section 104 of the BVI Business Companies Act, 2004 deals with contracts before incorporation. The section provides as follows:

> "(1) A person who enters into a written contract in the name of or on behalf of a company before the company is incorporated, is personally bound by the contract and is entitled to the benefits of the contract, except where
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> (a) the contract specifically provides otherwise; or
>
> (b) subject to any provisions of the contract to the contrary, the company adopts the contract under subsection (2).
>
> (2) A company may, by any action or conduct signifying its intention to be bound by a written contract entered into in its name or on its behalf before it was incorporated, adopt the contract within such period as may be specified in the contract or, if no period is specified, within a reasonable period after the company's incorporation.
>
> (3) When a company adopts a contract under subsection (2),
>
> (a) the company is bound by, and entitled to the benefits of, the contract as if the company had been incorporated at the date of the contract and had been a party to it; and
>
> (b) subject to any provisions of the contract to the contrary, the person who acted in the name of or on behalf of the company ceases to be bound by or entitled to the benefits of the contract."

[24] This very clear statutory provision is the converse to the judicial authorities cited by Dr Archibald. The present state of the law is plain: it is no longer the law that a contract entered into by an individual on behalf of a company before it is incorporated is a nullity. A company can adopt or ratify this contract within a specified time as provided for in the contract or within a reasonable time after it has been incorporated. The Second Agreement was signed by Mr Johnson, on 4 March 2007, on behalf of Victor BVI which was not incorporated until September 2007.

[25] The question which needs to be answered is whether Victor BVI adopted the Second Agreement within a reasonable time after incorporation? Consequent on the making of the Second Agreement, work began on the site. In July 2007, dispute arose between the parties. The Claimants alleged that the dispute arose because of the Henderson's failure to perform their obligations under the Second Agreement while the Hendersons alleged that the Claimants have breached the Second Agreement. Victor BVI was incorporated in September 2007. On 7 December 2007, both Claimants sued the Defendants on the Second Agreement and ask for the relief sought in the fixed date claim form. I agree with Mr. Farara QC that this is prima facie evidence that Victor BVI, by its actions and conduct adopted the Second Agreement within a reasonable term after incorporation and is bound by it.

[26] Furthermore, in her First Affidavit, Mrs Henderson alleges breaches of the Second Agreement by the Claimants, not by Victor International. It therefore appears that the Defendants have accepted that Victor BVI is bound by that contract and its obligations. By virtue of section 104, it appears that Victor BVI is bound and entitled to the benefits of the Second Agreement from 4 March 2007 (the date of the Agreement). Prima facie, I find that the Second Agreement is not a nullity.

Is Victor International a party to the Second Agreement?

[27] Dr Archibald QC contends that Victor International is not a party to the Second Agreement as it did not sign or adopt or ratify this Agreement. It is not in dispute that the Second Agreement was not signed by or on behalf of Victor International. Dr Archibald submitted

that Victor International did not become a party to the Second Agreement and therefore, cannot obtain an injunction based on its fears that the Second Agreement would be interfered with. He therefore sought a discharge of the injunction in so far as it relates to Victor International.

[28] Mr Farara QC correctly submitted that the fact that there is not an actual signature on an agreement in relation to a party does not mean that that party is not bound by the agreement, particularly if they treated themselves as being bound and the other party treated them likewise. He next argued that on the Defendants' own evidence, they treated both the Claimants as bound by the Second Agreement. He referred the Court to several paragraphs in Mrs Henderson's First Affidavit where she alleges that the Claimants have breached the Second Agreement. At paragraph 42 of her affidavit, Mrs Henderson states:

> "At no time after the 6 of March, 2007 did Mr Johnson or the Claimants act in good faith to reach the agreements envisaged by paragraph 24 of the 4 March 2007 document."

[29] At paragraphs 45, 70 and 82 respectively, she avers:

> "The Claimants and Mr Johnson abandoned the 4 March 2007 document by failing or refusing to disclose to the Defendants the various efforts in the USA to sell Oil Nut Bay lands to invited purchasers on the basis of undisclosed deposits taken…"
>
> "The Defendants had no previous knowledge of Oil Nut Bay Development Limited as an entity involved with Oil Nut Bay, and consider this letter to be evidence that Mr Johnson arbitrarily determined to involve the Defendants in his interest in Biras Creek Resort which is a fundamental breach and abandonment of 4 March document and a collapse of any intended joint venture business of any kind between the Claimants and Mr Johnson of the one side and the Defendants of the other side."
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> "As to paragraph 7 of the Second Affidavit the Defendants say that the Claimants have no right or permission or authority to occupy any part of Oil Nut Bay up to the present time except within the limitation set out in paragraph E of the indemnity document stipulated by the Defendants former Counsel Mrs Barbara O'Neal and signed by Mr Johnson at Tab 28 of the First Affidavit, and such right or permission or authority ceased when the Claimants and Mr Johnson fundamentally breached and abandoned the 4 March 2007 document".

[30] In referring to the aforementioned paragraphs, I am admonished by Lord Diplock in **American Cyanamid** that the evidence available to the Court at a hearing such as this is incomplete. It is given on affidavit and has not been tested by oral cross-examination. It follows therefore, that it is not the function of the Court at this stage to resolve conflicts of evidence. However, looking at the averments, it appears that the Defendants have accepted that Victor International is a party to the said Agreement.

[31] In any event, the issue of who is a party to the Agreement is a question of fact to be established by evidence: see **Sims v Audubon Holdings Ltd**[12]. The principle is of ancient vintage. In **Maclaine v Gattey,**[13] Lord Birkhead explained the principle in simple language as:

> "Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his detriment, A is not permitted to affirm against B that a different state existed at the time."

[32] In **John Paul Dejoria and Another v Gigi Osco-Bingeman and Others**,[14] Gordon JA stated that:

> "Estoppel by convention, as I understand the principles, requires that the party raising the estoppel (in this case the appellants) to prove at the very least that both parties to the Agreement acted on an "assumed state of facts or law the assumption being either shared or acquiesced in by the other" **and** that it would be unjust or unconscionable to allow one party to resile from that common assumption. As I understood the argument of Learned Queen's Counsel for the appellants, he would exclude from the criteria for application of this form of estoppel, the requirement of unjustness or unconscionableness. I am unaware of any authority that lends support to this argument… I hold that the party alleging the estoppel must show, in addition to a mistake shared by the parties or acquiesced in by the party alleged to be estopped, that both parties conducted themselves on the basis of that shared or acquiesced in mistake; the estoppel "requires communications to pass across the line between the parties. It is not enough that each of two parties acts on an assumption not communicated to the other".

[33] It appears from these passages that the Defendants treated the Claimants as bound by the contract and it is clear that Victor International considers itself bound by the contract since

[12] BVI Civil Appeal Nos. 14 and 15 of 2006, per Barrow J.A. at paragraphs 42 -47 [unreported].
[13] [1912] AC 376 at 386
[14] Anguilla Civil Appeal No. 4 of 2005, Judgment delivered on 24 April 2006 [unreported].

it has brought the claim with Victor BVI. Nowhere in her 85-paragraph Affidavit did Mrs Henderson assert that Victor BVI is the only party bound by the Second Agreement or that Victor International is not a party to the said Agreement. I go a step further to say that the Defendants, by their signature to the Second Agreement accepted Victor International as the principal party and were fully aware that Victor BVI was to be incorporated as a subsidiary of Victor International to carry into effect the terms of the said Agreement.

[34] At the end of the day, I am of the view that the issue of estoppel raises a serious issue to be tried. It cannot be determined at this interlocutory stage of the proceedings. It is not part of the Court's function at this stage to attempt to resolve conflicts of evidence on affidavits as to facts in on which the claims of either party will ultimately depend nor to decide difficult questions of law which call for detailed and mature considerations.

Damages as an adequate remedy

[35] In **American Cyanamid,** Lord Diplock said at page 408:

> "If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."

[36] I am of the view that damages will not be an adequate remedy for the Claimants as they have expended money, labour and effort in developing the property. By the same token, one may say that damages would not be an adequate remedy for the Defendants as the property has been in their family for generations and must have some sentimental attachments. However, it is to be observed that the Defendants were and are willing to sell the property.

Balance of convenience

[37] Since there are serious issues to be tried, I am of the view that the status quo should be maintained pending the hearing of the claim. The Defendants should not sell the Property and the Claimants should not continue any works on the Property until further Order.

Conclusion

[38] The oral application of Learned Queen's Counsel, Dr Archibald to declare the Second Agreement a nullity is dismissed with costs to the Claimants. In the premises, the interlocutory injunction granted on 20 December 2007 is to continue until further order of this Court.

Postscript

[39] Directions have previously been given for an expedited hearing of the matter and this will be heard following the delivery of this judgment.

Indra Hariprashad-Charles

High Court Judge