

COURT OF APPEAL SITTING

GRENADA

13th – 15th June 2012

JUDGMENT

Case Name: Quilvest Finance Limited v Fairfield Sentry Limited
[High Court Civil Appeal Nos. 41-51, 54-56 and 58-62 of 2011]
(Territory of the Virgin Islands)

Date: Wednesday, 13th June 2012

Coram: The Hon. Sir. Hugh A. Rawlins, Chief Justice
The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal

Appearances:

Appellant: Mr. James Bristol holding papers for Maples and Calder

Respondent: Ms. Shereen Wilkinson holding papers for O'Neal Webster

Issues: Civil appeal – Commercial – Net Asset Value – Ponzi scheme – Trial of Preliminary Issues – What constitutes a certificate as to Net Asset Value per Share and Redemption Price within the meaning of Article 11(1) of Articles of Association of Fairfield Sentry – Mistake – Whether NAV per Share should be revalued – Contract – Mutual mistake – Common mistake – Whether surrendering shares was good consideration for payment of the Redemption Price – Whether contract voidable in equity or common law – Whether restitutionary claim available

Result & Held: dismissing the appeals against the

Reason:

learned trial judge's findings in relation to the Article 11 Preliminary Issues and upholding his finding on the Article 11 Defence; awarding one set of costs to Fairfield Sentry to be in two-thirds of the amount assessed below, and dismissing the appeal against the learned trial judge's finding in relation to the Good Consideration defence and the grant of Summary Judgment and awarding costs to the former shareholders (as one set of costs) to be fixed at two thirds of the amount as assessed below, that:

- 1. Article 11(1) does not require that a certificate be signed. If this was the case, then the Article would have expressly so stated. The absence of a signature on a Document would not necessarily preclude it from being deemed a certificate for the purpose of Article 11(1).**

North Shore Ventures Ltd. v Anstead Holdings Inc. and Others [2011] 3 W.L.R. 628 distinguished.

- 2. The learned trial judge was right in holding that none of the Documents could have amounted to certificates. Firstly, the plain wording of the Article is that there can be a determination published without it having been certified. Secondly, the function that the Directors had delegated to Fairfield Greenwich and Citco was that of calculation; there is nothing in the documentation that indicates a delegation of either determination or certification. Thirdly, there is no reason why under Article 11 there cannot be an uncertified determination which is not binding; the plain meaning of the wording of the Article is that not every determination is intended to be binding on the parties. Fourthly, the mere stating of a precise price will not suffice for any Document to amount to a certificate. The**

learned trial judge was correct to find that a certificate must be something more than a simple statement. Lastly, the certificate must have been issued either by the Directors or by some agency to whom the power to certify was delegated. The Documents were not issued by the Directors, nor was there any delegation of the power to certify.

3. A claimant may be entitled to restitution if he can show that a defendant was unjustly enriched at his expense. However, this payment may be irrecoverable where the claimant was required to pay by contract. In the present case, there were specified contractual obligations to be fulfilled by both Sentry and former shareholders by virtue of Article 10 of Sentry's Articles of Association. The former shareholders fully performed all their obligations under the contract. Upon a request by them for redemption of their shares, Sentry was contractually bound to pay the Redemption Price for the shares, the Redemption Price having been determined by the Directors of Sentry. Sentry, in paying the Redemption Price did so in the discharge of its debt obligations to the redeeming shareholders pursuant to Sentry's Articles which remained perfectly valid and in force.

Goff & Jones: The Law of Unjust Enrichment (8th edn., Sweet & Maxwell 2011) considered.

4. The alleged mistaken calculation of the NAV does not undermine the legal obligation which required that Sentry pay the Redemption Price to the former shareholders upon their request. Sentry's contractual obligations gave rise

to a debt obligation whatever the value of the shares and the surrender of the rights to the shares by the former shareholders was good consideration which would defeat Sentry's restitutionary claim.

5. The fact that BLMIS was operating as a Ponzi scheme did not render the contract between Sentry and the former shareholders impossible to perform. The subject matter of the subscription contract was the shares; as such the subject matter existed. The contract for the shares was with Sentry and not with BLMIS, and therefore it mattered not what the value of Sentry's investment in BLMIS was as this did not form part of the contract. It was clearly possible for Sentry to redeem or purchase the shares at a price which was fixed by its own Directors. Essentially, there remained a contract between Sentry and the former shareholders which was never invalidated. On the true construction of the contract it was still possible to be performed.

Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners and another [2007] 1 A.C. 558 applied; *Bell and Another v Lever Brothers, Limited* [1932] A.C. 161 applied.

6. Mistake as to a quality of the thing contracted for would not affect assent unless it was the mistake of both parties, and was as to the existence of some quality which made the thing without the quality essentially different from the thing as it was believed to be. It cannot be said that there existed a common mistake for the alleged mistaken calculation of the NAV was solely a mistake of Sentry's. Likewise it cannot be said that there was anything essentially different about the subscription contract when it became

known that BLMIS was operating as a Ponzi scheme, for the subscription contract was for the shares and the redemption payment was for the surrender of the shares. Thus, Sentry's payment for the redeemed shares based on Sentry's alleged mistaken calculation of the NAV did not nullify Sentry's obligation to pay on redemption.

Bell and Another v Lever Brothers, Limited [1932] A.C. 161 applied; Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd [2003] Q.B. 679 applied.

7. Applicants for summary judgment are entitled to have their applications dealt with on the facts as they are, not as they might be. The adjournment sought by Sentry in the hope of turning up information which may assist or strengthen its case was rightly refused.

APPLICATIONS AND APPEALS

Case Name:	The Appeal Commissioners v Bank of Nova Scotia [High Court Civil Appeal No. 27 of 2011]
Date:	Wednesday, 13th June 2012
Coram:	The Hon. Mr. Hugh A. Rawlins, Chief Justice The Hon. Mde. Janice M. Pereira, Justice of Appeal The Hon. Mr. Davidson K. Baptiste, Justice of Appeal
Appearances:	
Appellant:	Mr. Darshan Ramdhani, with him, Ms. Francine Foster

Respondent: Mr. James Bristol

Issue: Final Leave to Appeal to Her Majesty in Council

Result / Order: [Oral delivery]
Application for final leave to appeal to Her Majesty in Council is granted as prayed.

Reason: There was no objection by counsel for the respondent to the application being sought.

Case Name: [1] Anne-Marie MacLeish
[2] Lynette Rooker
v
[1] Avison Albert “Bert” Marryshow
[High Court Civil Appeal No. 12 of 2010]

Date: Wednesday, 13th June 2012

Coram: The Hon. Mr. Hugh A. Rawlins, Chief Justice
The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal

Appearances:
Appellant: Mr. James Bristol
Respondent: Dr. Francis Alexis, QC

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

Result / Order: [Oral delivery]

1. The application of the appellants for conditional leave to appeal to Her Majesty in Council is hereby granted on the following conditions:

(a) The appellants do pay into court the sum equivalent to £500.00 sterling pursuant to section 5(a) of the West Indies Associated States (Appeal to Privy Council) (Grenada) Order 1967 (Statutory Instruments 1967) No. 224, such payment to be made within 90 days from today's date.

(b) The appellants shall prepare the record of appeal and the same to be transmitted to the Registrar of the Supreme Court of Grenada immediately upon final leave of appeal being granted and shall include a copy of the orders granting conditional and final leave.

(c) The appellants shall apply to this Court within 30 days of receipt of the Certificate of the Registrar that the security for costs ordered herein has been given within the time prescribed to the satisfaction of the Registrar and that the appellants have otherwise complied with this order, for an order for final leave to appeal to Her Majesty in Council.

Reason:

There was no objection by counsel for the respondent to the application being sought.

Case Name:

**Humphrey Thompson v The Queen
[High Court Criminal Appeal No. 1 of
2010]**

Date:

Wednesday, 13th June 2012

Coram:

The Hon. Mr. Hugh A. Rawlins, Chief Justice

The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal

Appearances:

Appellant:

In person

Respondent:

Mr. Christopher Nelson, Director of Public Prosecutions

Issues:

Criminal appeal against sentence – Robbery with violence

Result / Order:

[Oral delivery]

- 1. The appeal against sentence dismissed and the conviction and sentence affirmed.**
- 2. The Prison Authority should take the necessary steps to provide anger management counselling for the appellant and to ensure that he is given appropriate skills training.**

Reason:

The accused has a history of committing the same offence. The Court found no signs of rehabilitation. Additionally, the factors in aggravation outweighed the factors in mitigation.

Case Name:

Lester James v The Queen
[High Court Criminal Appeal No. 2 of 2010]

Date:

Wednesday, 13th June 2012

Coram:

The Hon. Mr. Hugh A. Rawlins, Chief Justice
The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Davidson K. Baptiste, Justice of Appeal

Appeal

Appearances:

Appellant:

In person

Respondent:

Mr. Christopher Nelson, Director of Public Prosecutions

Issues:

Criminal appeal against sentence – Unlawful carnal knowledge

Result / Order:

[Oral delivery]

- 1. The appeal against conviction having been withdrawn is accordingly dismissed.**
- 2. The appeal against sentence is dismissed and the sentence is hereby affirmed.**
- 3. The Prison Authority shall take the necessary steps to ensure that the appellant is provided on a continuous basis with anger management counselling and appropriate skills training**

Reason:

The Court looked at the offence committed and against whom it was committed. Having done so, the Court did not find any error on the part of the trial judge which would cause the Court to reduce the sentence.

Case Name:

**Leroy Andrew v The Commissioner of Police
[Magisterial Criminal Appeal No. 1 of 2012]**

Date:

Wednesday, 13th June 2012

Coram:

**The Hon. Mr. Hugh A. Rawlins, Chief Justice
The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Davidson K. Baptiste, Justice of**

Appeal

Appearances:

Appellant:

In person

Respondent:

Mr. Christopher Nelson, Director of Public Prosecutions

Issues:

Criminal appeal against conviction and sentence – Driving without due care and attention

Result / Order:

[Oral delivery]

The appeal is dismissed and the conviction and order of the learned trial Magistrate is affirmed.

Reason:

The Court found no reason to upset the conviction and sentence of the learned trial Magistrate. The Court decided that there was no ground on which to allow the appeal as the appellant was careless in his judgment and in his driving and reversed at a place where he ought not to reverse.

Case Name:

Jude Hakim v The Queen

[High Court Criminal Appeal No. 3 of 2009]

Date:

Thursday, 14th June 2012

Coram:

The Hon. Mde. Janice M. Pereira, 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:	Mr. Christopher Nelson, Director of Public Prosecutions
Issues:	Criminal appeal against conviction and sentence – Receiving
Result / Order:	[Oral Delivery] The appeal is dismissed and the conviction and sentence hereby affirmed.
Reason:	The Court found that there was no merit in the appeal. The Court found no basis on which the trial judge went wrong on the evidence which grounds the conviction.
Case Name:	David Phillip v The Queen [High Court Criminal Appeal No. 2 of 2009]
Date:	Thursday, 14th June 2012
Coram:	The Hon. Mde. Janice M. Pereira, Justice of Appeal The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.] The Hon. Mr. Tyrone Chong, Justice of Appeal [Ag.]
Appearances:	
Appellant:	Mr. Anselm Clouden
Respondent:	Mr. Christopher Nelson, Director of Public Prosecutions
Issues:	Criminal appeal against conviction and sentence – Murder

Result / Order:

[Oral delivery]

- 1. The appeal against conviction is withdrawn and accordingly dismissed.**
- 2. The appeal against sentence is dismissed and the sentence affirmed.**

Reason:

The Court was satisfied that the trial judge took all the aggravating and mitigating factors into consideration when he gave the sentence. Consequently, there was no basis to interfere with the judge's ruling.

Case Name:

**[1] The Attorney General
[2] The Commissioner of Police
[3] Corporal Portia Nicholas
[4] Sergeant Samuel Smart
v
[1] Dexter Smith**

[High Court Civil Appeal No. 23 of 2010]

Date:

Thursday, 14th June 2012

Coram:

**The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal
[Ag.]
The Hon. Mr. Tyrone Chong, Justice of Appeal
[Ag.]**

Appearances:

Appellant:

Mr. Darshan Ramdhani

Respondent:

Mr. Ruggles Ferguson, with him, Ms. Anyika Johnson

Issues:

Malicious prosecution – Damages

Result / Order: [Oral delivery]
The appeal is hereby dismissed.

Reason: There must be more than mere suspicion when a decision is taken to prosecute a crime. There must be reasonable grounds.

Case Name: George Blaize v Bernard LaMothe
[High Court Civil Appeal No. 4 of 2012]

Date: Thursday, 14th June 2012

Coram: The Hon. Mde. Janice M. Pereira, Justice of Appeal
The Hon. Mr. Don Mitchell, Justice of Appeal [Ag.]
The Hon. Mr. Tyrone Chong, Justice of Appeal [Ag.]

Appearances:

Appellant:	Mr. James Bristol
Respondent:	Mr. Dwight Horsford

Issues: Section 8(8) of the Constitution – Right to a fair hearing – Entitlement to be heard on an assessment of damages

Result / Order: [Oral delivery]
1. The parties are to file and serve further written submissions by 31st July 2012 addressing CPR 10, 12, 14 and 16 as they relate to the framework which the Rules provide to a defendant to address the issue of quantum of damages where that is the only issue for determination and whether in the context of that CPR 12.1 (3) is

unconstitutional.

2. Having regard to the Constitutional challenge to CPR 12.1(3) raised in this appeal it is further directed that counsel for both parties serve the Solicitor General no later than 29th June 2012 the Record of Appeal herein and the submissions and authorities filed to date and the Solicitor General shall be at liberty to file and serve written submissions on the issue as stated in paragraph 1 by August 10th 2012.
3. The hearing of this appeal is adjourned and that following the receipt of the submissions a date for further hearing will be fixed by the Court Head Office.

Reason:

In order for the Court to rule on the constitutionality of rule 12.1(3) of the Civil Procedure Rules 2000 ("CPR") the Court was of the view that it ought to have the benefit of written submissions on the other Rules of CPR that has a direct bearing on CPR 12.1(3), i.e. CPR 10.2(4), 12, 14.8 and 16. This position was shared by counsel on both sides and the Solicitor General.

Case Name:

[1] Damon Dubois

v

[1] Matthias Jerome

[2] Natasha Joseph

[High Court Civil Appeal No. 6 of 2012]

Date:

Thursday, 14th June 2012

Coram:

The Hon. Mde. Janice M. Pereira, Justice of Appeal

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

The Hon. Mr. Tyrone Chong, Justice of Appeal

[Ag.]

Appearances:

Appellant: Ms. Celia Edwards, QC, with her, Ms. Karina Johnson

Respondent: Ms. Kim George

Issues:

Assessment of Damages – Loss of Future Earnings

Result / Order:

[Oral delivery]

- 1. The appeal is allowed in part.**
- 2. The claim for loss of earnings is disallowed and the Court upholds the Master's decision on that ground.**
- 3. The challenge to the general damages awarded succeeds and the Court substitutes for the Master's award on general damages in the sum of \$50,000.00 and costs below will be calculated on the prescribed basis.**
- 4. Costs on the appeal to the appellant is fixed at 1/3 of the costs below.**

Reason:

The Master was correct in her conclusion with regard to the element of loss of earnings and in applying the new Appendix B from the amended Civil Procedure Rules 2000.

However, the Master was wrong in the exercise of her discretion when on the issue of general damages she reviewed the comparable awards in the jurisdiction and based her award on the case of Kariyma Abdul Lateef v Michael Armstrong GDAHCV1990/0124. The award of \$27,500.00 was outside of her ambit and this allowed the Court to interfere and substitute a higher sum.

Case Name: Alana Brathwaite v Republic Bank (Grenada) Limited
[High Court Civil Appeal No. 21 of 2010]

Date: Friday, 15th June 2012

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: Dr. Francis Alexis, QC, with him, Mr. Dwight Horsford

Respondent: Mr. Gregory Delzin, with him, Mrs. Michelle Emmanuel-Steele instructed by Renwick & Payne represented by Ms. Amy Bullock

Issues: Life Insurance Policy – Lapse of policy – Breach of duty of care – Oral contract – Cross appeal on issue of costs – Assessment of costs on a cumulative basis

Result / Order: [Oral delivery]
1. The appeal is dismissed.
2. Costs awarded in the court below to the Republic Bank based on the prescribed costs basis on the amount of \$470,000.00 that is \$55,821.00.
3. Costs in the Court of Appeal pursuant to CPR 65.1(3) will be 2/3 of that amount that is \$37,214.00.

Reason: The Court was satisfied that the judge having found, as she was entitled to, that the entire contract between the Republic Bank and the deceased was constituted by written agreements between the two of them and that the Republic Bank had carried out its obligations as stipulated in the written

agreements, she was entitled to give no weight to any letter written subsequently by the Republic Bank to the Insurance Company.

The Court was satisfied that the judge's finding that the Republic Bank owed a contractual duty of secrecy to the deceased was correct both at common law and under the Banker's Act of Grenada, 2005.

On the counter appeal on costs it was accepted by the Court that the judge erred in applying the fixed costs regime as opposed to the prescribed costs.

On the issue of quantum, in light of the order of consolidation in this case, the Court did not agree with the Republic Bank that the costs should be prescribed costs of the total of the two claims. Both claims flowed from the same factual matrix.