

COURT OF APPEAL SITTING

MONTSERRAT
22nd to 23rd April 2013

APPLICATIONS AND APPEALS

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:

Monday, 22nd April 2013

Coram:

The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal
[Ag.]
The Hon. Mr. Tyrone Chong, Justice of Appeal
[Ag.]

Appearances:

Appellant:

Ms. Karen Reid

Respondent:

Mr. John Fuller

Issue:

Application for leave to appeal interlocutory order of Justice Thomas W.R. Astaphan made on 28th November 2012

Result / Order:

[Oral delivery]

1. Leave to appeal the judgment of Justice Thomas W. R Astaphan dated 28th November 2012 is granted.
2. The matter is to proceed pursuant to CPR 2000.
3. No order as to costs.

Reason:

The Court was of the opinion that the issues in the case can only be determined on the hearing of the appeal.

Case Name:

Neville Sylvester Kirwan

V

Mildred Agnita Kirwan

[MNIHCVAP2012/0002]

Date:

Monday, 22nd April 2013

Coram:

The Hon. Mr. Davidson K. Baptiste, Justice of Appeal

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

The Hon. Mr. Tyrone Chong, Justice of Appeal [Ag.]

Appearances:

Appellant:

Mr. Kharl Markham

Respondent:

Mr. Sylvester Carrott

Issues:

Application for notice of appeal to be struck out – Application for extension of time to file and serve record of appeal – Application for relief from sanctions – Whether the appellant having filed his notice of appeal on 14th February 2012 and thereafter failing to file the relevant skeleton arguments and notes of evidence in

the time prescribed by the Rules should be allowed relief from sanctions

Result / Order:

[Oral delivery]

1. The application of the appellant for an extension of time within which to file and serve the record of appeal is granted and time is extended to 42 days from 22nd April 2013.
2. The applications of the appellant filed on 28th January 2013 and on 4th February 2013 are withdrawn and hereby dismissed.
3. The filing of the record of appeal by the appellant is conditional on the appellant paying to the respondent prior to filing and serving of the Record, the sum of EC\$37,000.00 and commencing the end of April 2013, one half of rental of the Olveston property paying the sum directly to the respondent with notice to the counsel for the respondent.
4. The appellant will also pay to the respondent at the same time with the payment of EC\$37,000.00, the costs of this application in the sum of EC\$1,500.00.
5. Thereafter the rules of the Court to apply.

Reason:

The Court applied the principles in Carleen Pemberton v Mark Brantley (SKBHCVAP2011/0009, delivered 14th October 2011, unreported) and held that though the delay was significant, the reasons for the delay were understandable, the chance of success has been made out, and no prejudice will be caused to the respondent.

Case Name:

**Nathan Galloway
v
The Queen**

[MNIHCRAP2011/0003]

Date: Monday, 22nd April 2013

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]
The Hon. Mr. Tyrone Chong, Justice of Appeal [Ag.]

Appearances:

Appellant: Mr. Kharl Markham

Respondent: Ms Kathyann Pyke, Director of Public Prosecutions

Issue: Application for extension of time to appeal

Result / Order / Reason: [Oral delivery]
The application for an extension of time to appeal is withdrawn and accordingly dismissed.

Case Name: Ottley Laborde
v
The Commissioner of Police

[MNIMCRAP2012/0004]

Date: Monday, 22nd April 2013

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]
The Hon. Mr. Tyrone Chong, Justice of Appeal [Ag.]

Appearances:

Appellant: Ms. Anesta Weekes, QC

Respondent: Ms. Kathyann Pyke, Director of Public Prosecutions

Issues:

Criminal appeal against conviction – Disorderly conduct – Using threatening language – Unlawful assault – Whether the learned magistrate erred in proceeding to trial in the matter knowing that appellant’s counsel could not attend on the trial date set by the Court – Whether the exercise of the discretion of the learned magistrate to refuse to adjourn the trial to a date suitable to the appellant’s counsel a wrongful exercise of that discretion

Result / Order:

[Oral delivery]

The matter be sent for retrial before a different magistrate.

Reason:

The Court was of the opinion that the decision of the magistrate to refuse the application for adjournment by the appellant’s counsel was a wrongful exercise of the magistrate’s discretion and that it led to an unfair result.

Case Name:

Leron Brade

V

The Commissioner of Police

[MNIMCRAP2012/0003]

Date:

Monday, 22nd April 2013

Coram:

The Hon. Mr. Davidson K. Baptiste, Justice of Appeal

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

The Hon. Mr. Tyrone Chong, Justice of Appeal
[Ag.]

Appearances:

Appellant:

In person

Respondent:

Ms. Kathyann Pyke, Director of Public Prosecutions

Issues:

Criminal appeal against conviction – Possession – Whether the appellant was properly convicted of possession of cannabis contrary to section 7(2) of the Drugs (Prevention of Misuse) Act, Cap 4.07 – Whether the appellant was properly convicted of having an offensive weapon in his possession outside his premises contrary to section 70(1) of the Penal Code, Cap. 4.02 which the appellant argued was a toy gun which had been purchased at a store – Whether a toy gun is an imitation firearm

Result / Order:

[Oral delivery]

The appeal is dismissed and the conviction affirmed.

Reason:

The appeal was based in part on a misinterpretation of section 70(2) of the Penal Code of Montserrat. The section states that any person who carries or has in his possession any offensive weapon, or any explosive or incendiary device, outside his own house or premises shall be guilty of an offence. Subsection 2 states that an imitation firearm shall be deemed to be an offensive weapon and imitation firearm means anything which has the appearance of a firearm whether or not the same is capable of being fired. A toy gun would certainly fall within that description. The evidence led by the prosecution strongly supported the conviction of the appellant. The Court concluded that there was no error on the part of the magistrate in finding that the firearm

was an offensive weapon.

Case Name: **The Director of Public Prosecutions**
v
Leron Brade

[MNIMCRAP2012/0005]

Date: **Monday, 22nd April 2013**

Coram: **The Hon. Mr. Davidson K. Baptiste, Justice of Appeal**
The Hon. Mr. Don Mitchell, Justice of Appeal
[Ag.]
The Hon. Mr. Tyrone Chong, Justice of Appeal
[Ag.]

Appearances:

Appellant:	Ms Kathyann Pyke, Director of Public Prosecutions
Respondent:	In person

Issues: **Possession of controlled drug – Whether it was proper for the learned magistrate to refuse the application of the Crown made pursuant to section 28(2) of the Drugs (Prevention of Misuse) Act Cap, 04.07 for the forfeiture of the motor bike belonging to the appellant – Whether the refusal of this application by the learned magistrate was in error and in breach of the mandatory provision of section 28(2) of the Drugs (Prevention and Misuse) Act. Cap. 04.07**

Result / Order / Reason: **[Oral delivery]**
The appeal is withdrawn and accordingly dismissed.

Case Name:

[1] Reuben White

v

[1] Cassandra Weekes

[2] Sylvester Solomon

[MNIMCVAP2012/0004]

Date:

Monday, 22nd April 2013

Coram:

The Hon. Mr. Davidson K. Baptiste, Justice of Appeal

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

**The Hon. Mr. Tyrone Chong, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Mr. Jean Kelsick

Respondent:

In person

Issues:

Whether the learned magistrate erred in ordering the return of the chattels – Whether the learned magistrate erred in proceeding with the hearing in the absence of counsel for the appellant despite being requested to adjourn the matter because counsel was at the time sitting as acting magistrate – Whether proceeding to hear the matter without counsel for the appellant was a serious injustice to the appellant which rendered the trial unfair – Whether the learned magistrate erred by not awarding costs to the appellant and for failing to give reasons for not awarding costs – As the first respondent did not ask for the return of his belongings, whether the learned magistrate erred in introducing the remedy of detinue as no proper basis had been laid for it – Whether the magistrate award of \$2000.00 was a nominal award

Result / Order:

[Oral delivery]

1. The appeal is allowed.
2. The order of the magistrate is varied to an amount of EC\$5,000.00 in damages and EC\$40.00 in costs which the appellant is to pay to the second respondent.

Reason:

The Court was of the view that the order of the magistrate to return the chattels lacked specificity making it impossible for the appellant to perform the order.

The Court also took the view that the magistrate erred in proceeding with the matter without the presence of counsel for the appellant and it rendered the trial unfair. The Court concluded that the award of \$2,000.00 was a nominal value.

Case Name:

Leslie Pierre

v

The Queen

[MNIHCRAP2012/0003]

Date:

Monday, 22nd April 2013

Coram:

The Hon. Mr. Davidson K. Baptiste, Justice of Appeal

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

The Hon. Mr. Tyrone Chong, Justice of Appeal [Ag.]

Appearances:

Appellant:

Ms Kathyann Pyke, Director of Public Prosecutions

Respondent:

In person

Issues:

Criminal appeal against sentence of ten years

imprisonment – Burglary – Whether the learned trial judge failed to consider the mitigating factors – Whether the sentence was excessive and wrong in principle

Result / Order:

[Oral delivery]

The appeal is allowed and the sentence is reduced to 5 years imprisonment.

Reason:

The sentence imposed by the trial judge was unduly severe. The learned trial judge did not use a notional sentence in arriving at a sentence. He appeared to use the maximum sentence of 14 years. The Court was of the view that there were no aggravating factors in the case and held that it will use a notional sentence of 10 years, reduce it by 1/3 to arrive at a sentence of 7 years and further reduced it by 2 years to 5 years imprisonment.

Case Name:

[1] Irene Roach

v

[1] Raymond Allen

[2] Francis Kirwan

[MNIHCVAP2012/0010]

Date:

Monday, 22nd April 2013

Coram:

The Hon. Mr. Davidson K. Baptiste, Justice of Appeal

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

The Hon. Mr. Tyrone Chong, Justice of Appeal
[Ag.]

Appearances:

Appellant:

Mr. Jean Kelsick

Respondent: Mr. Hogarth Sergeant

Issues:

Whether the trial judge erred in holding that in a claim for correction of the Land Register based on fraud the appellant is required to appeal the decision of the Registrar of Lands first as a pre-requisite to seeking relief from the High Court – Whether the learned trial judge erred by failing to consider the discrepancies in evidence containing in the affidavit filed by the 1st respondent at the Land Registry in supported of his claim for adverse possession – Whether the trial judge addressed his mind correctly to the requirements of adverse possession as stipulated by section 135(1) of the Registered Land Act, Cap. 8.01

Result / Order:

[Oral delivery]

1. The appeal is allowed and the matter is sent back for hearing before a different judge.
2. Costs awarded to the appellant in the sum of EC\$750.00.

Reason:

The Court was of the opinion that the basis of the trial judge's decision seemed to have been that the appellant had to appeal the decision of the Registrar of Lands and that appeal not having been filed within time, the learned trial judge dismissed the claim. The Court disagreed with the learned trial judge and held that it was not a requirement in a claim before the High Court for rectification of the Land Register for the appellant to first appeal the decision of the Registrar of Lands before seeking relief from the High Court on the basis that the registration appeared to have been obtained by fraud.

Case Name:

[1] Susannah Dee

[2] Warren Cassell
v
[1] Violet Melvina Cabey
[2] Elvina Adelaine Morgan (nee Piper)

[MNIHCVAP2012/0004]

Date: Tuesday, 23rd April 2013

Coram: The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal
[Ag.]
The Hon. Mr. Tyrone Chong, Justice of Appeal
[Ag.]

Appearances:

Appellant: Mr. David Brandt

Respondent: Mr. Sylvester Carrott

Issues: Whether the learned trial judge erred in finding that the purported Will of 30th November 1995 existed – Whether the learned trial judge erred in finding that the Will of March 2007 was made in suspicious circumstances and undue influence – Whether there was sufficient evidence led at the trial for the learned trial judge to find that Will of 30th November 1995 had been voluntarily made by the testator – Whether the learned trial judge erred in making his findings of evidence as no witness statements were filed by the respondents and no witnesses were called to give evidence at the trial on behalf of the respondents

Result / Order: [Oral delivery]
The appeal is dismissed with costs to the respondent in the amount of 2/3 of the costs in the Court below.

Reason: It was proper for the judge to hear the matter,

albeit the matter was started incorrectly, by way of claim form and not as it should have commenced, by way of fixed date claim pursuant to CPR 68.5. As the matter was before the judge including all the evidence at the trial, there was no error on the judge's part in dealing with the matter.

The Court ultimately found that the trial judge had sufficient evidence before him to find as he did that the Will of 30th November 1995 was made by the testator and that the Will of March 2007 had been procured by undue influence.

Case Name:

**[1] The Central Tenders Board
[2] The Attorney General**

v

[1] Vernon White

[MNIHCVAP2012/0008]

Date:

Tuesday, 23rd April 2013

Coram:

The Hon. Mr. Davidson K. Baptiste, Justice of Appeal

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

**The Hon. Mr. Tyrone Chong, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Ms. Karen Reid with her Mr. Fitzroy Buffonge

Respondent:

Mr. Kharl Markham

Issues:

Whether the learned trial judge erred in law when he found that the first named appellant acted in bad faith – Whether the learned trial judge erred in law in determining that the first named appellant's acceptance of the

respondent's non-compliant tender was ultra vires – Whether the learned trial judge erred in finding that the withdrawal of the award breached a legitimate expectation of the respondent – Whether the learned trial judge erred in finding that the respondent was entitled to compensation as a result of the withdrawal of the award – Whether the learned trial judge erred in awarding costs in the sum of \$50,000.00

Result / Order:

[Oral delivery]

1. The appeal is dismissed in relation to the finding of the learned trial judge that the Tenders Board acted ultra vires.
2. The costs award made in the High Court is varied and it is hereby ordered that costs in the court below should be on the basis of a value of \$50,000.00 pursuant to CPR 65.5.
3. Costs on appeal in the sum of 2/3 of the costs that would otherwise be allowed pursuant to CPR 65.13 to be paid to the respondent.

Reason:

The learned trial judge had evidence before him from which he could properly conclude that the Board acted irrationally and unfairly in selecting this alleged omission of Mr. White as the reason for its withdrawal of the acceptance of his tender.

The learned trial judge in the course of his findings concluded that the Tenders Board had shown bad faith in their dealings with Mr. White. In our view there was no material before the court upon which the judge could properly draw an inference of bad faith, or come to the conclusion that the appellant acted in bad faith. The Court agreed with the appellant that there was no basis for this finding.

Mr. White claimed 'damages' as alternative to the other remedies he sought. Given the circumstances of this matter, the judge could

properly consider an award of damages. His order that the quantum is to be agreed, failing which an application may be made to the court to settle the matter, was a proper order.

The learned trial judge erred in awarding the sum of \$50,000 costs, as the respondent was only entitled to costs on the prescribed scale. The correct order that he should have made was for prescribed costs on the basis of a value of \$50,000.00 pursuant to CPR 65.5.

Case Name:

**[1] The Secretary of State for Foreign and
Commonwealth Affairs**

[2] His Excellency the Governor

V

**[1] Adrienne Mars for and on behalf of
Adrienne B. Mars Real Estate Trust**

[2] Brian Hollender

[MNIHCVAP2012/0003]

Date:

Tuesday, 23rd April 2013

Coram:

**The Hon. Mr. Davidson K. Baptiste, Justice of
Appeal**

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

**The Hon. Mr. Tyrone Chong, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Mr. Jean Kelsick

Respondent:

Mr. David Brandt

Issues:

**Whether it was be the intention of the parties,
that the death of Mark Twigg was an unforeseen
and or circumstance that entitled the appellants
to terminate the agreement – Whether the**

learned trial judge erred in awarding pre-trial interest – Whether it was the intention of the parties as outlined in the agreement that the appellant's rental of the 1st respondent's dwelling house was for the use of Mark Twigg and his wife solely and should be interpreted in that way

Result / Order:

[Oral delivery]

1. The appeal is dismissed.
2. Costs awarded to the first named respondent in the sum of 2/3 of the prescribed costs awarded below.
3. The judge's order awarding interest of 4% up to the date of judgment is hereby set aside.

Reason:

The Court determined that the tenancy agreement was between Adrienne B. Mars Real Estate Trust ("the Trust") and the Secretary of State for Foreign and Commonwealth Affairs for use of the dwelling house by the person who held the position of head of the Governor's office. At that time the position was held by Mr. Mark Twigg. As the tenancy was not between Mr. Twigg and the Trust, the death of Mr. Twigg did not bring the tenancy agreement to an end.