

COURT OF APPEAL SITTING
TERRITORY OF THE VIRGIN ISLANDS
11th – 15th January, 2010

Monday 11th January, 2010

Coram: Hon. Chief Justice Mr. Hugh A. Rawlins
Hon. Justice of Appeal Mde. Ola Mae Edwards
Hon. Justice of Appeal Mde. Janice George-Creque

JUDGMENTS

Edwin M. Hughes v La Baia Limited
[HCVAP 2006/008] (Anguilla)

Appearances:

Appellant: Mrs. Hazel-Ann Hannaway-Boreland holding papers for Mr. Kenneth Porter

Respondent: Mr. Malcolm Arthurs holding papers for Ms. Jenny Lindsay

Issues:

Civil appeal – dispute as to the ownership of land – claim for injunctive relief and for specific performance – construction of agreements of sale and related documents – whether they constitute a valid contract binding on the parties – whether the claim is statute barred – whether the trial judge erred in holding that the agreement is not illegal as formed or performed – failure by purchaser to obtain an Aliens Landholding Licence – whether the learned judge erred in granting specific performance – Aliens Land Holding Regulation Act Cap. A50 of the 2000 Revised Statutes of Anguilla – Limitation Act Cap. L60 of the 2000 Revised Statutes of Anguilla – Registered Land Act Cap. R30 of the 2000 Revised Statutes of Anguilla

Result:

The appeal was dismissed with costs to be borne by the appellant in the appeal.

Reasons:

1. The trial judge was correct in her finding that the Limitation Act does not apply to substantive claims for specific performance and injunctive relief by virtue of Section 3(7) of the Limitation Act. Additionally, inasmuch as the cause of action accrued in January 1996, the limitation period for bringing the claim for damages is 6 years and as the claim was filed in April 2001, the damages aspect of the claim was also not statute barred.
2. The learned trial judge did not err in finding that the contract for the sale of the disputed land was valid and binding upon the parties to this appeal.
3. The judge did not err in exercising her discretion to order specific performance notwithstanding that the purchaser does not hold an Aliens Land Holding Licence and there is a charge in favour of Caldwell Limited, a company that is not registered in Anguilla and which is beneficially owned by non-citizens of Anguilla, who also own La Baia. Caldwell is not a party to these proceedings. La Baia obtained an equitable interest in the disputed land under the contract, which is only voidable at the instance of the Crown. Since the Crown has taken no action it remains only for Mr. Hughes, the registered proprietor of the land, to complete the transfer in order for La Baia to obtain the legal interest in the land.

The principle in *Young v Bess* [1995] 46 WIR 165 [PC], at page 170, and in *Spiricor of Saint Lucia Limited v The Attorney General of St. Lucia*, Saint Lucia Civil Appeal No. 3 of 1996, 26th May 1997, at pages 14-15, followed.

**The Director of Public Prosecutions v Shaunlie Fahie
[HCVAP 2008/003] (Territory of the Virgin Islands)**

Appearances:

Appellant: Mrs. Candace Raphael de Jonge for Director of Public Prosecutions

Respondent: Mr. Shaunlie Fahie in Person

Issues:

Criminal Appeal – Review against sentence by the DPP – sentences too lenient having regard to the circumstances of the case and the offender – aggravated burglary s.212(2) Criminal Code 1997 – keeping an unlicensed firearm – Firearms (Amendment) Act 1993 – whether the judge failed to take into account all the relevant aggravating and mitigating factors –

the exercise of the discretionary powers by the appellate court

Result: The appeal was allowed and a sentence of three years substituted on the firearms offences and of seven years on the aggravated burglary offences to run concurrently with time on remand being taken into consideration.

Reasons:

1. That the learned judge's sentence was manifestly too low and as such it can only be inferred that he failed to take into account all of the relevant facts and circumstances.
2. That the governing principles which guide the court in respect of sentencing have been settled and affirmed in several cases in this jurisdiction.
Desmond Baptiste et al SVG Crim. App. No. 8 of 2008 followed.
3. That the sentencing court in considering the appropriate sentence for a firearm offence should address its mind to (a) the type of weapon used and (b) the use of the weapon.
R v Avis [1998] Cr. App. R 420 followed.
4. That the very nature of the offence of aggravated burglary connotes a burglary accompanied by aggravating circumstances.

Arnold Celestine (Administrator of the Estate of O'Ferril Celestine) v Carlton Baptiste [HCVAP 2008/011] (Grenada)

Appearances:

Appellant: Ms. Anthea Smith holding papers for Ms. Celia Edwards, QC

Respondent: Mrs. Tana'ania Small-Davis holding papers for Mr. Michael Lindo

Issues: Civil Appeal – Property Law – adverse possession – owner in fee simple – whether person claiming ownership of land as of right may also claim ownership based on adverse possession under the Limitations of Actions Act Chap. 173 of the Laws of Grenada

Result: The appeal was allowed and the order in the court below set aside with costs in the appeal and in the court below to the appellant.

Reasons:

1. Adverse possession can only arise where it is recognised by the “adverse possessor” that the paper title is vested in someone else. In essence, the adverse possessor seeks to say that he has dispossessed the paper owner. It is inconsistent for the respondent, Mr. Baptiste, to claim to be in possession of land “as of right” whilst at the same time claiming to be in adverse possession.
2. Sections 4 and 27 of the Limitation of Actions Act are directed at the right of the paper owner to bring a claim for recovery of land and limit the time frame within which the paper owner may do so. This contemplates that the paper owner must have become dispossessed of the land by the adverse possessor. What these provisions do not permit or contemplate is the situation where, as here, the adverse possessor brings a claim against the paper owner and then sets up the limitation bar as against the paper owner as a basis upon which the adverse possessor becomes entitled to ownership of the land.
3. The court is empowered to make binding declarations of right whether or not any consequential relief is or could be claimed. The grant of a declaration must be based on some right which a claimant has established, or is shown to be entitled to, which the court is empowered to grant. In this case, Mr. Baptiste is simply not entitled to a right or title as owner. Accordingly, the learned judge could not properly grant to Mr. Baptiste a declaration of such a right and title. Gordon Charles (also known as Augustus James Alexis, Administrator in the Estate of Lorna Alexis, Deceased, By His Attorney Raymond Scott) v Clarie Holas Grenada Civil Suit No. 151 of 1996 (unreported), approved.

**Saint Lucia Motor & General Insurance Co. Ltd. v
Peterson Modeste
[HCVAP 2009/008] (Saint Lucia)**

Appearances:

- | | |
|--------------------|--|
| Appellant: | Mrs. Hazel-Ann Hannaway-Boreland holding papers for Mr. Dexter Theodore |
| Respondent: | Mrs. Tana’ania Small-Davis holding papers for Mrs. Carol Gideon-Clovis |

Issues: Civil Appeal – Civil Procedure – Illegality – the principle of ex turpi causa – whether the non-statutory defence of illegality could be pleaded in the instant case - whether the master failed to consider or consider adequately the defence of illegality – fraud – whether particulars of fraud must be set out in pleadings – purpose of pleadings – summary judgment – whether defence had a real prospect of success – Motor Vehicles Insurance (Third Party Rights) Act Cap. 8.02 of the Revised Laws of Saint Lucia – Civil Procedure Rules 2000

Result: The appeal was dismissed and the decision of the learned master affirmed with costs in the appeal to the respondent.

Reasons:

1. Where no reasons are given for a decision which is appealed, an appellate court can, in the circumstances, consider the matter afresh and exercise its own discretion. *Employers International et al v Boston Life and Annuity Company Ltd. British Virgin Islands HCVAP 2007/005* and *Amazing Global Technologies Limited v Prudential Trustee Company Ltd. Saint Christopher and Nevis HCVAP 2008/008* followed.
2. An insurer is not limited to pleading the statutory defences as set out in section 9 of the Motor Vehicles Insurances (Third Party Rights) Act Cap. 8.02 but may rely on the common law principle of illegality, that is, the ex turpi causa principle. This principle is also part of the law of Saint Lucia. *Moore Stephens (A Firm) v Stone & Rolls Ltd. [2008] EWCA Civ. 644* applied. *Attorney General of Saint Lucia v Donovan Isidore Saint Lucia Civil Appeal No. 20 of 2003* (unreported) followed.
3. The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it.
4. Illegality must be properly pleaded. Notwithstanding the fact that the Civil Procedure Rules 2000 (“CPR”) does not contain a specific rule with regard to the manner in which allegations of fraud are to be pleaded, the principle that where an allegation of fraud is made particulars must be given, is a long and well settled principle which does not require restating in CPR for giving it force. The instant case is devoid of any factual or evidential background to substantiate the allegations of fraud or dishonesty so that the illegality defence cannot, in the circumstances, be entertained.
East Caribbean Flour Mills Limited v Ormiston Ken Boyea Saint Vincent and the Grenadines Civil Appeal No. 12 of 2006 which applied *Three Rivers DC v Bank of England (No. 3)*

- (Summary Judgment) [2001] UKHL 16 and *McPhilemy v Times Newspapers Ltd.* [1993] 3 All ER 775, followed.
5. Summary judgment should only be granted in cases where it is clear that a claim on its face obviously cannot be sustained, or in some other way is an abuse of the process of the court. What must be shown is that the claim or the defence has no “real” (i.e. realistic as opposed to fanciful) prospect of success. Having regard to the deficiency of the pleadings and the evidence, the defence of fraud/illegality is unlikely to meet with any degree of success so that the case is a suitable one for the entry of summary judgment. *Swain v Hillman* [2001] 1 All ER 91 applied.

APPLICATIONS

Melvina Frett Henry v Tortola Concrete Limited and Clayton Smithen
[Civil Appeal NO. 24 of 2008]

Appearances: Appellant: Mr. John Carrington

Respondents: Ms. Dionne Boreland-Fearon with Mr. Miraz Manraj

Issue: Application to amend counter-notice of appeal

Result: It was ordered that:

1. The Application to amend the counter-notice of appeal filed on 1st April, 2009 by inserting a new ground “A”, and consequently renumbering the grounds of appeal, is allowed.
2. Costs shall be in the appeal.
3. The appeal is traversed to the next sitting of the Court in the Territory in 2010.

Reason:

**Betty Lou Bailey nee Chalwell v Mark Bailey
[Civil Appeal No. 3 of 2009]**

Appearances: **Applicant:** **Mrs. Tana'ania Small-Davis**

Respondent: **Mr. John Carrington**

Issues: **Application for extension of time to appeal**

Result: **It was ordered that:**
 1. The Application for extension of time to appeal is allowed.
 2. The time within which to file the Notice of Appeal is
 extended to 27th August, 2009, so that the notice of appeal
 that was filed on that date was properly filed.
 3. The Applicant shall pay \$500.00 costs on this application to
 the Respondent.

Reason:

**Attorney General of the Virgin Islands v Berenice
Freeman
[Civil Appeal No. 25 of 2009]**

Appearances:
 Appellants: **Ms. Tamara Cameron**

Respondent: **Ms. JoAnn Williams-Roberts**

Issue: **Application for Leave to Appeal**
 Application for Stay of Execution

Result and **It was ordered that:**
Reason: **1. The Application for leave to appeal is treated as the**
 appeal.
 2. The appeal against the Master's order is allowed in as
 much as it is clear that the Master had jurisdiction to hear
 this application to set aside the order of 10th June, 2009.
 3. The matter is hereby remitted to the court below for the

- determination of the application to set aside and any other applications there are in this proceeding in that court.
4. Costs on this application shall in the cause.

HIGH COURT CRIMINAL APPEALS AGAINST CONVICTION

Lorne Parsons v The Queen [Criminal Appeal No. 2 of 2006]

Appearances: **Appellant:** Mr. Patrick Thompson holding papers for Sir Richard Cheltenham, QC

Respondent: Mrs. Grace Henry-McKenzie for the Director of Public Prosecutions

Issues: Appeal against conviction for murder

Result: It was ordered that:
The matter is traversed, pending the outcome of the review under the Parole Act in the High Court, to the next sitting of the Court in the Territory in 2010.

Clinton Hamm v The Queen [Criminal Appeal No. 3 of 2006]

Appearances: **Appellant:** Mr. Hayden St. Clair Douglas on the record

Respondent: Mrs. Grace Henry-McKenzie for the Crown

Issues: Appeal against conviction for murder

Result: It was ordered that:
The matter is traversed, pending the outcome of the review under the Parole Act in the High Court, to the next sitting of the Court in the Territory in 2010.

Reason:

**Damian Hodge v The Queen
[Criminal Appeal No. 1 of 2009]**

Appearances:

Appellant: Mr. Paul Webster, QC

Respondents: Mrs. Grace Henry-McKenzie for the Crown

Issue: Appeal against conviction for assault occasioning bodily harm

Result:

It was ordered that:

1. The Appellant has leave to file an amended Notice of Appeal.
2. The Appellant shall file and serve skeleton argument on or before 26th February, 2010.
3. The Respondent shall file and serve skeleton arguments on or before 31st March, 2010.
4. The hearing of the appeal is adjourned to the next sitting of the Court in the Territory in 2010.

**Deshawn Marcus Stoutt v The Queen
[Criminal Appeal No. 3 of 2009]**

Appearances: **Appellant:** Dr. J. S. Archibald, QC with Ms. Anthea Smith

Respondent: Mrs. Grace Henry-McKenzie for the Crown

Issues: Appeal against conviction for murder

Result:

It was ordered that:

1. Leave is granted to the Appellant to amend the Notice of Appeal to include a ground against sentence.
2. The amended Notice of Appeal shall be filed and served b15th January, 2010.

3. The Appellant shall file and serve skeleton arguments on or before 26th February, 2010.
4. The Respondent shall file and serve skeleton arguments on or before 31st March, 2010.
5. The hearing of this appeal is adjourned to the next sitting of the Court in the Territory in 2010.

HIGH COURT CIVIL APPEALS

Claudette Francis v Cecilia Martin [Civil Appeal No. 7 of 2009]

Appearances:

Appellant: Mr. Gerard Farara, QC with Mr. Akilah Anderson
Respondent: Mr. Sydney Bennett, QC with Mr. Dwayne Jean Baptiste

Issue: Personal injury – motor vehicle – quantum of damages

Result: It was ordered that:
1. Solicitors for the Respondent shall file and serve skeleton arguments in reply within 28 days of service, of the skeleton arguments on behalf of the appellant.
2. The hearing of the appeal is adjourned to the next sitting of the Court in the Territory in 2010.

National Parks Trust v Nervin Wheatley [Civil Appeal No. 8 of 2009]

Appearances:

Appellant: Mrs. Tana'ania Small-Davis
Respondent: Mrs. Mare Lou Creque holding papers for Mr. Marlon Gordon

Issues: Lease agreement – payment of arrears – whether the learned judge erred in finding that the Trust did not have any right to

request monies from persons who had no obligation to pay

Result:

It was ordered that:

The hearing of the appeal is adjourned to the next sitting of the Court in the Territory in May, 2010.

HIGH COURT CRIMINAL APPEAL AGAINST SENTENCE

**Dennis Campbell v The Queen
[Criminal Appeal No. 4 of 2008]**

Appearances:

Appellant: Mr. Dennis Campbell in Person

Respondent: Ms. Christilyn Benjamin for the Crown

Issue:

Appeal against sentence for burglary

Result:

It was ordered that:

The matter is adjourned to Wednesday 13th January, 2010.

Reason:

For enquiries to be made regarding the status of the appellant's application for legal representation through the Legal Aid Board.

HIGH COURT CIVIL APPEAL

**Kevin Whitten (In his own name and on behalf of all
the shareholders of Whitten Trust Company Limited) v
Financial Services Commission
[Civil Appeal No. 6 of 2009]**

Appearances:

Appellant: Mrs. Tana'ania Small-Davis with her Ms. Tamara Cameron

Respondent: Mr. Charles Flint, QC with him Ms Lynette Ramoutar

Issue: Whether the legal principles of legitimate expectation apply – whether the Financial Service Commission acted unfairly towards the Appellant

Result: It was ordered that:
The decision is reserved.

Tuesday 12th January, 2010

Coram Hon. Justice of Appeal Mde. Ola Mae Edwards, President of the Court
Hon. Justice of Appeal (Ag.) Mr. Davidson Baptiste
Hon. Justice of Appeal (Ag.) Mr. Edward Bannister, QC

HIGH COURT CIVIL APPEALS

**D & B Trucking & Trailer Hauling Services Ltd. v
Caribbean Insurers Limited
[Civil Appeal No. 25 of 2008]**

Appearances:

Appellant: Mrs. Tana'ania Small-Davis

Respondent: Mrs. Hazel-Ann Hannaway-Boreland

Issues: Contract – whether D & B Trucking was allowed to rescind the contract as a result of Caribbean Insurers' breach – quantum of damages

Result: It was ordered that:
The decision is reserved.

**Excel Mobile Investments Limited v Gerald Nicholas
Tan and David James Wong
[Civil Appeal No. 26 of 2008]**

Appearances:

Appellant: Mrs. Tana'ania Small-Davis

Respondent: Mr. Malcolm Arthurs

Issue:

Application to set aside statutory demand – whether the fact that a properly sworn affidavit was not filed with the application on the deadline for filing such application results in failure to comply with rule 16 of the Insolvency Rules

Result:

It was ordered that:

1. The appeal is allowed.
2. The Application is remitted to the High Court for determination of the application on its merits.
3. Costs of the appeal in the sum of \$1500.00 as agreed between the parties.
4. Costs of the rectification shall follow the event.

Reason:

The trial judge has power under Part 26.9 of the Civil Procedure Rules to rectify the matter.

MAGISTERIAL CIVIL APPEAL

**Yvonne Remington v Betteto Frett
[Magisterial Civil Appeal No. 6 of 2008]**

Appearances:

Appellant: Ms. Susan Demers

Respondent: Mr. Betteto Frett in Person

Issue: Property law – whether the Magistrate erred in law and fact in findings regarding the return of the security deposit pursuant to a lease agreement

Result: It was ordered that:

1. The appeal is allowed in the absence of any evidence before the Magistrate from the Respondent. The judgment entered by the Magistrate is set aside and judgment entered for the Appellant in the sum of \$10,000 with costs in the court below being \$2,000 and costs of the appeal being \$1,334.00.
2. Costs awarded against the Respondent on 30th September, 2009 to be added to this amount.

Wednesday 13th January, 2010

Hon. Justice of Appeal Mde. Ola Mae Edwards, President of the Court

Hon. Justice of Appeal (Ag.) Mr. Davidson Baptiste

Hon. Justice of Appeal (Ag.) Mr. Edward Bannister, QC

HIGH COURT CRIMINAL APPEAL AGAINST SENTENCE

**Dennis Campbell v The Queen
[Criminal Appeal No. 4 of 2008]**

Appearances:

Appellant: In person

Respondent: Ms. Christilyn Benjamin for the Crown

Issues: Appeal against sentence for burglary

Result and Reason: It was ordered that:
The appeal was discontinued and accordingly stands dismissed.

MAGISTERIAL CIVIL APPEAL

**Brian Blyden v Denise Stanley
[Magisterial Civil Appeal No. 1 of 2009]**

Appearances:

Appellant: Mrs. Marie Lou Creque

Respondent: Mr. Patrick Thompson

Issues:

Arrears of maintenance payment for children – sections 118 and 119 of the Magistrates Code of Procedure – interim order made in the absence of the Appellant

Result:

It was ordered that:

- 1. The appeal is allowed.**
- 2. The interim order made in 2009 is set aside and the matter is remitted to the Magistrates Court for there to be a determination as to whether or not the Appellant is adjudged to be the putative father of the two children.**

Reason:

Under sections 118 and 119 of the Magistrates Code of Procedure, the complaint brought in 2007 required proof that the Appellant has, within twelve months of the birth of the children, contributed to their maintenance.

Coram:

Hon. Justice of Appeal Mde. Ola Mae Edwards, President of the Court

Hon. Justice of Appeal (Ag.) Mde. Janice George-Creque

Hon. Justice of Appeal (Ag.) Mr. Davidson Baptiste

MAGISTERIAL CRIMINAL APPEAL AGAINST SENTENCE

**John Schulterbrandt v Commissioner of Police
[Magisterial Criminal Appeal No. 5 of 2008]**

Appearances:

Appellant: Mr. Patrick Thompson

Respondent: Ms. Tiffany Scatliffe for the Crown

Issue:

Appeal against conviction and sentence – whether there was any evidence to link the appellant to room 6 and the contents in room 6

Result:

It was ordered that:

1. The appeal against conviction and sentence in respect of complaints 13/08 and 74/08 is allowed and the sentences are set aside and the Appellant is discharged.
2. The appeal against conviction and sentence in respect of complaint 75/08 is dismissed and the sentence having already spent, the Appellant is discharged.

Thursday 14th January, 2010

Coram:

Hon. Chief Justice Mr. Hugh A. Rawlins
Hon. Justice of Appeal Mde. Ola Mae Edwards
Hon. Justice of Appeal Mde. Janice George-Creque

HIGH COURT CRIMINAL APPEALS

Maureen Peters v The Queen
[Criminal Appeal No. 5 of 2009]

Appearances:

Appellant: Mr. William Hare

Respondent: Mrs. Grace Henry-McKenzie with her Ms. Leslie-Ann Faulkner for the Crown

Issue:

Appeal against conviction for theft
Application for bail – applicant convicted by jury on a majority

verdict – whether there are exceptional circumstances for the grant of bail

Result:

It was ordered that:

- 1. The Application is dismissed.**
- 2. The Application can be renewed in the event that the appeal is not ready for hearing in May, 2010.**

Reason:

The cause for concern regarding the production of the transcript is not an exceptional circumstance for the grant of bail. The matters raised at this time have not established a likelihood of success.

**Jerry Martin v The Queen
[Criminal Appeal No. 3 of 2007]**

Appearances:

Appellant: Dr. J. S. Archibald, QC with Mr. Dwayne Jn Baptiste

Respondent: Mrs. Candace Raphael de Jonge for the Crown

Issues:

Appeal against sentence for murder – whether sentence of life imprisonment fixed by section 23 of the Criminal Code, and therefore mandatory, must be interpreted by the judiciary to be a discretionary provision

Result:

It was ordered that:

The decision is reserved.