

COURT OF APPEAL SITTING

**ANGUILLA
3rd to 4th May 2016**

JUDGMENTS

Case Name: **Westerhall Point Residents Association
Limited
v
Anthony Batihk**

**[GDAHCVAP2015/0004]
(Grenada)**

Date: **Tuesday, 3rd May 2016**

Coram: **The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

Appellant: **Mr. D. Michael Bourne holding for Mr. Alban John**

Respondent: **Mr. Thomas W.R. Astaphan QC holding for Kim
George & Associates**

Issues: **Magisterial Civil Appeal – Covenants affecting land –
Maintenance of estate road by residents’ association
Positive covenant in deed of conveyance to
contribute to maintenance – Benefit and burden
principle – Whether purchaser’s successor in title
bound by covenant**

**Result and
Reason:** **Held: allowing the appeal; setting aside the decision
of the learned magistrate; ordering the respondent to
pay the arrears of maintenance of \$7,690.00 within 21
days; and ordering the respondent to pay costs of
\$500.00 in the court below and \$1,000.00 on the
appeal within 21 days, that:**

1. As a general rule, a positive covenant is a

matter of contract between the parties to the contract and does not run with the land. However, the rule is not absolute and is subject to the exception that a person who takes the benefit of a positive covenant must also subscribe for the burden attached to the covenant, but only where the benefit is related to and conditional upon the burden. The burden as a condition for enjoying the benefit of the covenant can be made in express terms or by implication.

Halsall and others v Brizell and another [1957] 1 All ER 371 applied; Rhone v another v Stephens (Executrix of May Ellen Barnard, decd.) [1994] 2 AC 310 applied.

2. In the present case, the covenants in the Peraya Deed conferred benefits on Dr. Peraya and imposed related burdens on him and other residents of the Development to pay for the maintenance and upkeep of the Estate Road and other common facilities. Although there was nothing in the Peraya Deed that said that the use of the Estate Road is conditional on the payment of maintenance costs, it is clear that the parties to the Deed intended that the purchaser's use of the Estate Road was not gratuitous but that it was conditional on the payment of a proportionate share of the maintenance costs. That the Deed does not state that the positive covenants were to be binding on Dr. Peraya's successors in title is of no moment. What is of consequence is that the right to use the Estate Road is related to and conditional upon paying the proportionate share of the maintenance costs. In the circumstances, the learned magistrate erred in her decision regarding the obligation to contribute to the maintenance of the Estate Road.

Halsall and others v Brizell and another [1957] 1 All ER 371 applied; Rhone v another v Stephens (Executrix of May Ellen Barnard, decd.) [1994] 2 AC 310 applied.

	Comodo Holdings Limited
	v
Case Name:	[1] Renaissance Ventures Limited et al [2] Joseph Katz (as Executor for the Estate of the late Eric D. Emanuel deceased)
	[BVIHCMAP2014/0032] (Territory of the Virgin Islands)
Date:	Tuesday, 3rd May 2016
Coram:	The Hon. Dame Janice M. Pereira, DBE, Chief Justice The Hon. Mr. Mario Michel, Justice of Appeal The Hon. Mde. Gertel Thom, Justice of Appeal
Appearances:	
	Appellant: Mr. Ravi Bahadursingh holding for Vernon Flynn QC instructed by Walkers
	Respondent: Mr. D. Michael Bourne holding for Ogier
Issues:	Civil appeal – Interlocutory appeal – Amendment of pleadings – Amendment of statement of case after date fixed for first case management conference – Adjournment of first case management conference – No directions given – Whether leave required to amend pleadings after first date fixed for case management conference had arrived (albeit adjourned) – Whether learned judge erred in ruling that appellant required leave to amend its reply and defence – Whether learned judge erred in refusing amendment on basis of not broadening claim – Summary judgment – Part 15 of Civil Procedure Rules 2000 – Whether learned judge erred in finding that appellant had no real prospect of successfully defending counterclaim
Result and	Held: allowing the appeal, granting leave to Comodo

Reason:

to amend its reply and defence to counterclaim, ordering that Comodo file and serve the amended document on both parties within 14 days of this judgment, setting aside the judgment of the learned judge with costs to Comodo to be assessed if not agreed within 21 days of this judgment and remitting the claim to the Commercial Court of the British Virgin Islands to be dealt with in accordance with the Civil Procedure Rules 2000, that:

1. Rule 20.1 of the Civil Procedure Rules 2000 (“CPR 2000”) enables a party to amend its statement of case once, without the court’s permission, at any time prior to the date fixed for the first case management conference. Once the date of the first case management conference arises, there can be no amendment of pleadings without first obtaining the permission of the court. It is of no moment that the first case management conference is later adjourned and no directions are given; what triggers the need to obtain the permission of the court is the arrival of the date of the first case management conference. In the case at bar, Comodo desired to amend its pleadings after the date fixed for the first case management conference had arrived, albeit being adjourned. It was therefore necessary to first obtain the leave of the court to do so. The learned judge therefore did not err in holding that Comodo required leave of the court in order to be able to amend its pleadings.

George Allert et al v Joshua Matheson et al
GDAHCVAP2017/0007 (delivered 24th
November 2014, unreported) followed.

2. The learned judge, as part of his case management powers, has a discretion to grant or refuse leave to amend a statement of case. An appellate court will rarely interfere with the exercise of a judge’s discretion unless it can clearly be shown that the learned judge exercised his discretion on either a wrong principle or in a manner contrary to how the discretion should have been exercised, or if the

exercise of discretion has led to a miscarriage of justice. In this case, the learned judge refused the amendments on the basis that he did not want the landscape to be cluttered with allegations of misrepresentations and subsequent dealings of Mr. Emanuel. This is not a proper legal basis upon which the court could refuse to grant permission to amend pleadings. The learned judge failed to address his mind to whether or not the allegations that Comodo wished to proffer in the amendments were hopeless or highly relevant to the claim. The learned judge clearly took into account irrelevant matters in arriving at his conclusion to refuse leave to amend and thus committed an error of principle.

George Allert et al v Joshua Matheson et al GDAHCVAP2017/0007 (delivered 24th November 2014, unreported) followed; Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 applied

3. In determining whether or not leave should be granted, the court is guided by the general principles relevant to applications to amend pleadings and will consider, mainly, if to do so would be in the interest of justice. The court will take a number of factors into account when faced with late amendment applications, including; the exact stage reached in the proceedings, how great a change is made in the issues by the proposed amendments and whether the other side would be prejudiced in a manner for which they cannot be properly compensated.

George Allert et al v Joshua Matheson et al GDAHCVAP2017/0007 (delivered 24th November 2014, unreported) followed.

4. It therefore falls to this Court to exercise its discretion afresh to determine whether or not to grant leave to amend pleadings. In doing so this Court will consider the overriding objective. Disposing of a case justly would

mean that amendments should be allowed to enable real issues to be determined subject to the payment of costs. However, amendments which are futile or frivolous will not be permitted, once the party who is prejudiced can be properly compensated by costs. There is a public interest in allowing a party to deploy its real case, provided it is relevant. The Court will refuse leave to amend the pleadings if the proposed amendments will serve no useful purpose or are fanciful. In the present case, the proposed amendments are neither irrelevant nor hopeless as they impact directly the question of title to the shares and the claim for rectification of the register of shares. The justice of the matter weighs in favour of granting Comodo leave to amend its reply and defence to counterclaim to enable the real issues to be determined, particularly since no trial date has been fixed.

Cook & Carlton Communications Ltd. v News Group Newspapers Ltd (No.2) [2002] EWHC 1070 applied; Dufour and Others v Helenair Corporation Ltd and Others(1996) 52 WIR 188 applied.

5. CPR 15.2 provides that summary judgment is appropriate where the claim or defence and counterclaim has no real prospect of success. While it is recognised that on a summary judgment application, the court is entitled to go behind the evidence which is incredible, the court will also disregard fanciful claims and defences. A claim or defence may be fanciful where it is entirely without substance, or where it is clear beyond question that the statement of case is contradicted by all documents or other material on which it is based. In this case, Comodo's defence is neither frivolous nor fanciful.

Swain v Hillman and another [2001] 1 All ER 91 applied; St Lucia Motors Ltd & General Insurance Co v Peterson Modeste SLUHCVP2009/0008 (delivered 11th January

2010, unreported) followed; Three Rivers District Council v Bank of England [2001] 2 All ER 513 at para 95 applied

6. The summary judgment procedure is unsuitable for claims or issues which would necessitate the court embarking upon a “mini-trial” or to resolve issues which ought to be properly tried. Summary judgment will almost always be inappropriate where there are allegations of reprehensible conduct. Similarly complex claims, cases relying on complex facts and issues involving questions of law and fact where the law is not simple, are likely to be inappropriate for summary judgment.

Swain v Hillman and another [2001] 1 All ER 91 applied; Three Rivers District Council v Bank of England [2001] 2 All ER 513 applied, Hallman Holding Ltd v Webster and another [2016] UKPC 3 applied; Citco Global Custody NV v Y2K Finance Inc BVIHCVAP2008/0022 (delivered 19th October 2009, unreported) 5 followed; Alfa Telecom Turkey Ltd v Cukurova Finance International Ltd et al BVIHCVAP 2009/0001 (delivered 16th September 2009, unreported) followed

7. In the case before the Court, the judge was not merely required to rectify the register but critically would have needed to determine who had title to the shares. He would only be able to properly do so after there is a full ventilation of the issues that have been joined by Comodo and Renaissance. Additionally, the case involved allegations of reprehensible conduct. The issues raised are ideally suited to be determined by the court after it has had the benefit of full arguments. Accordingly, this case was unsuitable for summary disposal and the learned judge therefore erred in awarding Renaissance summary judgment on its counterclaim.

Nilon Ltd & Another v Royal Westminster Investments S.A. & others [2015] UKPC 2

applied Hallman Holding Ltd v Webster and another [2016] UKPC 3 applied.

APPLICATIONS AND APPEALS

Case Name:

**Patricia Yvette Harding
v
The Attorney General of Anguilla
[AXAHCVAP2013/0003]**

Date:

Tuesday, 3rd May 2016

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

**Appellant: Ms. Merlanih Lim, with her Mr. Carlyle Rogers
instructed by Hodge's Law Office holding for Mr.
Horace Fraser**

Respondent: Mr. Ivor Greene of the Attorney General's Chambers

Issue:

**Application for conditional leave to appeal to Her
Majesty in Council**

**Type of Oral
Result / Order
Delivered
(if applicable):**

Oral Judgment or Decision

Result / Order:

- [Oral delivery]**
- 1. Conditional leave is hereby granted to appeal to
Her Majesty in Council on the conditions as
contained in the draft order submitted with the
application as amended by the court.**
 - 2. The conditions are:-**
 - (a) The Appellant do pay into Court security**

in the sum of 500 Pounds Sterling pursuant to Section (5)(a) of the West Indies Associated States (Appeals to Privy Council) Order 1967, such payment to be made within 90 days from today's date. The sum shall be for the due prosecution of the appeal and the payment of all such costs as may become payable by the Applicant in the event of her not obtaining an order granting her final leave to appeal or of the appeal being dismissed for non-prosecution or of the Judicial Committee ordering the Appellant to pay the cost of the appeal as the case may be.

- (b) The Appellant shall apply to the Court within 30 days of the receipt of the Certificate of the Registrar and that the Appellant has otherwise complied with this Order, for an order for final leave to appeal to Her Majesty in Council.
- (c) The Appellant shall prepare the Record of Appeal and shall transmit to the Registrar of the Supreme Court in Anguilla immediately upon final leave to appeal being granted and shall include a copy of the orders granting conditional and final leave to appeal.
- (d) Costs of the application shall be costs in the appeal to Her Majesty in Council.

Reason:

The Court was of the view that the threshold requirements for the grant of an application for conditional leave to appeal to Her Majesty in Council had been satisfied, in that the appeal is from a final judgment and it is in respect of a claim where the value is more than \$2,500.00.

Case Name:

Commissioner Of Police

v

Brandon Busby

[AXAMCRAP2015/0001]

Date: Tuesday, 3rd May 2016

Coram: The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant: Ms. Erica Edwards of the Attorney General's Chambers

Respondent: No Appearance

Issues: Magistrate Criminal Appeal – Possession of firearm without licence – Possession of ammunition for firearm without licence – Discharging firearm in a public place – Whether magistrate's dismissal of complaints and refusal to make conviction unreasonable – Whether decision erroneous on a point of law – Whether decision can be supported having regard to totality of the evidence

Type of Oral Result / Order Delivered (if applicable): N/A

Result / Order: [Oral delivery]
The appeal is removed from the list with liberty to restore, pending service of the notice of appeal and the record of appeal on the Respondent.

Reason: The Court noted that the respondent no longer resides in Anguilla and has not been duly served with the Notice of Appeal and other documents pertaining to the appeal. Counsel for the appellant indicated that she had not filed an application for service out of the jurisdiction but intends to do so. Accordingly, the appeal was removed from the list with liberty to restore pending service of the relevant documents.

Case Name:

**Sheldon Rogers
v
Chris Smith-Brooks**

[AXAMCVAP2015/0001]

Date:

Tuesday, 3rd May 2016

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

Appellant: Ms. Tara Carter instructed by Carter & Associates

Respondent: Ms. Yanique Stewart instructed by J.A.G. Gumbs & Co

Issues:

**Magistrate Civil Appeal – Enforceability of contract –
Absence of consideration/ mutuality of obligation –
Whether magistrate’s decision that there was a
legally enforceable contract unreasonable and
erroneous on point law.**

**Type of Oral
Result / Order
Delivered
(if applicable):**

Oral Judgment or Decision

Result / Order:

[Oral delivery]

- 1. The appeal is allowed. The decision of the magistrate is set aside**
- 2. The Respondent shall pay costs in the appeal and in the court below in the agreed sum of EC\$2,340.00.**

Reason:

The Court noted the essential elements which ought to be present in order for a contract to be legally enforceable; particularly that there ought to be some

form of consideration. The Court found that there was no evidence of such, in that there was nothing to indicate with certainty that there was a mutuality of obligation. There was no evidence of any undertaking or promise by the respondent to the appellant. Further, the learned Magistrate did not point out any consideration for which the promise was made. Accordingly, the Court was of the view that the learned Magistrate erred in her determination that there was an enforceable contract entered into between the appellant and the respondent.

c

Case Name:

**John Harrigan
v
Viceroy Hotel Group (Anguilla) Limited**

[AXAHCVAP2015/0004]

Date:

Wednesday, 4th May 2016

Coram:

**The Hon. Dame Janice M. Pereira, DBE, Chief Justice
The Hon. Mr. Davidson Baptiste, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal**

Appearances:

Appellant:

**Ms. Merlanih Lim, with her Mr. Carlyle Rogers
instructed by Hodge's Law Office**

Respondent:

**Mr. D. Michael Bourne instructed by Keithley Lake &
Associates**

Issues:

**High Court Civil Appeal – Wrongful dismissal –
Section 19 Labour Department Act – Whether learned
judge erred in reversing finding of fact made by
tribunal and making its own assessment of facts
where findings of tribunal can only be appealed on
points of law – Costs**

Type of Oral

Oral Judgment or Decision

**Result / Order
Delivered
(if applicable):**

Result / Order:

[Oral delivery]

- 1. The appeal to this court against the decision of Justice Mathurin rendered in the High Court on 12th February 2015 is accordingly allowed. The judgment of the High Court is set aside and the decision of the Tribunal that the Appellant was unfairly dismissed by the Respondent is restored.**
- 2. There is no basis in law, however, for the determination made by the Tribunal that the dismissal of the Appellant should be treated as redundancy and that he be paid severance pay as well as loss of wages and other benefits that he would be entitled to from the date of termination to the date of the commencement of the tribunal hearing. Accordingly, that decision of the Tribunal is set aside and is remitted to the Labour Tribunal for assessment of the compensation to which the Appellant is entitled in accordance with section 15 (2) and (3) of the Fair Labour Standards Act.**
- 3. There shall be no order as to costs in this appeal and in the court below.**

Reason:

This is an appeal against the decision of Justice Mathurin in which she upheld an appeal by Viceroy Hotel Group against a decision of the Labour Tribunal of Anguilla. There had been submitted to the Labour tribunal a dispute between Viceroy and its employee, John Harrigan, arising from the dismissal of Harrigan by Viceroy following a disciplinary hearing conducted by Viceroy into an altercation between Harrigan, as Viceroy's Director of Security, and an independent contractor working on Viceroy's compound. After a hearing of which Harrigan had no prior notice and in which he had read to him statements by witnesses to the altercation, Harrigan was summarily dismissed by Viceroy. Upon the submission of the dispute to the labour tribunal and the hearing of the dispute by it, the tribunal found that Harrigan's behaviour constituted gross misconduct on his part but that he was not given a fair hearing and so he was unfairly

dismissed, language which by agreement is correct. Viceroy appealed to the High Court pursuant to the Labour Department Act against the decision of the tribunal whereupon the High Court made a factual finding that Harrigan was in fact given a fair hearing and accordingly upheld Viceroy's appeal, set aside the decision of the labour tribunal and awarded costs on the appeal to Viceroy in the sum of US\$4,000.00. Harrigan appealed to the Court of Appeal citing seven grounds of appeal. The appeal, however, proceeded essentially on the ground of whether the High Court erred in reversing a finding of fact made by the tribunal making its own assessment of the facts and substituting its finding for that of the tribunal. The learned judge made no finding of any error of law on the part of the tribunal. The Court was of the view that pursuant to section 19 of the Labour Department Act, it was impermissible for the High Court to overturn a finding of fact made by the tribunal since section 19 specifically provided that : "The finding of a tribunal shall be final and binding and may only be appealed on a point of law." The Court found no basis in law, for the determination made by the tribunal that the dismissal of Harrigan should be treated as a redundancy and that he be paid severance pay as well as lost wages and other benefits that he would be entitled to from the date of termination to the date of the commencement of the tribunal hearing and accordingly set aside that decision of the tribunal and remitted the matter to the labour tribunal for assessment of the compensation to which Harrigan is entitled in accordance with section 15(2) and (3) of the Fair Labour Standards Act.