

COURT OF APPEAL SITTING

MONTERRAT
2nd – 4th December 2013

APPLICATIONS AND APPEALS

Case Name:

Aileen Ross
V
The Montserrat Centre Ltd.

[MNIHCVAP2013/0002]

Date:

Monday, 2nd December 2013

Coram:

The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal
[Ag.]
The Hon. Mde. Gertel Thom, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. David Brandt

Respondent: Ms. Marcelle Watts

Issues:

Application for permission to file a notice of appeal and skeleton arguments – Damages

Result / Order / Reason:

[Oral delivery]
The application of the appellant to file a notice of appeal and skeleton submissions is withdrawn and accordingly dismissed.

Case Name:

James White Jr.
V
Felix Awudo

[MNIMCVAP2012/0001]

Date: Monday, 2nd December 2013

Coram: The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]
The Hon. Mde. Gertel Thom, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Jean Kelsick

Respondent: Mr. David S. Brandt

Issues: Civil appeal – Whether the decision of the learned magistrate that it was not a requirement of the oral contract for the door frames and casings to be delivered to the appellant in person where there was no term in the oral contract as to the method of delivery of the door frames and casings was erroneous – Whether the decision of the Magistrate was erroneous in law as the 12 casings were delivered to the work site but not to the appellant in person who was the owner of the property/work site

Result / Order: [Oral delivery]
1. The appeal is dismissed.
2. Costs awarded to the respondent in the sum of two thirds of the sum of \$750.00, this sum being the costs awarded in the court below.

Reason: The respondent was contracted to build 12 casings for the appellant. The complaint of the appellant was that he was not satisfied with the work done by the respondent and he rejected the casings after they were made, delivered and installed.

The magistrate was satisfied from all the evidence that the casings were made and delivered; this was a finding of fact.

The Court held that the law is that an appellate court should be slow to disturb a finding of fact made by a magistrate who had the benefit of seeing the witnesses and hearing the witnesses gave oral evidence. An appellate court should not come to a different conclusion unless it is satisfied that any advantage enjoyed by the trial judge in hearing and seeing the witnesses could not be sufficient to justify their conclusions. The Court of Appeal may take a different view without having seen or heard the evidence and can come to a conclusion on the printed evidence if the reasons given by the magistrate are not satisfactory on the evidence.

The Court applied those principles of law and ultimately held that in this case the appeal must be rejected.

Case Name:

**[1] Denzil Edgecombe
v
[1] The Premier
[2] The Attorney General

[MNIHCVAP2013/0003]**

Date:

Monday, 2nd December 2013

Coram:

**The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal
[Ag.]
The Hon. Mde. Gertel Thom, Justice of Appeal
[Ag.]**

Appearances:

Applicant / Intended In person

Appellant:

Respondent: Ms. Amelia Daley

Issues: Application for leave to appeal – Application for adjournment

Result / Order: [Oral delivery]
The appeal is adjourned to the next sitting of the Court of Appeal in Montserrat during the week of 23rd June 2014.

Reason: The applicant/intended appellant requested an adjournment of the matter. There was no objection to the application for adjournment from counsel for the respondents.

Case Name: Charlesworth Piper
V
Montserrat Land Development Authority
[MNIMCVAP2013/0001]

Date: Monday, 2nd December 2013

Coram: The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]
The Hon. Mde. Gertel Thom, Justice of Appeal [Ag.]

Appearances:

Appellant: In person

Respondent: Mr. Kharl Markham

Issues: Civil appeal – Application for adjournment

Result / Order: [Oral delivery]
The hearing of this appeal is adjourned and traversed to the next sitting of the Court of Appeal in Montserrat during the week of 23rd June 2014.

Reason: The appellant requested an adjournment of the matter. There was no objection to the application for adjournment from the respondent.

Case Name: Marie T. Ryan
v
Mervin Browne

[MNIMCVAP2012/001A]

Date: Monday, 2nd December 2013

Coram: The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal
[Ag.]
The Hon. Mde. Gertel Thom, Justice of Appeal
[Ag.]

Appearances:
Appellant: Ms. Marcelle Watts
Respondent: In person

Issues: Civil appeal – Application for adjournment

Result / Order: [Oral delivery]
The hearing of this appeal is adjourned and traversed to the next sitting of the Court of Appeal in Montserrat during the week of 23rd

June 2014.

Reason: The respondent requested time to retain the services of an attorney.

Case Name: [1] The Central Tenders Board
[2] The Attorney General
v
[1] Vernon White (trading as White Construction Services)

[MNIHCVAP2012/0008]

Date: Tuesday, 3rd December 2013

Coram: The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]
The Hon. Mde. Gertel Thom, Justice of Appeal [Ag.]

Appearances:
Appellant: Mrs. Sheree Jemmotte-Rodney
Respondent: Mr. Kharl Markham with him Ms. Chivonne Gerald

Issue: Application for leave to appeal to Her Majesty in Council

Result / Order: [Oral delivery]
1. The applicants/appellants are hereby granted leave to appeal to the Judicial Committee of the Privy Council on the following grounds:
(a) the applicants/appellants shall within 90 days of the date hereof enter into good

surety with the Registrar in the sum of five hundred pounds (£500.00) for the due prosecution of the appeal and the payment of all costs as may become payable by the applicants/appellants in the event of their not obtaining an order granting final leave to appeal or of the appeal being dismissed for non-prosecution or the Judicial Committee ordering the applicants/appellants to pay the costs of the appeal (as the case may be).

- (b) The parties shall abide by Rules 18 to 20 of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 and Practice Directions 4.2.1 to 4.2.3 and Practice Direction 5. The file shall be transmitted to the Registrar of the Judicial Committee of the Privy Council once final leave has been granted.
- (c) The applicants/appellants shall take the necessary steps without delay for the purpose of procuring the preparation of the Record and dispatch thereof to England.
- (d) The applicants/appellants shall make an application to the Court for final leave to appeal to the Judicial Committee of the Privy Council accompanied with the Certificate of the Registrar showing the payment of the security for costs for the prosecution of this appeal as prescribed in this Order.
- (e) The costs of this application shall be costs in the appeal.

Reason:

Appeals to the Privy Council are governed by section 3(1) of the Montserrat Appeals to the Privy Council Order 1967. The test outlined there for granting leave to appeal to the Judicial Committee of the Privy Council is where the decision being appealed is a final decision of the Court of Appeal and the matter in dispute is of a value of 300 pounds or greater, then an appeal lies as of right to the Privy Council.

The claim in this case is for judicial review of the decision to reject or deny a tender bid for the construction of a school on the ground of procedural irregularity. There is no doubt that the subject matter of the claim is valued in excess of 300 pounds thereby making the appeal to the Privy Council as of right.

Case Name:

Yusuf Muhammed

v

Selsi Limited

[MNILTAP2012/0001]

Date:

Tuesday, 3rd December 2013

Coram:

The Hon. Mde. Louise E. Blenman, Justice of Appeal

The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

The Hon. Mde. Gertel Thom, Justice of Appeal [Ag.]

Appearances:

Appellant:

Mr. Jean Kelsick

Respondent:

Mr. David S. Brandt

Issues:

Civil appeal – Employment law – Whether the finding of the Labour Tribunal that the appellant was not an employee of Selsi Limited was correct in law – Whether the finding of the Labour Tribunal that the appellant was not an employee of Selsi Limited was consistent with the findings of fact made by the Labour Tribunal – Whether the Labour Tribunal addressed its mind to the burden of proof as prescribed by the Employment Ordinance in finding that the appellant was not an employee of Selsi Limited – Whether the finding of the Labour Tribunal

that the appellant was employed as an independent contractor was correct in law

Result / Order:

[Oral delivery]

1. The question of the calculation and award of any severance pay or alternatively compensation or redundancy pay to which Mr. Muhammed is entitled based on his claim, is remitted for consideration and determination by the Labour Tribunal.
2. No order as to costs.

Reason:

The Employment Act, Cap. 15.03, Revised Laws of Montserrat 2008, provides at section 41 that an appellant has a right of appeal only on a point of law, by way of a case stated from a decision of the Tribunal to the Court of Appeal. In order for the appellant to succeed he has to show that the Tribunal misdirected itself in law or its decision was one of which no Tribunal properly directed could have reached on the facts. In the House of Lords case of *Edwards (Inspector of Taxes) v Bairstow and Another* [1956] AC 14 the Lords made it clear that the Court of Appeal should only interfere with the conclusion which no reasonable Tribunal, properly instructed, could have reached. The Lords went on to deprecate the suggestion that since the question whether a contract was frustrated was one of law the court was free to decide the matter itself contrary to the decision of the arbitrators. Sir John Donaldson MR in *O'Kelly and Others v Trusthouse Forte P.L.C* [1984] QB 90 set out the approach which an appeal court should adopt in reviewing the decision of a tribunal on a question of law. He said at page 122:

“The appeal tribunal is a court with a statutory jurisdiction. So far as is material, that jurisdiction is limited to hearing appeals on questions of law arising from any decision of, or arising in any proceedings before, an industrial tribunal ... If it is to vary or reverse a

decision of an industrial tribunal it has to be satisfied that the tribunal has erred on a question of law”.

Sir John Donaldson further held that the court has to be satisfied that the Tribunal has erred on a question of law. The court must otherwise loyally accept the conclusions of fact with which it is presented.

Following those principles, the Court stated that it had no doubt that an appellate court could interfere with a decision of a Tribunal only in the following circumstances:

- (a) If the Tribunal was positively wrong in law; or
- (b) If the only reasonable conclusion on the facts found by the Tribunal was inconsistent with the determination it came to (See the judgment of Lord Griffiths in *Lee Ting Sang v Chung Chi-Keung and Another* [1990] 2 AC 374 and Lord Radcliffe in *Edwards (Inspector of Taxes) v Bairstow and Another* [1956] AC 14.

The Court went on to hold that it is well established that the question of whether someone is or is not employed under a contract of employment is a question of fact for a Tribunal. In arriving at its finding, a Tribunal reasonably directing itself would consider the following factors, adapted from Chitty on Contracts Twenty Sixth Edition, Volume II, at paragraph 3858:

- (a) the degree of control exercised by Selsi Ltd. over Mr. Muhammed;
- (b) whether Mr. Muhammed's interest in the relationship with Selsi Ltd involved any prospect of profit or loss;
- (c) whether Mr. Muhammed was properly regarded as part of Selsi Ltd.'s organization;
- (d) whether Mr. Mohammed was carrying on business on his own account or carrying on the business of the

- employer;
- (e) the provision of equipment by Selsi Ltd.;
- (f) the incidence of tax and national insurance;
- (g) the fact Selsi Ltd. applied for and obtained a work permit for every year Mr. Muhammed worked for it;
- (h) the duration of the time the appellant worked for Selsi Ltd; during that period the pay slips and stubs to Mr. Muhammed, and the preparation of time sheets in relation to him;
- (i) the parties' own view of their relationship; and
- (j) the traditional structure of the trade or procession concerned and the arrangements within it.

The Court agreed with the appellant that the Tribunal failed to formulate the test completely. If it omitted some of the key ingredients of the test and failed to give proper weight to the legal consequences of some that it did identify, such as the legal effect of the applying for the work permits and the submission of the PAYE and Social Security payments as employer on behalf of Mr. Muhammed, then it omitted to take into consideration all of the relevant factors. Instead, it placed undue emphasis on the statements made in cross-examination by Mr. Muhammed that he worked for himself, and sometimes when they (the respondent) called him he told them he had something else to do. The Court did not consider that those statements outweighed the preponderance of the evidence to the contrary.

If the Tribunal had properly addressed its mind to the other factors that were placed before it, and had correctly weighed those factors, acting reasonably, it ought to have concluded that a contract of service existed between Mr. Muhammed and Selsi Ltd. The Court accepted the submissions of counsel for the appellant that no Tribunal properly addressing itself to

the facts could reasonably have come to the conclusion that Mr. Muhammed was an independent contractor. In that regard, the Court could intervene.

In view of the findings above, the Court answered the questions in the case stated as follows:

- (a) Whether the finding that at the material time Mr. Muhammed was not an employee of Selsi Ltd?

The Court found that he was an employee.

- (b) Whether the finding that Mr. Muhammed was not an employee of Selsi Ltd was consistent with the findings of fact made by the Labour Tribunal in its written decision?

The Court found that the finding was not consistent with its findings of fact.

- (c) Whether in finding that Mr. Muhammed was not an employee of Selsi Ltd the Labour Tribunal addressed the burden of proof prescribed by the Employment Act correctly or at all?

The Court was satisfied that as a matter of law he who asserts must prove, and since it was the claimant/appellant who asserted that he was an employee, then it was he who had to prove that he was an employee.

- (d) Whether the finding that Mr. Muhammed was employed as an independent contractor under a contract for services is correct?

The Court answered no.

- (e) Whether the Labour Tribunal erred in law by failing to address the submission of

counsel for Mr. Muhammed at the hearing of this application that, in contravention of the Employment Act, Selsi Ltd. was contracting out of the provisions thereof?

The Court considered that in view of the findings above this question becomes otiose.

- (f) The Court was of the view that there was no need to deal with the further subsidiary questions raised in paragraphs (f), (g) and (h), of the case stated. The Court considered that those were matters that would be more properly dealt with by the Labour Tribunal.

Case Name:

**William Taylor
v
The Commissioner of Police
[MNIMCRAP2012/0006]**

Date:

Tuesday, 3rd December 2013

Coram:

**The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]
The Hon. Mde. Gertel Thom, Justice of Appeal [Ag.]**

Appearances:

Appellant: Mr. Hogarth Sergeant

Respondent: Ms. Kathyann Pyke

Issues:

Criminal appeal – Willful obstruction of police officer and unlawful assault – Whether the learned magistrate properly convicted the appellant of the offences of unlawful

obstruction of a police officer in the due execution of his duty contrary to section 313(a) of the Penal Code Cap. 4.02 of the Laws of Montserrat and unlawful assault on a police officer of the Royal Montserrat Police Service contrary to section 189 of the Penal Code Cap. 4.02 of the Laws of Montserrat

Result / Order:

[Oral delivery]

The appeal is dismissed and the conviction is affirmed; the sentence is upheld.

Reason:

The Court was of the opinion that the magistrate acted properly in convicting the appellant of the offences as charged. Consequently, there was no reason to upset magistrate's decision.

Case Name:

Thomas Allen

v

The Queen

[MNIHCRAP2013/0004]

Date:

Tuesday, 3rd December 2013

Coram:

The Hon. Mde. Louise E. Blenman, Justice of Appeal

The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

The Hon. Mde. Gertel Thom, Justice of Appeal [Ag.]

Appearances:

Appellant:

Mr. David S. Brandt

Respondent:

Ms. Kathyann Pyke

Issues:

Criminal appeal against sentence of 15 months

and 19 days – Unlawful sexual intercourse with a girl under 16 years – Whether the learned trial judge took into account the statement of the probation officer that the virtual complainant had two encounters with the appellant, one at Cudjoe Head and the other at Salem, despite the fact that the legal representative for the appellant told the learned trial judge to banish from her mind any reference to the incident at Cudjoe Head as that incident was not before the court – Whether the learned trial judge erred in failing to deduct 1/3 from the notional sentence after the appellant admitted to having unlawful sexual intercourse to the Police at the Preliminary Inquiry and had pled guilty to the offence at trial – Whether the learned trial judge failed to take into account that the offence for which the appellant had pled guilty was his first offence – Whether the learned trial judge erred in failing to inform the legal representative for the appellant whether 1/3 was deducted from the maximum sentence or notional sentence

Result / Order:

[Oral delivery]

1. The appeal is allowed.
2. The sentence of the High Court imposed on the appellant of fifteen (15) months, nineteen (19) days is hereby varied and substituted with a sentence of six (6) months imprisonment to take effect from the 12th of July 2013, the date of conviction of the appellant.
3. All periods spent on remand are to be deducted in calculating the term of imprisonment of six (6) months.

Reason:

The Court found that the mitigating factors were overwhelmingly in favour of the appellant as he had no previous convictions. He pleaded guilty on his arrest and pleaded guilty to his offenses at trial. Further, there was no violence involved in the commission of the offence.

The Court concluded that the mitigating factors

clearly outweighed the aggravating factors. In so far as the appropriate sentence is concerned, the Penal Code, Cap. 4.02, Revised Laws of Montserrat 2008, has imposed a maximum sentence of two (2) years for the offence. The learned trial judge was required to determine the notional sentence. The notional sentence in this case is one (1) year. In this case, where the appellant pleaded guilty at the trial, he ought to have been given a one third reduction in sentence. The only aggravating factor in this case is that the appellant was a grown man having sexual intercourse with a girl under the age of sixteen (16) years.

The Court further noted that the appellant should also have been given credit for time spent in prison awaiting trial.

Case Name:

Sean Knights

v

The Queen

[MNIHCRAP2013/0003]

Date:

Tuesday, 3rd December 2013

Coram:

The Hon. Mde. Louise E. Blenman, Justice of Appeal

The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]

The Hon. Mde. Gertel Thom, Justice of Appeal [Ag.]

Appearances:

Appellant:

Mr. David S. Brandt

Respondent:

Ms. Kathyann Pyke

Issues:

Criminal appeal – Unlawful wounding

Result / Order:

[Oral delivery]

The hearing of this appeal is adjourned and the matter is traversed to the next sitting of the Court of Appeal in Montserrat during the week of 23rd June 2014.

Reason:

To facilitate the attendance/appearance of the appellant.

Case Name:

[1] Geraldine Cabey

v

**[1] His Excellency the Governor of
Montserrat**

[2] The Attorney General

[MNIHCVAP2012/0009]

Date:

Wednesday, 4th December 2013

Coram:

**The Hon. Mde. Louise E. Blenman, Justice of
Appeal**

**The Hon. Mr. Don Mitchell, Justice of Appeal
[Ag.]**

**The Hon. Mde. Gertel Thom, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Mr. Jean Kelsick

Respondent:

Mrs. Sheree Jemmotte-Rodney

Issues:

Civil appeal – Whether the decision of the Governor to retire the appellant in the public interest was illegal and infringed the principles enunciated in R v Sussex Confirming Authority ex parte Tamplin & Sons' Brewery (Brighton), Ltd. (1937) 4 All ER 106 which indicated that an objective test ought to be

utilized when determining the “public interest”
– Whether there was sufficient evidence for the learned trial judge to find that the relationship between the appellant and the public service had been so damaged and confidence undermined – Whether the decision of the Governor to retire the appellant was irrational, irregular and procedurally unfair – Whether the learned trial judge erred when he found that there was no basis for concluding that the decision of the Governor was influenced by bias, bad faith or was improperly motivated – Whether the learned trial judge failed to consider the contentions based on the appellant’s pleadings, evidence and written submissions that her retirement was unconditional, and additionally due to the respondent’s errors of the law and/or illegal conduct, breach of statutory duty, negligence, misfeasance in public office, her retirement was wrong in law

Result / Order:

[Oral delivery]

1. The appeal is dismissed and the order of the learned trial judge is affirmed.
2. There is no order as to costs.

Reason:

The Court found that at paragraphs 31 to 39 of the lower court judgment the learned trial judge stated what he considered to be the only the effect of R v Sussex. Further, the learned trial judge opined that the decision of the Governor could only be challenged successfully on the grounds that the discretion was improperly exercised for example on the grounds of improper motive, bias, or bad faith or a breach of the rules of natural justice and that there was no basis to impose any other condition.

The Court was of the opinion that the legislation gave the Governor the discretion to retire a public servant in the public interest once the Governor had regard to all relevant factors such as public confidence, relationships between the

claimant and colleagues, the efficiency of the department and its smooth functioning. The Court considered that the Governor did put his mind to these matters before retiring the appellant.

The Court reviewed the careful analysis of the trial judge and found that the Governor's decision to retire the appellant was intra vires regulation 35(1) of the Public Service Commission Regulations Cap. 1.06, and General Orders of Montserrat 43, 219 and 220. There was no evidential basis on which the learned trial judge could have come to a conclusion to the contrary.

Learned counsel for the Crown asked the Court to find that the Governor had proper reasons to retire the appellant in the public interest based on the reasons given by the Governor, some of which were clearly articulated in the letter of 15th December 2006. Counsel for the Crown reminded the Court that the recommendation that the appellant be retired in the public interest came from the Public Service Commission ("PSC"), an independent body, and this was after they had carefully considered the record of the Transcript and the Reports that were submitted both by the appellant and the Financial Secretary. It was as a consequence of the recommendation that the Governor acting independently came to the conclusion that a retirement in the public interest was desirable. Counsel stressed that there was not a scintilla of evidence before the Court from which it could be concluded that the decision was irrational. The Court agreed with the submissions of counsel and was of the view that there was no basis upon which it could properly conclude that the Governor's decision was irrational or that she took into account irrelevant considerations.

In relation to bias, the Court had no doubt that looking at the entire matter and at everything that transpired in relation to the Financial

Secretary, the PSC and the Governor, the latter being the one who made the actual decision, there was no basis for any of the allegations of bias made by the appellant. In so far as they were made before the learned trial judge and rejected, the Court agreed with the conclusion the learned trial judge came to.

Counsel for the appellant asserted that the decision of the learned trial judge was procedurally irregular and unfair in light of a number of circumstances including the premature advertisement of the Post of Accountant General while the appellant was still the Office Holder. Counsel for the respondent maintained that there was no procedural irregularity or unfairness occasioned by the premature advertisement of the post of Accountant General. Counsel asked the Court to accept that it was indeed an administrative error and to place significant weight on the intimation of the Governor when she sought to assure the appellant that neither the PSC nor herself was implicated in that erroneous advertisement of the post. The Court carefully reviewed the evidence of both the appellant and the respondents, the judgment of the learned trial judge and the submissions, both written and oral, and agreed with the conclusion the learned trial judge arrived at. The Court found no merit in the complaint that the decision of the learned trial judge was procedurally irregular and unfair.

On the ground of appeal of whether the learned trial judge failed to consider the contentions based on the appellant's pleadings, evidence and written submissions that her retirement was unconditional, and additionally due to the respondent's errors of the law and/or illegal conduct, breach of statutory duty, negligence, misfeasance in public office, her retirement was wrong in law, the Court found that the learned trial judge made no specific findings on those matters. The Court considered the allegations and was of the view that there no scintilla of

evidence on which the appellant could have prevailed.

Finally, in relation to costs, the matter being a judicial review matter and taking into account rule 56.13(6) of the Civil Procedure Rules 2000 which states that the general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application and the Court being of the opinion that the appellant did not act unreasonable in making the application or in the conduct of the application, the Court was of the opinion that there should be no order as to costs.

Case Name:

**[1] The Attorney General
[2] Planning and Development Authority
[3] Easton Farrell-Taylor**

v

**[1] Jon Miller
[2] Steve Price
[3] Andy Burk
[4] Ed Berger
[5] Hank Henry
[6] Eric Tomme
[7] Greg Mehring
[8] Gerry Blomquist
[9] Troy Deppermann
[10] George G. Walker, QC**

[MNIHCVAP2012/0011]

Date:

Wednesday, 4th December 2013

Coram:

**The Hon. Mde. Louise E. Blenman, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal**

[Ag.]
The Hon. Mde. Gertel Thom, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mrs. Sheree Jemmotte-Rodney
Respondent: Mr. John Fuller

Issues:

Civil appeal – Whether the decision of the learned trial judge was correct in law when he ruled that the appellants were estopped from arguing that the respondents had not filed their fixed date claim form out of time after they had been granted an extension of time to file their fixed date claim form out of time in writing by the respondents the claim for judicial review by the respondents and claim form – Whether the respondents could properly grant an extension of time to the appellants to file a fixed date claim form outside of the time permitted by rule 56.4(11) of the Civil Procedure Rules 2000 – Whether the respondents can rely on an affidavit filed on the leave to file a claim for judicial review application as an affidavit in support of a claim for judicial review as required by rule 56.7(3) of the Civil Procedure Rules 2000

Result / Order:

[Oral delivery]
1. The appeal is dismissed.
2. There will be no order as to costs.
3. Matter remitted to the High Court be dealt with expeditiously.

Reason:

The Court was of the opinion that a number of cases underline the importance of rule 56 of the Civil Procedure Rules 2000 (“CPR”) which rule governs administrative actions and requires as a mandatory pre-condition that the fixed date claim be filed within 14 days of the leave given by the trial judge. However, in this case, as the learned trial judge found, the Crown had

specifically advised the respondents that it would not be insisting on the 14 day rule and consented to the fixed date claim form being filed afterwards. In those circumstances the Court considered it unfair and contrary to all concepts of justice to permit the appellants to now rely on the mandatory rule. The Court agreed with the learned trial judge that the appellants were estopped from insisting on the application of the mandatory rule.

Further, the Court was satisfied that while it is a requirement of the CPR that evidence on affidavit must be filed with the fixed date claim form, where the affidavits that were going to be relied on were, as in this case, extensive and consequently expensive to reproduce and the respondents having indicated on the fixed date claim form that they would be relying on the affidavits which were filed with the application for leave, it would be an unnecessary burden to require that these affidavits, in identical or similar form, be refiled with the fixed date claim form.

The Court felt it prudent to place on record that where applicants intend to rely on affidavits or pleadings filed earlier in the same matter or in an application which is a precursor to the claim the applicants must seek the leave of the Court to do that.

Case Name:

Neville S. Kirwan

V

Mildred A. Kirwan

[MNIHCVAP2012/0002]

Date:

Wednesday, 4th December 2013

Coram:

The Hon. Mde. Louise E. Blenman, Justice of Appeal

**The Hon. Mr. Don Mitchell, Justice of Appeal
[Ag.]
The Hon. Mde. Gertel Thom, Justice of Appeal
[Ag.]**

Appearances:

Appellant: Mr. Kharl Markham with him Ms. Chivonne Gerald

Respondent: Mr. Sylvester Carrott

Issues:

Civil appeal – Whether the learned trial judge erred in awarding the parties a 50% equal share in the property in Olveston registered as Block 12/4 Parcel 083 – Whether the learned trial judge erred in ordering that an account be taken of the monies paid by Tradewinds Montserrat for rent of the Olveston property and that 50% of the rental sum be paid to the respondent – Whether the learned trial judge erred in departing from the general equity rule in awarding the respondent 75% of the Woodlands property and in doing so arrived at a decision which was unreasonable and contrary to law

Result / Order:

[Oral delivery]

- 1. The appeal is allowed only to the extent that the appellant and the respondent are entitled to a 50% interest in the Woodlands property.**
- 2. The order as to costs is varied by consent to a prescribed costs basis instead of an award of \$25,000.00, which was the amount awarded at the trial in the High Court.**

Reason:

In this case, the learned trial judge awarded the property in Olveston to the two parties in equal shares. His finding was that the parties worked together from the beginning of the relationship which dated back to the period when the respondent was 15 years old. The parties married afterwards.

The Court stated that an appellate court could

only interfere with a trial judge's finding of fact if the Court was satisfied that the learned trial judge misdirected himself or drew erroneous inferences from the facts or if the judge was plainly and blatantly wrong or as it is sometimes more elegantly stated, where the learned trial judge has exceeded the generous ambit within which reasonably disagreement is possible. The Court relied on the case of *Golfview Development Limited v St. Kitts Development Corporation et al*, Saint Christopher and Nevis High Court Civil Appeal SKBHCVAP2004/0017 (delivered 20th June 2007, unreported). The Court held that it is only in those circumstances where an appellate court would be in as good a position as the trial judge to evaluate the evidence and to determine what inference/s can be drawn from the facts.

With this in mind, the Court had no doubt that on the facts as found by the learned trial judge it was open to him to conclude that the parties shared a common intention that the respondent will have an interest in the Olveston property and based on this common intention she acted to her detriment. There was cogent and compelling evidence that she did indeed act to her detriment. It was their new matrimonial home after the volcanic eruption. The respondent had testified that they funded the construction from their personal savings, rent received from the Amersham house, hurricane settlement insurance, sale of agricultural produce and maroon and help from friends, which evidence the learned trial judge accepted. The Court had no basis on which to overturn his finding on this property.

In relation to the Amersham property, the Court reviewed the findings of fact of the learned trial judge and considered that the learned judge carefully analysed the case and applied the relevant legal principles enunciated in the cases of *Abbott v Abbott* [2007] UKPC 53 and *Gissing v Gissing* [1971] AC 886 in relation to the Amersham property. As such, there was no

basis to overturn the finding of the learned trial judge.

On the ground of appeal in so far as it relates to the order that an account be taken of the rental paid by Tradewinds Montserrat for the rental of the Olveston Property and that 50% of the rental sum plus 10% interest be paid to the respondent, based on the conclusion that the respondent was entitled to a 50% interest in the Olveston property, the Court had no doubt that the learned trial judge did not err in ordering that an account be taken of the monies paid by Tradewinds Montserrat for the rental of said property.

In relation to the ground of appeal that the learned trial judge erred in departing from the general equity rule in awarding the respondent 75% of the Woodlands property, the Court accepted that the learned trial judge did not provide reasons for his departure from the general half share rule when he awarded the respondent 75% of that property. In those circumstances, an appellate court is entitled to review the matter and to seek to determine whether or not the learned trial judge was correct to make such an award. The Court, on reviewing the matter, noted the appellant's evidence in which he claimed that he had instructed the respondent to put title in his name, in the respondent's name and in their son's name; instead the respondent put the title of the property in only her name. The appellant claimed that he decided to build a house on the land and the respondent borrowed \$100,000.00 from her former employer to assist with the construction of the house. The appellant also claimed that the house was valued \$700,000.00 at the time of trial and that he had paid for all the materials and labour in the construction of the house and had furnished it. The respondent claimed that she had paid the sum of \$35,000.00 for the property at auction. She had testified that she built the house with a loan from the bank. The learned trial judge accepted

the respondent's evidence over the appellant's. The trial judge found it significant that of all the matrimonial properties this was the only one taken by the respondent in her name only. However, the learned trial judge held that the appellant had made a substantial contribution to the acquisition of the house, therefore he was one quarter share to the property.

The Court, after reviewing the matter in its entirety, in particular the finding of facts made by the learned trial judge held there was no basis on which the judge could have properly awarded the respondent a 75% share in the Woodlands property. The Court therefore held that an appropriate award, given the totality of the circumstances, would have been to award the parties 50% share in the property. The Court relied on *Hughes v Hughes* (1993) 45 WIR 149.