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The Move Toward an Indigenous Virgin Islands Jurisprudence: *Banks* in Its Second Decade

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SYMPOSIUM

THE MOVE TOWARD AN INDIGENOUS VIRGIN ISLANDS JURISPRUDENCE: *BANKS* IN ITS SECOND DECADE

*Kristen David Adams**

*In 2011, the Supreme Court of the U.S. Virgin Islands decided *Banks v. International Rental & Leasing Corp.* and, with that decision, introduced a new era in Virgin Islands jurisprudence that embraced a much more active role for Virgin Islands courts and a correspondingly diminished role for the American Law Institute’s restatements. This Essay examines what I will call “second-generation” decisions referencing *Banks* with the goal of determining whether *Banks* and its progeny have met, or are at least in the process of meeting, “the goal of establishing ‘an indigenous Virgin Islands jurisprudence’” set by the *Banks* court. Ultimately, this Essay concludes that this question has now been answered in the affirmative, and strongly so.*

*In reaching this conclusion, this Essay opens by tracking Virgin Islands courts’ increased willingness to reject and modify restatement rules, increasingly clear treatment of the restatements as secondary sources, and increased willingness to adopt minority rules when doing so is the best fit for the Virgin Islands. It continues by exploring several changes in the *Banks* analysis over time, several reasons why courts may decline to do a *Banks* analysis, and several cases that demonstrate that *Banks*’s meaning continues to evolve.*

INTRODUCTION.....	1602
I. REJECTION AND MODIFICATION OF RESTATEMENT RULES	1603
II. CLEARER TREATMENT OF RESTATEMENTS AS SECONDARY SOURCES	1604

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III. ADOPTION OF MINORITY RULES	1607
IV. CHANGES IN THE <i>BANKS</i> ANALYSIS ITSELF	1608
A. <i>More Holistic Analyses</i>	1608
B. <i>The Evolving Analysis of the Best Rule for the Virgin Islands</i>	1609
V. REASONS TO DECLINE A <i>BANKS</i> ANALYSIS	1614
A. <i>Mootness and Ripeness</i>	1614
B. <i>Failure to Fully Brief the Issue</i>	1617
VI. THE STILL-EVOLVING MEANING OF <i>BANKS</i>	1618
CONCLUSION	1621

INTRODUCTION

It has now been well over a decade since the Supreme Court of the U.S. Virgin Islands issued the landmark decision *Banks v. International Rental & Leasing Corp.*¹ *Banks* introduced a new era in Virgin Islands jurisprudence in which the courts of the Virgin Islands have had a much more active role in determining Virgin Islands common law, while the American Law Institute's Restatements of the Law have had a correspondingly diminished role.² The effect of *Banks* came into much sharper focus after the 2014 decision by the Supreme Court of the U.S. Virgin Islands in *Government of the Virgin Islands v. Connor*,³ in which the court set forth the clearest articulation of what has become known as the *Banks* analysis.⁴ The key language from *Connor* follows:

The first step in the analysis—whether any Virgin Islands courts have previously adopted a particular rule—requires the Superior Court to ascertain whether any other local courts have considered the issue and rendered any reasoned decisions upon which litigants may have grown to rely.⁵

The second step—determining the position taken by a majority of courts from other jurisdictions—directs the Superior Court to consider all potential sides of an issue by viewing the potentially different ways that other states and territories have resolved a particular question.⁶

Finally, the third step in the *Banks* analysis—identifying the best rule for the Virgin Islands—mandates that the Superior Court weigh all persuasive authority both within and outside the Virgin Islands, and determine the

1. 55 V.I. 967 (V.I. 2011).

2. The *Banks* decision itself includes a lengthy and thoughtful recitation of the relevant historical context and an in-depth description of the pre-*Banks* state of Virgin Islands jurisprudence. See *id.* at 974–80. See also generally Kristen David Adams, *The Folly of Uniformity?: Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423 (2004) (exploring some of these same themes).

3. 60 V.I. 597 (V.I. 2014).

4. See *id.*

5. *Id.* at 603.

6. *Id.*

appropriate common law rule based on the unique characteristics and needs of the Virgin Islands.⁷

In 2017, I published an article examining the first generation of decisions referencing *Banks*, in which I attempted to identify some trends and best practices.⁸ This Essay examines what I will call “second-generation” decisions referencing *Banks* with the goal of determining whether *Banks* and its progeny have met, or are at least in the process of meeting, “the goal of establishing ‘an indigenous Virgin Islands jurisprudence.’”⁹ This Essay’s goal is to gather in one place most of the recent decisions citing *Banks* in a way that will, I hope, be useful to scholars, practitioners, and other students of Virgin Islands law.

I. REJECTION AND MODIFICATION OF RESTATEMENT RULES

In reviewing the body of second-generation *Banks* decisions, I have noted some trends that differ from what I saw in the first-generation cases. For example, in my prior research, of 102 post-*Banks* cases, only six cases clearly considered and clearly rejected a restatement rule.¹⁰ Second-generation *Banks* cases reveal a number of reasons why a court might reject a restatement rule. A court might, for example, reject or modify a restatement rule that it finds to be poorly written. In *Merchants Commercial Bank v. Oceanside Village, Inc.*,¹¹ for example, the superior court adopted a modified version of the restatement rule on fraudulent misrepresentation because it found the restatement’s language to be circular.¹² Because the court determined that “[t]he principles of law summarized in [the relevant restatement section] have long provided the rule of law for litigants in this jurisdiction,” it “pattern[ed] the soundest rule of law after the principles summarized in [this restatement section]” but modified the language to correct its circularity.¹³

Courts may also reject restatement rules that are substantively a poor fit for the Virgin Islands. In *Arvidson v. Buchar*,¹⁴ the superior court rejected

7. *Id.*

8. See Kristen David Adams, *Living with Banks: Trends and Lessons from the First Five Years*, 46 STETSON L. REV. 391 (2017).

9. *Banks v. Int’l Rental & Leasing Corp.*, 55 V.I. 967, 978 (V.I. 2011) (quoting *Edwards v. HOVENSA, LLC*, 497 F.3d 355, 362 n.3 (3d Cir. 2007)). In preparing this Essay, I have reviewed about 165 cases citing the *Banks* decision, dating from my prior article to the present time. Most of the cases are from the Supreme Court of the U.S. Virgin Islands and the superior courts of the Virgin Islands, but district court and other decisions also appear in these materials. Those cases that cite *Banks* for purposes other than the *Banks* analysis have been omitted in the interest of space, but materials examining those cases are on file with the author.

10. See Adams, *supra* note 8, at 395 & app. A (“Cases in which a Restatement rule was considered, but rejected”); *id.* at 395 & app. B (“Cases in which a Restatement rule was clearly accepted”).

11. 64 V.I. 3 (Super. Ct. 2015).

12. *Id.* at 8 (holding that “a defendant is liable for fraudulent misrepresentation if he ‘fraudulently makes a misrepresentation’” (quoting RESTATEMENT (SECOND) OF TORTS § 525 (AM. L. INST. 1977))).

13. *Id.*

14. 71 V.I. 277 (Super. Ct. 2019).

the restatement's treatment of covenants not to compete in favor of an approach developed under the common law.¹⁵ Although the court noted that the two approaches are substantially similar, it preferred the common-law approach because it "(1) balances the promisee's legitimate business interests against the promisor's hardship incurred as well as the public interest and (2) assesses this balance through the lens of time, place, and manner restrictions."¹⁶ The court also found that the common-law approach better satisfied the *Banks* mandate that Virgin Islands common law be developed through judicial precedent rather than through application of the restatement rules.¹⁷

In addition, a court might reject a restatement rule because it revises, rather than restates, the majority common-law rule. In *Willie v. Amerada Hess Corp.*,¹⁸ in considering the question of whether the Virgin Islands should continue to recognize claims for common-law indemnification, the superior court declined to follow the Restatement (Third) of Torts.¹⁹ In reaching this decision, the court noted that the restatements have changed over time to become more normative and less descriptive: "The American Law Institute, in promulgating revisions to its restatements of the law, has begun, not only to restate the law, but also to revise the law."²⁰

Taken together, these three cases suggest that Virgin Islands courts in second-generation *Banks* cases will not follow a restatement rule that does not serve the jurisprudential needs of the Virgin Islands. The following part provides further evidence of the shift in how the restatements are treated in Virgin Islands jurisprudence.

II. CLEARER TREATMENT OF RESTATEMENTS AS SECONDARY SOURCES

Although Virgin Islands courts sometimes still adopt restatement rules, they typically do so in second-generation *Banks* cases only when the restatement approach represents either a majority rule or a growing trend that the court wishes to adopt as a policy matter. In *Davis v. UHP Projects, Inc.*,²¹ the Supreme Court of the U.S. Virgin Islands considered when a defect occurs within the context of a products liability case and whether different standards should apply based on the type of defect.²² The superior court conducted a *Banks* analysis and, based on that analysis, followed the approach of the Restatement (Third) of Torts on products liability and adopted separate liability standards depending on whether the matter involved a design defect, manufacturing defect, inadequate warnings, or inadequate instructions.²³ The superior court's holding was based on its view

15. *See id.* at 309.

16. *Id.*

17. *See id.* at 298.

18. 66 V.I. 23 (Super. Ct. 2017).

19. *See id.* at 28–29.

20. *Id.* at 29.

21. 74 V.I. 525 (V.I. 2021).

22. *See id.* at 533.

23. *Id.*

that the restatement rule represented a paradigm shift and a modernized approach that a clear majority of jurisdictions have now adopted.²⁴ The supreme court agreed on this point.²⁵

*Turnbull v. Turnbull*²⁶ is an example of a similar approach at the superior court level.²⁷ In that case, the court conducted a *Banks* analysis to determine what was required for a settlor to revoke a non-charitable trust.²⁸ With respect to the second part of the *Banks* analysis, the court held that, “[a]s most jurisdictions have looked to the Restatement of Trusts in one way or another, we find a discussion of the relevant restatements necessary to our analysis.”²⁹ After completing the *Banks* analysis, the court adopted the restatement rule because it was consistent with prior Virgin Islands decisions and reflected the majority rule in other U.S. jurisdictions.³⁰

Likewise, in *FirstBank Puerto Rico v. Webster*,³¹ although the court ultimately adopted the Restatement (First) of Restitution’s approach to what it described as a “unique” question, it did so only after a *Banks* analysis.³² The question in that case was whether a bona fide purchaser of property for value from a foreclosure sale is entitled to the property when the judgment of foreclosure is vacated prior to the passage of title.³³ In considering the question, the court noted, as a preliminary matter, that it could find no case in the Virgin Islands—or in any other jurisdiction—that had considered this precise subject matter.³⁴ The court did, however, find that the commentary to the Restatement (First) of Restitution § 74 had considered the situation and provided two illustrations distinguishing a purchaser that has obtained title from one that has not.³⁵ In addition, in analyzing the illustrations provided in the commentary, the court concluded that the rule “finds support well into the earlier days of American jurisprudence . . . [a]s far back as [an] 1864 [U.S. Supreme Court case that is still good law].”³⁶

The newer Restatement (Third) of Restitution contains a similar rule.³⁷ The court adopted the distinction proposed by the restatement, but only after carefully balancing the public policy considerations supporting the finality of judicial sales against the public policy considerations recognizing that a purchaser that has not yet obtained title is in a position different from one that has.³⁸ This holding suggests that the restatements may continue to be

24. *See id.*

25. *See id.*

26. 68 V.I. 534 (Super. Ct. 2018).

27. *See id.* at 539–42.

28. *Id.* at 540–45.

29. *Id.* at 540.

30. *See id.* at 542.

31. No. ST-12-CV-239, 2018 WL 3812917 (V.I. Super. Ct. July 18, 2018).

32. *Id.* at *2–7.

33. *See id.* at *2.

34. *Id.*

35. *See id.* at *3–4.

36. *Id.* at *3.

37. *See id.* at *5 (discussing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 18 (AM. L. INST. 2011)).

38. *See id.* at *7.

helpful in the Virgin Islands—as in other jurisdictions—when the court is considering a unique question of law for which little or no precedent can be found.

In addition, because courts in second-generation *Banks* cases treat the restatements as persuasive authority, they do not always find it necessary to indicate overtly whether they accept—or reject—a restatement rule that is on point. *Francis v. Carmen V. Ruan Living Trust*³⁹ provides an example.⁴⁰ In that case, the superior court considered how strict liability would apply in the case of a dog bite.⁴¹ In performing its *Banks* analysis, the court used Restatement (Second) of Torts section 509 only as part of the second prong to identify the majority rule used in other jurisdictions.⁴² When the court articulated the soundest rule for the Virgin Islands, the court did not reference the restatement rule at all, even though its holding was consistent with the restatement rule.⁴³ This treatment demonstrates that the court used the restatement as a secondary source.

The Supreme Court of the U.S. Virgin Islands has made clear that treating the restatements as a secondary source is appropriate. In *Reynolds v. Rohn*,⁴⁴ the court reviewed—and ultimately affirmed—the superior court’s *Banks* analysis regarding the elements of tortious legal malpractice.⁴⁵ In doing so, the court noted that the rule, as articulated in the Restatement (Third) of the Law Governing Lawyers, is substantially similar to the rule that Virgin Islands courts had historically used.⁴⁶ As the court stated, “[g]enerally, the Restatements distill the general rules in common law across the country and are typically ‘reflective of the development of the common law.’”⁴⁷ “Consequently,” the court continued, “the Restatements remain ‘helpful guide[s]’ to determining the majority rule, although they are not binding on the Court.”⁴⁸

This small sampling of cases suggests that pertinent restatement sections will continue to be discussed as secondary sources in second-generation *Banks* cases, when and to the extent that they are helpful to the court. Having briefly examined how the restatements are being used in second-generation *Banks* cases, the following part examines the Virgin Islands courts’ increased willingness over time to adopt minority rules.

39. No. ST-15-CV-177, 2016 WL 5867452 (V.I. Super. Ct. Oct. 5, 2016).

40. *See id.* at *3–4.

41. *See id.* at *3.

42. *See id.*

43. *See id.* at *4 (holding that “a landlord may be subject to strict liability, if he has actual knowledge of a tenant’s dog’s dangerous or vicious propensity to act in a way that does not lend itself to mere unruly characteristics”). The Restatement (Second) of Torts provides that “a possessor of a domestic animal that he knows or has reason to know has dangerous propensities abnormal to its class” will be subject to strict liability for harm that is done by the animal. RESTATEMENT (SECOND) OF TORTS § 509 (AM. L. INST. 1977).

44. 70 V.I. 887 (V.I. 2019).

45. *See id.* at 893–95.

46. *Id.* at 894.

47. *Id.* (quoting *Sloan v. Atl. Richfield Co.*, 552 P.2d 157, 160 (Alaska 1976)).

48. *Id.* (alteration in original) (quoting *Simon v. Joseph*, 59 V.I. 611, 623 (V.I. 2013)).

III. ADOPTION OF MINORITY RULES

Second-generation *Banks* decisions show a greater willingness on the part of Virgin Islands courts to adopt a minority rule than first-generation *Banks* decisions did. *Diaz v. Ramsden*⁴⁹ provides an example.⁵⁰ One of several causes of action that the *Diaz* court considered was negligent infliction of emotional distress.⁵¹ As the court noted, pre-*Banks* decisions by Virgin Islands courts had generally followed the majority approach by requiring either physical injury or presence in the “zone of danger.”⁵² After completing its *Banks* analysis, however, the court chose to adopt what it described as the “growing minority” approach.⁵³ In doing so, the court not only noted that several post-*Banks* Virgin Islands decisions had already adopted this approach, but also advanced a distinct policy rationale for its holding: “Courts are concerned with the difficulties inherent in determining liability for NIED claims. These jurisdictions reason that arbitrary legal fictions are unnecessary because advances in medicine and science have led to more accurate methods for determining whether a plaintiff has suffered severe emotional distress.”⁵⁴

Virgin Islands courts may be especially likely to adopt a minority rule when their analysis of the third *Banks* factor reveals policy considerations that are particularly applicable to the Virgin Islands. In *XO Bistro, LLC v. Merrill*,⁵⁵ one of the questions that the court considered was whether third-party reliance should be recognized in the context of a claim for fraudulent misrepresentation when the defendant makes a statement to a third party who then relies on that statement to the plaintiff’s detriment.⁵⁶ After conducting a *Banks* analysis on that issue, the court held that such reliance should be recognized, even though its analysis of the second *Banks* factor revealed that only seven of the nineteen states that had considered the issue had recognized reliance in this context.⁵⁷ In reaching this holding, the court’s analysis of the third *Banks* factor included its observation that, “[p]articularly in the Virgin Islands, a relatively small community, . . . fraudulent misrepresentations against an individual may have the potential to tarnish their reputation and impede their efforts to earn a livelihood.”⁵⁸ On this point, the court concluded that “[t]he best approach for the Virgin Islands is to hold those who make misrepresentations to third parties to the detriment of the plaintiff liable.”⁵⁹

49. 67 V.I. 81 (Super. Ct. 2016).

50. *See id.* at 91–93.

51. *Id.* at 85.

52. *Id.* at 91–92.

53. *Id.* at 93.

54. *Id.* at 95.

55. No. ST-18-CV-780, 2021 WL 3214788 (V.I. Super. Ct. July 21, 2021).

56. *See id.* at *5–7.

57. *See id.*

58. *Id.* at *7.

59. *Id.*; *see also* Halliday v. Great Lakes Ins. SE, No. 18-CV-00072, 2019 WL 3500913, at *9–10 (D.V.I. Aug. 1, 2019) (adopting what the court termed a “compromise” between the minority and majority approaches and holding that an adjuster can be liable to a claimant on

The small sampling of cases in the two prior parts illustrates how the role of the restatements has changed over time and how Virgin Islands courts are increasingly willing to adopt minority rules in second-generation *Banks* cases. The following part explores the evolution of the *Banks* analysis itself.

IV. CHANGES IN THE *BANKS* ANALYSIS ITSELF

A. *More Holistic Analyses*

When I analyzed first-generation *Banks* jurisprudence, I often observed courts emphasizing one of the three *Banks* factors.⁶⁰ In analyzing the body of second-generation *Banks* cases, I generally found courts' reasoning to be more holistic. *Sarauw v. Fawkes*⁶¹ provides a model for such an approach.⁶² In that case, the Supreme Court of the U.S. Virgin Islands established the elements for a claim of judicial estoppel by conducting a *Banks* analysis.⁶³ With respect to the first *Banks* element, the court found prior Virgin Islands cases to be of "little utility" because they had not yet determined the factors required for judicial estoppel.⁶⁴ With respect to the second *Banks* element, the court noted that the U.S. Supreme Court in *New Hampshire v. Maine*⁶⁵ articulated a flexible, non-exhaustive list of factors for state and federal courts to consider when determining whether the doctrine should be applied.⁶⁶ In analyzing the third *Banks* element, the court declined to align itself with those courts that—*notwithstanding New Hampshire*—either required "a showing of success as a necessary condition for applying judicial estoppel" (the "success" approach) or "plac[ing] great weight on whether the party intended 'to play fast and loose with the court,' regardless of whether the party succeeded in the first proceeding" (the "intent" approach).⁶⁷ In reaching this holding, the court noted the purpose of the judicial estoppel doctrine in protecting the integrity of, and public confidence in, the judicial process, and held that any test mandating proof of certain factors in every

a theory of gross negligence but not ordinary negligence, citing the fact that "the Virgin Islands Code contains numerous examples of instances where the Legislature has categorically exempted certain classes of individuals from ordinary negligence but not for gross negligence"); *People v. Rivera*, 68 V.I. 552, 564–68 (Super. Ct. 2018) (adopting the minority rule that a criminal defendant has the right to be present at the hearing of a motion for a new trial when newly discovered evidence is the basis for the motion, based on the customs of courts in the Virgin Islands and the fact that "[t]he Virgin Islands does appear to be unique insofar as the Director [of Corrections] can transfer [their] inmates anywhere in the nation"); *Kiwi Constr., LLC v. Pono*, No. ST-2013-CV-11, 2017 WL 4082061, at *6 (V.I. Super. Ct. Sept. 1, 2017) (adopting minority rule rejecting nonmutual collateral estoppel in the context of arbitration unless the agreement provides such relief to a nonparty).

60. See *Adams*, *supra* note 8, at 425–32.

61. 66 V.I. 253 (V.I. 2017).

62. See *id.* at 260–64.

63. See *id.*

64. See *id.* at 261.

65. 532 U.S. 742 (2001).

66. See *Sarauw*, 66 V.I. at 262–63 (citing *New Hampshire v. Maine*, 532 U.S. 742 (2001)).

67. *Id.* at 263–64.

case would be inconsistent with this purpose.⁶⁸ The court’s decision clearly weighed both the second and third *Banks* factors, but it would be difficult to say with certainty which factor predominated.⁶⁹

*Diamondrock Hospitality Co. v. Certain Underwriters*⁷⁰ provides an example of a holistic *Banks* analysis at the superior court level.⁷¹ In that case, the court conducted two *Banks* analyses, only the first of which is discussed here. In its first *Banks* analysis, the court examined whether reinsurance information is discoverable.⁷² The first *Banks* factor was summarily discussed, since the court found no prior decisions in the Virgin Islands on that issue.⁷³ With respect to the second *Banks* factor, the court found that about half of U.S. jurisdictions allow discovery of reinsurance information in certain, enumerated circumstances.⁷⁴ Under the third *Banks* factor, the court examined several reasons why a court might not wish to allow broad discovery of reinsurance information.⁷⁵ In deciding to follow what it described as the majority rule and to allow discovery of reinsurance information only in four enumerated situations, the court noted that it had weighed all of the *Banks* factors.⁷⁶ It is difficult to determine whether the second or the third factor was outcome-determinative; instead, the court’s analysis seems to have been holistic. Although the court adopted the majority approach, it does not seem to have been the *fact* that it was the majority approach that caused the court to adopt this rule, since the court also advanced other policy factors in explaining its decision.⁷⁷

In addition to the fact that *Banks* analyses are often more holistic in second-generation cases than they were in first-generation cases, the analysis of the third element has evolved, as well. The next section examines this evolution.

B. The Evolving Analysis of the Best Rule for the Virgin Islands

In the first generation of *Banks* cases, courts often applied what I have previously termed a “mathematical approach,” meaning that they “treated the third [*Banks*] factor as almost a mathematical equation of the first and second

68. *See id.* at 264–66.

69. *See id.* at 261–65; *see also* Gov’t of the V.I., Dep’t of Educ. v. St. Thomas/St. John Educ. Adm’rs Ass’n, Loc. 101 *ex rel.* Forde, 67 V.I. 623, 632–40 (V.I. 2017) (holistic *Banks* analysis of circumstances for vacating or modifying an arbitration award).

70. 72 V.I. 185 (Super. Ct. 2019).

71. *See id.* at 189–97.

72. *See id.*

73. *See id.* at 194.

74. *See id.* at 194–96.

75. *See id.* at 196–97.

76. *See id.* at 197.

77. *See id.* at 194; *see also* Gerald v. R.J. Reynolds Tobacco Co., 68 V.I. 3, 57–79 (Super. Ct. 2017) (holistic *Banks* analysis of product defect claims based on a failure to warn or to provide adequate instructions); Percival v. Overbeek, No. ST-15-CV-656, 2017 WL 3754939, at *2–3 (V.I. Super. Ct. Aug. 23, 2017) (holistic *Banks* analysis of offensive collateral estoppel); Gov’t of the V.I. v. Takata Corp., 67 V.I. 316, 413–17 (Super. Ct. 2017) (holistic *Banks* analysis of fraudulent concealment).

elements—that is, if local courts had previously taken a certain position, and a majority of other jurisdictions had done the same, then that approach must be clearly best for the Virgin Islands.”⁷⁸ In second-generation *Banks* cases, this mathematical approach is far less common. Instead, second-generation *Banks* cases typically involve a separate policy analysis of the third element that examines factors specific to the Virgin Islands.

The mathematical approach is not, however, entirely absent from second-generation *Banks* cases. One example can be found in *Greenaway v. Virgin Islands Water & Power Authority*.⁷⁹ In that case, the court adopted the approach in the Restatement (Second) of Torts section 414, which provides that an employer may be liable for the acts of an independent contractor, notwithstanding the usual rule of nonliability, when the employer has both retained and negligently exercised control over the independent contractor and its employees.⁸⁰ In reaching this decision, the court applied a streamlined *Banks* analysis that did not include a separate analysis of the third *Banks* factor.⁸¹ The restatement rule had been followed in the local and federal courts of the Virgin Islands for decades, and it had been adopted in most other jurisdictions, so the court held that it was the soundest rule for the Virgin Islands as well.⁸²

Another application of the mathematical approach occurs when there are no prior Virgin Islands cases to be considered under the first element, and the court holds that the best rule for the Virgin Islands is to adopt the majority rule from other jurisdictions. This approach can be found in *Courtney v. Pineapple Condominium Ass’n*.⁸³ In that case, in considering the interplay between the irrevocability of contracts and agency law, the court concluded that the Virgin Islands should follow the majority approach, without separately analyzing the third factor, and after noting the lack of Virgin Islands case law on point.⁸⁴

78. Adams, *supra* note 8, at 427.

79. 74 V.I. 363, 377 (V.I. 2021).

80. See RESTATEMENT (SECOND) OF TORTS § 414 (AM. L. INST. 1965); *Greenaway*, 74 V.I. at 377.

81. See *Greenaway*, 74 V.I. at 376–77.

82. See *id.* at 377; see also *Lawaetz v. Hamm*, No. SX-11-CV-092, 2020 WL 1875262, at *10–11 (V.I. Super. Ct. Apr. 3, 2020) (adopting the doctrine of equitable deviation); *Finley v. Gov’t of the V.I.*, No. SX-16-CV-456, 2019 WL 7987453, at *3–4 (V.I. Super. Ct. Nov. 12, 2019) (holding that notifications of personnel action should not be recognized as contracts); *Davila v. V.I. Taxi Ass’n*, No. 2018-9, 2019 WL 5270202, at *2–3 (D.V.I. Oct. 17, 2019) (adopting choice-of-law principles from the Restatement (Second) of Conflict of Laws); *Lopez v. Renaissance St. Croix Carambola Beach Resort & Spa*, 70 V.I. 27, 36 (Super. Ct. 2019) (considering whether a third party may enforce an arbitration provision); *Ebner v. Petrohan*, No. ST-14-CV-537, 2018 WL 3996888, at *5–7 (V.I. Super. Ct. Aug. 14, 2018) (determining the elements of a claim of breach of fiduciary duty); *Gerald v. R.J. Reynolds Tobacco Co.*, 67 V.I. 441, 463–66 (Super. Ct. 2017) (ascertaining the parameters of the equitable tolling doctrine in a case of fraudulent concealment); *Smith v. Henley*, 65 V.I. 179, 192 (Super. Ct. 2016) (applying the mathematical approach and holding that the best rule for the Virgin Islands is that pension benefits should be considered marital property, based on both prior Virgin Islands case law and the majority approach in other jurisdictions).

83. 71 V.I. 166 (Super. Ct. 2019).

84. See *id.* at 174.

By contrast, *Atlantic Human Resource Advisors, LLC v. Espersen*⁸⁵ is one of numerous examples of the trend toward providing a more fulsome policy explication of the third element in cases before the Supreme Court of the U.S. Virgin Islands.⁸⁶ In that case, the court considered whether a managerial employee’s statement to a nonmanagerial employee constituted “unprivileged publication to a third party” so as to satisfy that element of a defamation claim.⁸⁷ The court conducted a *Banks* analysis on this question. In adopting the majority rule that such a statement did not satisfy the publication element, the court’s analysis of the third element posited that “the minority rule, if adopted, would necessarily have a chilling effect on employers’ willingness to conduct internal investigations into serious allegations of employee misconduct, as well as the willingness of employees to report potential misconduct by other employees to their supervisors.”⁸⁸

*Bank of Nova Scotia v. Boynes*⁸⁹ is one of many examples of the trend toward conducting an independent policy examination of the third element in the superior courts.⁹⁰ In that case, the court considered whether it should permit claims of prima facie torts.⁹¹ Although the court noted that no *Banks* analysis may actually be required because the Restatement (Second) of Torts identifies prima facie tort as a “general principle rather than a specific rule,”⁹² it nevertheless performed a *Banks* analysis. The court began by noting that all Virgin Islands courts—including the federal courts—have recognized prima facie tort as a cause of action, as have at least twenty-one states and the District of Columbia, thus satisfying prongs one and two of the *Banks* analysis.⁹³ In analyzing the third factor, the court added an independent policy analysis:

Given that prima facie tort fills in gaps in the law and grants relief where there may not be any available, the Court finds that recognition of prima facie tort as a cause of action represents the soundest rule for the Virgin Islands and is in accord with local public policy.⁹⁴

85. No. 2019-0065, 2022 WL 1793689 (V.I. May 27, 2022).

86. *See id.* at *12.

87. *Id.* at *11.

88. *Id.* at *12.

89. No. ST-16-CV-29, 2016 WL 6268827 (V.I. Super. Ct. Oct. 18, 2016).

90. *See id.* at *3 n.16.

91. *See id.* at *3.

92. *Id.* at *3 n.15 (quoting RESTATEMENT (SECOND) OF TORTS § 870 (AM. L. INST. 1979)).

93. *See id.* at *3 n.16.

94. *Id.*; *see also* *Inniss v. Inniss*, 65 V.I. 270, 287 (2016) (adopting the “analytic approach” to the question of how a personal injury settlement would be treated after dissolution of a marriage with respect to equitable distribution “[b]ased on the legislature’s unambiguous intent to preserve the separateness of a spouse’s property within the equitable distribution system of marital property . . . because it is most consonant with the legislative intent underlying the law of the Virgin Islands governing dissolution of marriages”). For other cases providing a comprehensive, independent analysis of the third factor, *see Helman v. Marriott Int’l, Inc.*, No. 2019-36, 2022 WL 3444931, at *9 (D.V.I. Aug. 17, 2022) (declining to extend the “fraud on the market” theory to infer reliance in a class action fraud complaint on the basis that it would extend the theory beyond what had originally been intended and that declining to do so would not cause significant prejudice); *Aarndel v. Hess Oil V.I. Corp.* (*In re* Catalyst

*Irish v. People*⁹⁵ shows the way in which considerations specific to the Virgin Islands may influence the court's analysis of the third *Banks* factor.⁹⁶ In that case, the superior court considered the question of which driver has the right of way at an uncontrolled intersection.⁹⁷ The court adopted the common-law rule providing that the first driver to reach the intersection should have the right-of-way, rather than the precedent in other jurisdictions holding that the vehicle coming from the right side should have the right-of-way.⁹⁸ In reaching this decision, the court found the majority approach to be unworkable, given the topographies of the Virgin Islands which, the court explained, "often do not lend themselves to a grid-like layout of roads and streets because our roads wind and curve and many do not meet at four-way intersections."⁹⁹

Even some cases that may initially seem to adopt a mathematical approach to the third *Banks* factor also include a fulsome policy analysis. In *Wilkinson v. Wilkinson*,¹⁰⁰ the Supreme Court of the U.S. Virgin Islands considered when rescission should be allowed in cases of fraudulent misrepresentation.¹⁰¹ In analyzing the first factor, the court concluded that courts in the Virgin Islands had followed the restatement's rules that are on point, as well as the restatement's definitions of "fraudulent" and "material."¹⁰² In analyzing the second factor, the court found that most other jurisdictions had applied rules that were either the same or substantially similar.¹⁰³ The court, therefore, concluded that the best rule for the Virgin Islands was to follow the restatement's rules allowing rescission after

Third-Party Litig.), 72 V.I. 726, 753 (Super. Ct. 2020) (holding that the Virgin Islands should continue to recognize a cause of action for breach of an indemnification agreement, noting in its analysis of the third factor that "the underlying purpose of contract law . . . is to hold parties to their agreements so that they receive the benefit of their bargains" (quoting *Phillip v. Marsh-Monsanto*, 66 V.I. 612, 621 (V.I. 2017))); *Simon v. Gov't of the V.I.*, 67 V.I. 702, 709–10 (2017) (adopting the majority rule and dismissing a second petition for writ of habeas corpus when both the first and second petitions advance the same issues, noting that doing so "enables the orderly resolution of habeas petitions and preserves judicial comity").

95. 70 V.I. 336 (Super. Ct. 2019).

96. *See id.* at 359–60.

97. *See id.* at 350.

98. *See id.* at 350–52.

99. *Id.* at 359–60; *see also* *Bluewater Constr., Inc. v. CBI Acquisitions, LLC*, 70 V.I. 586, 606–07 (Super. Ct. 2019) (considering—in its analysis of the third *Banks* factor on the question of which jurisdiction's law should govern the interpretation and enforceability of forum selection clauses—that "the Virgin Islands Legislature declared it to be a matter of public policy that disputes centering on insurance contracts and insured policyholders who reside in the Virgin Islands are resolved and adjudicated in Virgin Islands courts under Virgin Islands law"); *Hathiramani v. Hathiramani*, No. ST-03-DI-201, 2018 WL 11274733, at *3 (V.I. Super. Ct. May 31, 2018) (extending the rule from a prior case to cover modification of alimony payments based on a supporting spouse's retirement and explaining that doing so is not only consistent with Virgin Islands common law and statutory law, but also prevents the uncertainty that other jurisdictions have experienced).

100. 70 V.I. 901 (V.I. 2019).

101. *See id.* at 907–14 (conducting *Banks* analysis after noting that the superior court erred in failing to do so).

102. *Id.* at 908–10.

103. *See id.* at 911–12.

showing that the misrepresentation in question was either fraudulent or material, “[g]iven the longstanding and widespread acceptance of these traditional principles of contract law.”¹⁰⁴

Had the court’s analysis ended there, it could fairly have been termed a mathematical analysis. The court continued, however, by noting the policy reasons that supported its holding: “[A]llowing parties to rescind contracts on the basis of either fraudulent or material misrepresentations best promotes the interests of justice and equity by providing a means of relief for those induced to enter into contracts by another party’s misrepresentations, fraudulent or otherwise.”¹⁰⁵

*Bluewater Construction, Inc. v. Hill*¹⁰⁶ provides an example of the same phenomenon at the superior court level.¹⁰⁷ That case involved the question of whether the Virgin Islands should adopt the implied warranty of good workmanship.¹⁰⁸ In the first portion of its *Banks* analysis, the court determined that the best rule for the Virgin Islands was to adopt the cause of action, based on the fact that both pre-*Banks* practice in the Virgin Islands and the practice of “the vast majority of courts outside the Virgin Islands” was to recognize the warranty.¹⁰⁹ The court then considered whether to apply a privity requirement, whether the warranty should extend to repairs as well as new constructions and additions, and how to handle the limitations

104. *Id.* at 913.

105. *Id.*; *see also* Cent. Mortg. Co. v. Powers, No. 2014-0096, 2017 WL 1190383, at *7–8 (D.V.I. Mar. 30, 2017) (adopting the majority approach from other jurisdictions and permitting reformation of mortgages due to mutual mistake because it “will permit land to be alienated” even if “the clear intentions of the parties were not incorporated in the writings”); V.I. Taxi Ass’n v. V.I. Port Auth., 67 V.I. 643, 668–72 (V.I. 2017) (adopting the law-of-the-case doctrine—which had been followed in the Virgin Islands for more than two decades and also by a clear majority of other U.S. jurisdictions—and noting that doing so “precludes indefinite litigation, and promotes consistency, fairness, and judicial efficiency”); Phillip v. Marsh-Monsanto, 66 V.I. 612, 619–21 (V.I. 2017) (“In light of this consistency between case law in the Virgin Islands and other jurisdictions, we adopt these elements [of a breach of contract claim] as the soundest path forward because they comport with the underlying purpose of contract law, which is to hold parties to their agreements so that they receive the benefit of their bargains.”); Stewart v. V.I. Bd. of Land Use Appeals, 66 V.I. 522, 531–33 (V.I. 2017) (“In light of such widespread consistency between our courts and those in other jurisdictions, we conclude that this application of res judicata represents the soundest rule for the Virgin Islands because it protects litigants ‘from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.’” (quoting *Montana v. United States*, 440 U.S. 147, 153–54 (1979))); V.I. Taxi Ass’n v. W. Indian Co., 66 V.I. 473, 493–96 (V.I. 2017) (adopting the majority approach from other jurisdictions as to the question of the extent to which courts may, as a matter of common law, review corporate decision-making, when no Virgin Islands court had examined the matter in detail); Browne v. Stanley, 66 V.I. 328, 333–35 (V.I. 2017) (“In light of such widespread uniformity between our courts and those in other jurisdictions, we have little difficulty in adopting this application of equitable estoppel [that protects an innocent party who reasonably relies on material misrepresentations] as the soundest rule for the Virgin Islands because it promotes equity and justice by preventing one party from taking unfair advantage of another.”).

106. 76 V.I. 15 (Super. Ct. 2022).

107. *See id.* at 25.

108. *See id.*

109. *Id.* at 29.

period.¹¹⁰ In each part of this subsequent analysis, the court considered specific policy considerations. The court decided not to apply a strict privity requirement, noting, among other considerations, “the limited geographical size of the islands, the unique building conditions specific to each island, a housing market predominated by the sale of vacant for-sale homes, and a relative dearth of construction of single-family homes versus the construction of timeshares, condominiums, and resort-style units.”¹¹¹ Likewise, in deciding that the warranty should extend to repairs of existing structures as well as new construction and additions, the court noted “the particular climatic problems faced by Virgin Islanders.”¹¹² Thus, the court’s analysis of the third factor could not be accurately termed as a merely mathematical one because of the additional analysis given.¹¹³

Having explored several aspects of the *Banks* analysis, the next part examines circumstances in which a court might decline to conduct a *Banks* analysis.

V. REASONS TO DECLINE A *BANKS* ANALYSIS

There is a significant body of second-generation *Banks* cases in which courts do not conduct a *Banks* analysis. Courts may decline to do a *Banks* analysis when the issue that would require such analysis is moot or not yet ripe, or when the matter is not properly before the court due to the parties’ failure to fully brief the relevant issues.

A. *Mootness and Ripeness*

The Supreme Court of the U.S. Virgin Islands has recognized the doctrine of mootness, not as a jurisdictional matter, but instead as “an exercise of judicial restraint that, as with other judicially created doctrines, is subject to

110. *See id.* at 35–36.

111. *Id.* at 35.

112. *Id.* at 37.

113. *See also* *Gordon v. Heavy Materials, LLC*, No. ST-20170-CV-127, 2019 WL 11718648, at *4–6 (V.I. Super. Ct. Jan. 18, 2019) (in a case involving a hybrid contract, considering whether to adopt the “predominant purpose” test to determine whether article 2 of the Uniform Commercial Code applies and, after noting that Virgin Islands courts and the majority of other jurisdictions have followed the rule, stating that “the predominant purpose test grants contracting parties reliability so that they are able to structure their contracts and commercial transactions with an eye to which rule of law courts will apply in the event a transaction is disputed”); *Roy v. Banco Popular de P.R.*, No. ST-14-CV-306, 2018 WL 4178704, at *3 n.14 (V.I. Super. Ct. Aug. 29, 2018) (adopting the shareholder standing rule and noting its widespread application but also noting the rule’s “basis in the fundamental principle that a corporation or LLC is a separate legal entity”); *id.* at *6 n.23 (adopting the rule found in the Restatement (Second) of Contracts section 227 disfavoring conditions to a party’s performance and noting not only that a majority of jurisdictions have adopted the rule, but also that the rule serves as a “safeguard[] against contract forfeitures” (quoting *Bank of N.S. v. Herman*, No. ST-10-CV-270, 2016 WL 3007489, at *4 n.13 (V.I. Super. Ct. May 13, 2016)); *Jones v. Lockheed Martin Corp.*, 68 V.I. 158, 191–92 (Super. Ct. 2017) (adopting the rule that the attorney-client relationship is terminated by death and not only noting that this is the majority rule, but also discussing the policy supporting such a rule).

waiver.”¹¹⁴ At times, Virgin Islands courts have declined to conduct a *Banks* analysis because of mootness.

One such example is *Hendricks v. Clyne*,¹¹⁵ which involved the alleged unauthorized use and occupation of land.¹¹⁶ In that case, the superior court noted the lack of binding precedent on the question of whether tacking was available in cases of adverse possession.¹¹⁷ The issue arose because one party alleged that another party was indispensable to the case based on the principle of tacking.¹¹⁸ Even so, because the court held that the party in question was not indispensable regardless of whether tacking applied, the court held that no *Banks* analysis was required as to the issue of tacking because the question had been rendered moot by the court’s holding.¹¹⁹

Similarly, the Supreme Court of the U.S. Virgin Islands has recognized the doctrine of ripeness as a claims-processing rule that can be waived, rather than a binding jurisdictional doctrine.¹²⁰ In applying this rule, “courts will defer from ruling on a claim when ongoing or potential future litigation precludes an informed determination of the issues.”¹²¹ In addition, the Supreme Court of the U.S. Virgin Islands has held that “[a] claim is not ripe if it depends upon contingent future events that may not occur as anticipated, or indeed may not occur at all.”¹²² As with mootness, ripeness has been a reason used by Virgin Islands courts in declining to conduct a *Banks* analysis.

A court may, for example, decline a *Banks* analysis when it determines that there has been a failure to plead sufficient facts to support the claim that would require the *Banks* analysis. One such case is *Smith v. Liger*,¹²³ in which the superior court considered a dispute arising from a three-car collision.¹²⁴ The driver of one of the vehicles, Smith, sued another driver, Liger, on a theory of gross negligence.¹²⁵ Although the court noted the lack of post-*Banks* precedent with respect to gross negligence involving a vehicle,

114. *Vazquez v. Vazquez*, 54 V.I. 485, 489 n.1 (V.I. 2010) (noting that the requirements of Article III of the U.S. Constitution do not apply because the courts of the Virgin Islands are not Article III courts).

115. No. ST-16-CV-147, 2016 WL 6427879 (V.I. Super. Ct. Oct. 28, 2016).

116. *Id.* at *3 n.20.

117. *See id.*

118. *See id.* at *2–3.

119. *See id.*; *see also* *Gerace v. Bentley*, No. SX-2005-CV-00368, 2022 WL 4240671, at *11–12 (V.I. Super. Ct. Sept. 12, 2022) (declining to conduct a *Banks* analysis as to the gist-of-the-action doctrine if it would not apply to the case at bar, even if adopted); *Nelson v. Centerline Car Rentals*, 75 V.I. 126, 139 (Super. Ct. 2021) (determining that no *Banks* analysis was necessary in analyzing a claim of respondeat superior because the plaintiff alleged that the defendant was directly liable for its own behavior, and thus the respondeat superior claim must be dismissed).

120. *See* *Simon v. Joseph*, 59 V.I. 611, 629 (V.I. 2013).

121. *Id.* at 628.

122. *Tip Top Constr. Corp. v. Gov’t of the V.I.*, 60 V.I. 724, 730 n.2 (V.I. 2014) (quoting *Nat’l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687 (2d Cir. 2013)).

123. No. SX-15-CV-345, 2016 WL 9503811 (V.I. Super. Ct. Oct. 3, 2016).

124. *See id.* at *2.

125. *See id.* at *1.

the court held that no *Banks* analysis was necessary because Smith had failed to plead facts sufficient to support a claim of gross negligence.¹²⁶

In other cases, a court might decline a *Banks* analysis once it determines that the factual record would not support the claim requiring a *Banks* analysis, even if it were adopted. In *Mills Electric, Inc. v. GEC, LLC*,¹²⁷ for example, the court conducted only a partial *Banks* analysis on the question of whether the Eichleay Formula should be used to calculate damages for indirect costs associated with construction delay.¹²⁸ The court analyzed the first two *Banks* factors and noted that no Virgin Islands court had addressed the applicability of the formula and that, of the thirteen states that have addressed the formula, six have adopted it and two have rejected it.¹²⁹ In addressing the third factor, focusing on the best rule for the Virgin Islands, the court described the formula as “a legitimate means of calculating unabsorbed overhead costs”¹³⁰ but ultimately held that, even if the court were to adopt the formula, the defendant would not be entitled to damages by application of the formula.¹³¹ The court thus stopped short of declaring the use of the Eichleay Formula to be the best rule for the Virgin Islands.¹³²

A court might also decline a *Banks* analysis on the grounds of ripeness if the matter may be resolved in a way that would eliminate the claim and the need to conduct a *Banks* analysis. On this basis, the superior court in *Smith v. Law Offices of Karin A. Bentz, P.C.*¹³³ declined to conduct a *Banks* analysis as to the elements of tortious legal malpractice.¹³⁴ The alleged malpractice arose from the defendant-lawyer’s failure to file a notice of intent to file a tort claim within the statute of limitations.¹³⁵ Because, however, the plaintiff could still file an application for permission to file such a claim, and because the plaintiff’s claimed damages against the defendant-lawyer would no

126. *See id.*; *see also* Jensen v. Jensen, No. SX-14-CV-400, 2017 WL 6403891, at *7 n.4 (V.I. Super. Ct. Dec. 15, 2017) (declining to conduct a *Banks* analysis as to whether special proceedings should exist for a blind person’s will or trust to be executed in the event of suspicious circumstances because no evidence of suspicious circumstances had been presented); Davies v. Certain Underwriters at Lloyds of London, No. ST-2015-CV-0000637, 2017 WL 773715, at *6 (V.I. Super. Ct. Feb. 24, 2017) (declining to perform a *Banks* analysis as to the question of whether a court may modify a contract based on a scrivener’s error, in a case in which sufficient evidence of such an error had yet to be presented).

127. No. ST-14-CV-522, 2019 WL 11718393 (V.I. Super. Ct. Jan. 23, 2019).

128. *See id.* at *11–15. The Eichleay Formula is a means for calculating extended home office overhead costs. *See* 6 PHILIP LANE BRUNER & PATRICK J. O’CONNOR, BRUNER & O’CONNOR ON CONSTRUCTION LAW § 19:108 (2022).

129. *See Mills Electric*, 2019 WL 11718393, at *12–13.

130. *Id.* at *14–15.

131. *See id.* at *15–16.

132. *Id.* at *14–16; *see also* Davies v. Certain Underwriters at Lloyds of London, No. ST-2015-CV-0000637, 2017 WL 3759810, at *9 n.58 (V.I. Super. Ct. Aug. 25, 2017) (declining to conduct a *Banks* analysis as to the common-law tort of bad faith because any such tort claim would be time-barred).

133. No. ST-17-CV-116, 2017 WL 3123463 (V.I. Super. Ct. July 20, 2017).

134. *See id.* at *4.

135. *See id.* at *3.

longer exist if the application were granted, the court held that the matter was not ripe for review.¹³⁶

In addition to concerns of mootness and ripeness, a court may also decline to conduct a *Banks* analysis when the matter is not properly before the court due to the parties' failure to fully brief the issue. The following section explores this possibility.

B. Failure to Fully Brief the Issue

*Prosser v. Nissman*¹³⁷ is an example of a case in which a court declined to conduct a *Banks* analysis because the parties had not fully briefed the relevant issues.¹³⁸ In that case, the defendant asserted judicial estoppel to support his motion to dismiss libel and other claims against him based on statements he had made in a hearing report.¹³⁹ Because judicial estoppel is a common-law principle, a *Banks* analysis would have been required due to the lack of binding Virgin Islands precedent. Because, however, the defendant failed to brief the issue with *Banks* in mind, but instead cited only nonbinding authority, the superior court held that he had failed to properly bring the issue before the court and thus denied the motion to dismiss on that basis.¹⁴⁰ Similarly, in *Urh v. Buffo*,¹⁴¹ the superior court conducted a partial *Banks* analysis on the question of whether a party waives the statute of frauds as an affirmative defense by admitting the existence of a contract, but declined to make a determination as to the third factor—the best rule for the Virgin Islands—because the parties had not yet fully briefed the issue.¹⁴²

The prior sections endeavor to present a fairly cohesive picture of second-generation *Banks* jurisprudence. The following part shows that parties—and sometimes also courts—still sometimes struggle with the legacy of *Banks* and its meaning.

136. *See id.* at *5.

137. 67 V.I. 96 (Super. Ct. 2016).

138. *See id.* at 102.

139. *See id.* at 99–102.

140. *See id.* at 102 (“It is the responsibility of the movant to properly brief all arguments before the court and cite the appropriate authority.”); *see also* *Selkridge v. Greene*, 76 V.I. 3, 5 (Super. Ct. 2022) (denying the plaintiff’s request for a default judgment that would have ordered deed rescission on the basis that the request, which would have required *Banks* analyses on both whether the Virgin Islands should recognize a claim for rescission based on unilateral mistake and, if so, what the elements of such a claim should be, failed to cite relevant legal authority and was thus not properly before the court); *Yob v. Fawkes*, No. ST-16-CV-114, 2017 WL 11596723, at *3 n.14 (V.I. Super. Ct. Feb. 6, 2017) (declining to deny plaintiffs’ motion to dismiss based on the intervenor’s invocation of forfeiture by wrongdoing because the concept had not been previously applied in a Virgin Islands civil case and the intervenor had declined to brief the requisite *Banks* analysis); *Tutu Park, Ltd. v. Harthman Leasing I, LLLP*, No. ST-14-CV-456, 2016 WL 5853346, at *10 n.79 (V.I. Super Ct. Sept. 27, 2016) (denying plaintiffs’ motion to dismiss defendants’ fraud counterclaim due to plaintiffs’ failure to cite binding authority to support their contention that reliance must be proven and failure to brief the two requisite *Banks* analyses).

141. No. ST-2015-CV-0000315, 2017 WL 476837 (V.I. Super. Ct. Feb. 3, 2017).

142. *See id.* at *5–7.

VI. THE STILL-EVOLVING MEANING OF *BANKS*

There are still some cases in second-generation *Banks* jurisprudence, as there were in the first generation, that show that *Banks*'s effect and meaning are still evolving. As a starting point, courts sometimes seem to struggle with the validity of title 1, chapter 1, section 4 of the Virgin Islands Code.¹⁴³ The 2016 superior court case of *Mosley v. Penn*,¹⁴⁴ for example, cites *Banks* but also references section 4 as if it were still in force.¹⁴⁵ Notably, the *Banks* court itself made a similar reference.¹⁴⁶ As post-*Banks* decisions by the Supreme Court of the U.S. Virgin Islands have clarified, however, section 4 has been implicitly repealed and thus should no longer be cited as if it were good law.¹⁴⁷ Even so, references to this statute still sometimes show up in the case law in a way that could cause confusion.¹⁴⁸ For example, in the 2018 case of *People v. Rivera*,¹⁴⁹ the superior court cited *Banks* for the proposition that “generally, ‘the Virgin Islands legislature intended [the] majority rule to govern in the absence of specific legislation.’”¹⁵⁰ Although this is an accurate quotation from *Banks*, this quotation refers to section 4.

Other cases—especially those from other jurisdictions—demonstrate confusion regarding the proper role of the restatements after *Banks*. In *Doe v. Indyke*,¹⁵¹ for example, the U.S. District Court for the Southern District of New York performed a *Banks* analysis on the question of whether punitive damages against a decedent's estate should be available in the Virgin Islands.¹⁵² In holding that the answer should be “no,” the court's analysis of the second *Banks* element concluded that courts in the Virgin Islands would

143. Title 1, chapter 1, section 4 reads as follows:

The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

V.I. CODE ANN. tit. 1, § 1-4 (2022), *invalidated by Gov't of the V.I. v. Connor*, 60 V.I. 597 (V.I. 2014).

144. No. ST-15-RV-3, 2016 WL 4702427 (V.I. Super. Ct. Sept. 7, 2016).

145. *See id.* at *3 n.29 (citing *Banks* with the explanatory parenthetical “explaining that, although 1 V.I.C. § 4 does not incorporate all of the Restatement provisions as if they were actual statutory text, those provisions are nevertheless persuasive authority”). The same parenthetical is found in *Allen v. Williams*, No. ST-13-CV-82, 2016 WL 11740781, at *5 n.60 (V.I. Super. Ct. Oct. 18, 2016).

146. *See Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 980 (V.I. 2011) (“[W]e conclude that 1 V.I.C. § 4 does not incorporate all of the Restatement provisions as if they were actual statutory text; nor does it delegate to the American Law Institute the authority to enact changes in the law of the Virgin Islands in all of the areas covered by the Restatements.”).

147. *See, e.g., Cacciamani & Rover Corp. v. Banco Popular de P.R.*, 61 V.I. 247, 251 n.2 (V.I. 2014).

148. *See, e.g., United States v. Henry*, No. CR-11-2660, 2017 WL 6729963, at *5 n.4 (D.N.M. Dec. 31, 2017) (discussing section 4 as if it were still good law).

149. 68 V.I. 552 (Super. Ct. 2018).

150. *Id.* at 564 (alteration in original) (quoting *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 983 (V.I. 2011)).

151. 468 F. Supp. 3d 625 (S.D.N.Y. 2020).

152. *See id.* at 635–36.

be likely to adopt the majority rule prohibiting such damages against an estate.¹⁵³ The court reasoned that “[t]his is especially true considering that, before the adoption of the *Banks* analysis less than a decade ago, USVI courts strictly followed the Restatements.”¹⁵⁴ This analysis seems to discount the considerable change in Virgin Islands jurisprudence that *Banks* brought about because it assumes that a contemporary Virgin Islands court would continue to adopt a restatement rule simply due to its status.¹⁵⁵

Other cases show that parties still sometimes struggle with the status of pre-*Banks* case law, the proper use of the restatements, and the role of a *Banks* analysis in judicial decision-making. In *West Indian Co. v. Yacht Haven USVI, LLC*,¹⁵⁶ the district court corrected the plaintiff for relying on a pre-*Banks* district court decision that applied the restatement elements for tortious interference with existing contracts and tortious interference with prospective business relations under section 4.¹⁵⁷ Although, as the court noted, the plaintiff performed a “cursory *Banks* analysis,” the plaintiff failed to cite post-*Banks* decisions by both the Virgin Island’s supreme and superior courts that had adopted different elements and rejected the restatement rule under *Banks*.¹⁵⁸

Likewise, in *Libien v. MIFR (Virgin Islands), Inc.*,¹⁵⁹ neither the plaintiffs nor the defendants cited binding precedent on pleading requirements for punitive damages.¹⁶⁰ The plaintiffs criticized the defendants for citing local superior court and federal district court cases, but then themselves cited the Restatement (Second) of Torts and a U.S. Supreme Court case.¹⁶¹ The court responded by reminding both parties of their obligation to fully brief all issues before the court, including all three *Banks* factors, and that failing to do so may subject the parties to sanctions and may render their pleadings fatally deficient.¹⁶²

Courts also still sometimes prompt one or both parties to fully brief the issues so as to permit the court to conduct its own *Banks* analysis. In *Oxley*

153. *Id.*

154. *Id.* at 635.

155. In a case against the same defendants involving a different plaintiff, another judge in the Southern District of New York applied a traditional *Banks* analysis that does not demonstrate the same potential misunderstanding and also reached the decision that the Virgin Islands would be unlikely to recognize an award of punitive damages against an estate. *See Doe v. Indyke*, 457 F. Supp. 3d 278, 287 (S.D.N.Y. 2020).

156. No. 20-CV-0011, 2022 WL 819453 (D.V.I. Mar. 17, 2022).

157. *See id.* at *6 n.3.

158. *Id.*; *see also* *Virgin Grand Ests. #60 Villa Ass’n v. Certain Underwriters at Lloyd’s, London*, No. 21-CV-00074, 2022 WL 7006213, at *4 n.2 (D.V.I. Oct. 12, 2022) (finding that, because plaintiff had cited the Restatement (Second) and Restatement (Third) of Agency without a showing that Virgin Islands courts had adopted such provisions, the citations were not controlling); *Green v. Sterisil Int’l*, No. SX-17-CV-354, 2018 WL 3636169, at *2 (V.I. Super. Ct. July 26, 2018) (granting plaintiff’s motion to amend because the defendant, in opposing the amendment, sought to apply common-law rules from the Restatements that had been abrogated by statute in the Virgin Islands).

159. No. ST-15-CV-107, 2016 WL 7017642 (V.I. Super. Ct. Nov. 28, 2016).

160. *See id.* at *5.

161. *See id.*

162. *See id.* at *5 & n.35.

v. Sugar Bay Club & Resort Corp.,¹⁶³ the court stated the relevant pleading standard clearly:

[C]onsidering the policy of the Supreme Court of the Virgin Islands requiring the Superior Court to conduct a *Banks* analysis to determine the applicable common law when confronted with an issue of common law that has not yet been adopted by the Supreme Court of the Virgin Islands, in order to enable the Superior Court to recognize a potential *Banks* issue and order the parties to brief it, . . . a complaint should recite the elements of a common law claim so as to make clear the legal theory presented.¹⁶⁴

*Scully v. Peterson*¹⁶⁵ provides an example of the kind of unclear pleading with which the *Oxley* court might have been concerned.¹⁶⁶ In this case, a pro se plaintiff, Scully, brought claims for breach of contract and collusion.¹⁶⁷ The court found it unclear, however, whether Scully was pleading collusion as a separate cause of action (which would have required the court to conduct a *Banks* analysis before adopting the cause of action), or whether he intended to use facts showing collusion to support his claim for breach of contract (which would not have required the *Banks* analysis).¹⁶⁸ The court therefore granted Scully leave to amend his complaint to provide the appropriate clarification.¹⁶⁹

*Gourmet Gallery Crown Bay, Inc. v. Crown Bay Marina, L.P.*¹⁷⁰ further illustrates the hazards of complying with *Banks* only in a perfunctory fashion.¹⁷¹ In that case, the plaintiff grocery store alleged that the defendant landlord had violated the exclusive-use provision of their lease by renting space to another tenant that also sold groceries.¹⁷² The plaintiff sought a preliminary injunction against the defendant, which required the court to balance the hardships that injunctive relief would impose on the plaintiff and on the defendant.¹⁷³ After the superior court denied this relief, the plaintiff appealed to the Supreme Court of U.S. Virgin Islands and argued that the balance-of-the-hardships test should not be applied to the case at bar because the nonmoving party had “acted at their own risk by knowingly violating [the plaintiff’s] contractual rights.”¹⁷⁴ In affirming, the supreme court found that the plaintiff had waived this argument for the purpose of appeal by making a

163. No. ST-18-CV-96, 2018 WL 4002726 (V.I. Super. Ct. May 14, 2018).

164. *Id.* at *5 (footnote omitted).

165. No. ST-16-CV-196, 2018 WL 4348345 (V.I. Super. Ct. Jan. 25, 2018).

166. *See id.* at *4.

167. *See id.* at *1.

168. *See id.* at *4.

169. *See id.*

170. No. ST-2014-CV-513, 2016 WL 7107879 (V.I. Super. Ct. Nov. 30, 2016), *aff’d*, 68 V.I. 584 (V.I. 2018).

171. *See id.* at *6.

172. *See id.* at *1.

173. *See id.*

174. *Gourmet Gallery Crown Bay, Inc. v. Crown Bay Marina, L.P.*, 68 V.I. 584, 600 (V.I. 2018).

“perfunctory” argument consisting of “only a three-sentence *Banks* analysis.”¹⁷⁵

And finally, although there are fewer instances in which the Supreme Court of the U.S. Virgin Islands has found it necessary to correct a superior court for its failure to conduct a *Banks* analysis, the court still does so occasionally. For example, in *Touissant v. Stewart*,¹⁷⁶ the superior court ruled on a motion to enforce a mediated settlement agreement by citing three pre-*Banks* decisions from the District Court of the Virgin Islands that had relied on the Restatement (First) and Restatement (Second) of Contracts.¹⁷⁷ Neither of these had been adopted by the supreme court since *Banks*. Because the superior court committed reversible error by failing to conduct the requisite analysis, the Supreme Court of the U.S. Virgin Islands remanded the matter to the superior court.¹⁷⁸

CONCLUSION

When I examined first-generation *Banks* cases a number of years ago, the question of whether *Banks* had transformed—or would transform—the common law of the Virgin Islands was just beginning to come into focus. Second-generation *Banks* cases suggest that this question has now been answered in the affirmative, and strongly so. Although parties—and even courts—still sometimes struggle with the legacy of *Banks*, second-generation *Banks* cases reveal a growing body of jurisprudence that is unique to, and uniquely suited to, the people of the Virgin Islands. The restatements are now well-established as secondary authority in the Virgin Islands, the courts freely adopt minority rules when doing so is best for the jurisdiction, and the *Banks* analysis has evolved to support the unique policy considerations of the Virgin Islands.

175. *Id.*; see also *Greene v. V.I. Water & Power Auth.*, 67 V.I. 727, 736 (V.I. 2017) (holding the plaintiff waived his law-of-the-case argument by failing to address the elements required for the court to conduct a *Banks* analysis).

176. 67 V.I. 931 (V.I. 2017).

177. See *id.* at 951–52.

178. See *id.* at 952.