

Court of Appeal Sitting
BVI
22nd – 25th September 2008

22nd September, 2008

Coram: Hon. Chief Justice Mr. Hugh Rawlins
Hon. Justice of Appeal (Ag.) Ms. Ola Mae Edwards
Hon. Justice of Appeal (Ag.) Ms. Indra Hariprashad-Charles

JUDGMENTS

**HENRY LIU ET AL v THE ATTORNEY GENERAL OF
DOMINICA ET AL
[Civil Appeal No. 1 of 2006]**

Appearances:
Appellants: Mrs. Willa Tavernier holding papers for Mr. Ramesh Maharaj, SC
Respondents: Mrs. Tana'ania Small-Davis holding papers for the Attorney General of Dominica

Issues: Civil appeal – cross appeal - abuse of Process - substantive offences - whether the judge had jurisdiction to institute substantive charges against the appellants - Conspiracy charges - exceptional circumstances – whether there is a requirement to plead bad faith – remedies in public law by way of judicial review and constitutional motion – whether denying costs to the appellants was erroneous.

Result: The appeal was allowed only to the extent that the appellants were awarded their costs below. The cross-appeal was allowed in part. No order as to costs was made in the appeal.

Reason: (1) The filing of over 300 charges against the appellants and the prosecution do not constitute an abuse of process. Accordingly, the decision of the trial judge that the conspiracy charges against the appellants proceed and that there was no contravention of the appellants' right to property under the Constitution of the Commonwealth of Dominica, are upheld.
“An abuse can exist where the prosecution has

manipulated or misused the process of the court or taken advantage of a technicality or where on a balance of probability the accused has been or will be prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution.”

Hui Chi Ming v R [1991] 3 All ER 897 cited.

Bennett v Horseferry Road Magistrates' Court [1993] 3 All ER 138, Regina v Telford. Justices Ex Parte Badham [1991] 2 WLR 866 cited.

“The circumstances must be considered in the light of local conditions, legal, economic, social and cultural. The court can take account of economic realities, in particular lack of resources and skilled staff on the part of the prosecuting authorities, but there are limits to this: the constitutional right of an individual cannot be placed at the mercy of the Government's inefficiency. (See Bell v Director of Public Prosecutions [186] LR CONST 329, 401i to 402e and Mungroo v The Queen [1991] 1 WLR 1351, 1354f to 1355c).”

Dicta from Nazereus Andrew v Attorney General SLUHCV 2005/0090 delivered on 17th June 2005 applied.

Bhola Nandlal v The State [1995] 45 WIR 412 and Verrier v Director of Public Prosecutions (1967) 2 AC 195 applied.

- (2) The cross-appeal is allowed to the extent that the name of Gene Lawrence is restored to the conspiracy charges.
- (3) The appellants were entitled to their costs in the proceedings in the court below, but none of the parties is entitled to costs in the appeal because there was no unsuccessful party in the appeal proceedings.

**HAVIS FRANCOIS ET AL v CARDINAL AIRLINES
LIMITED ET AL
[Civil Appeal No. 19 of 2006]**

Appearances:

Appellants: Mrs. Benedicta Samuels holding papers for Counsel for the Appellants

Respondents: Mrs. Tana'ania Small-Davis holding papers for Counsel for the Respondents

Issues: Civil appeal – contract law – international law - limitation of liability for death – whether the Warsaw Convention 1929 is part of the domestic law of Dominica – meaning of “product liability” under the Transnational Causes of Action (Product Liability) Act No. 16 of 1997 – applicability of the Florida Wrongful Death Statute – The Dominica Modification of Enactments Order 1978 Statutory Instrument No. 1030 of 1978
Civil Procedure – statements of case – whether striking out was reasonable in the circumstances – rule 26.3 of the Civil Procedure Rules 2000

Result: The appellants’ appeal was dismissed, the respondents’ cross-appeal was allowed and the parties directed to file submissions on costs.

Reason:

- (1) Article 5, subparagraphs 1 and 2 of The Dominica Modification of Enactments Order 1978 Statutory Instrument No. 1030 of 1978 (“the 1978 Order”) provides for pre-independence laws of the U.K. Parliament and Orders in Council made under such enactments which applied to Dominica before independence to continue in force and have the same operation in Dominica after independence. Such laws include the Carriage by Air Act 1932, U.K and the Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953 which provided for the Warsaw Convention 1929 to be given the force of law in Dominica. By virtue of the 1978 Order and the Carriage by Air Act 1932, U.K, Dominica on attaining independence is bound to maintain in force the Warsaw Convention 1929 under the domestic laws of Dominica until there has been a statutory change to this law. Absent such a statutory change, the Warsaw Convention 1929 is part of the law of Dominica.
- (2) The first principle of statutory interpretation requires that the court give the words of a statute their clear and ordinary meaning and avoid absurd results if the language allows it. A literal reading of the TCAPL Act would not permit an overloaded Cessna aircraft being flown with passengers who die when it crashes to fall within the definition of the word “product”. Accordingly, the appellants do not have a cause of action under the TCAPL Act.
- (3) Since the relevance of the Florida Wrongful Death Statute depended on the appellants’ misplaced perception and interpretation of the TCAPL Act, the Florida Statutes would be irrelevant to any subsequent claims brought under the Warsaw Convention 1929 in Dominica.

(4) The statements of case which were before the Master failed to disclose a claim which was sustainable as a matter of law. Further, there were no draft amendments to the pleadings which would have permitted the Master to consider an alternative to striking out if there was any reasonable prospect of establishing the amended case. As such, there were good reasons for striking out the statements of case.

**LYRA SEWER COLLAZO v PERCIVAL WILLIAMS
[Civil Appeal No. 24 of 2007]**

Appearances:

Appellant: Ms. Susan Demers for the Appellant

Respondent: Mrs. Tana'ania Small-Davis holding papers for Ms. Lorna Shelly-Williams for the Respondent

Issues:

Vendor and Purchaser – option under lease to purchase property – whether agreement to purchase property concluded - Registered Land Act Cap. 229 section 37 – admissibility of parole evidence to show terms of agreement contained in several documents read together - whether a term should be implied that completion depended on the Purchaser being able to obtain financing using the property - whether agreement could be specifically enforced against the Vendor – effect of making time of the essence

Result:

The appeal was allowed and the orders made by the judge set aside.

Reason:

(1) The agreement between the parties as evidenced in the various documents appears to have been a complete agreement for the sale of the property by the appellant to the respondent for the sum of \$260,000.

(2) Parole evidence was admissible to link the unsigned transfer document dated 2003, with the chain of correspondences between March and September 2005, to show the terms of such agreement.

Elias v George Sahely & Co [1983] 1 AC 646, applied

(3) One of the terms of the agreement was that the time was made of the essence with respect to the date of completion of the sale.

Dictum in Harold Wood Brick Co v. Ferris [1935] 2 KB 198, 204

- considered.
- (4) Where parties have made time of the essence, the courts would not grant the remedy of specific performance where this condition has not been met.
Steedman v Drinkle [1916] 1 AC 275,279 and Brickles v Snell [1916] 2 AC 599 applied
 - (5) The courts will not imply a term into a contract for sale of land that completion was conditional upon the purchaser being able to charge the property by way of security for the purchase price as such a term was not necessary to give business efficacy to a contract for sale of land.

APPLICATIONS

BYRON SMITH v BVI ELECTRICITY CORPORATION [Civil Appeal No. 10 of 2008]

Appearances:

Appellant: Sir Richard Cheltenham, QC

Respondent: Mrs. Willa Tavernier

Issues:

**Application for leave to appeal
Application for adjournment**

Result:

The matter was adjourned to 23rd September, 2008.

Reason:

MARBLE POINT ENERGY LIMITED v MULTIPERILS INTERNATIONAL INC ET AL [Civil Appeal No. 26 of 2007]

Appearances:

**Respondent/
Applicant:** Mr. Terrance Neale holding papers for Mr. Michael Pringle who was in Court but could not be recognized.

**Appellant/
Respondent:** Mr. Terrance Neale holding papers for the Appellant/Respondent

Issue: Application for leave to serve out application

Result: The matter was adjourned to 25th September 2008 at 9:30am in Chambers before a single judge of the Court of Appeal.

Reason:

MAGISTERIAL CIVIL APPEAL

**SHARADA SHAW AND MATTHEW OWEN v DAVID PENN
AND MYRLA MAY PENN
[Magisterial Civil Appeal No. 2 of 2008]**

Appearances:

Appellant: No appearance

Respondent: Mr. Terrance Neale

Issue: Application for adjournment

Result: The matter was adjourned to the next sitting of the Court in the Virgin Islands in January 2009.

Reason: The record had not been certified by the Registrar.

HIGH COURT CIVIL APPEAL

**THOMAS TOWNSEND ET AL v PERSISTENCE
HOLDINGS LTD.
[Civil Appeal No. 8 of 2004]**

Appearances:

Appellant: Mr. Sydney Bennett, QC

Respondent: Mrs. Tana'ania Small-Davis

Issue: Application for adjournment

Result: The hearing of the appeal was adjourned to the next sitting of the

Court in the Virgin Islands in January 2009.

Reason: The parties agreed.

HIGH COURT CRIMINAL APPEAL

**JERRY MARTIN v THE QUEEN
[Civil Appeal No. 2 of 2007]**

Appearances:

**Respondent/
Applicant: Dr. J. S. Archibald, QC with Mr. Thomas Theobolds**

**Appellant/
Respondent: Mr. Terrence Williams, Director of Public Prosecutions**

**Issues: Application to amend grounds of appeal
Application for adjournment**

**Result: 1. The Application to amend the Grounds of Appeal to include the further ground which relates to the question of whether a verdict of guilty leads to a mandatory sentence of life imprisonment, is granted.
2. The matter was adjourned to the next sitting of the Court in the Virgins Islands in January 2009.**

Reason: The parties agreed.

MAGISTERIAL CIVIL APPEAL

**SATYAORAKASH RAJMUNGAL v BRIAN PENN
[Magisterial Civil Appeal No. 1 of 2008]**

Appearances:

Appellant: Mr. Terrance Neale

Respondent: No appearance

Issue: Application for adjournment

Result: The matter was adjourned to the 23rd September, 2008.

Reason: To facilitate the appearance of Mr. Brian Penn in Court.

23RD September, 2008

APPLICATIONS

**BYRON SMITH v BVI ELECTRICITY CORPORATION
[Magisterial Civil Appeal No. 10 of 2008]**

Appearances:

Appellant: Sir Richard Cheltenham, QC

Respondent: Mrs. Willa Tavernier

Issues:

Application for leave for appeal against order of Master - unfair dismissal - whether the Court of Appeal was bound by its own previous decision in Burrill v Schrader and Another - whether the decision in Ray George wrongly denies access to the Courts for contravention of a statutory right whereby the victim of the contravention suffers loss and or damage

Result: The decision was reserved.

Reason:

**DIRECTOR OF PUBLIC PROSECUTIONS v MORRISON
WATTLEY
[Criminal Appeal No. 2 of 2008]**

APPLICATION

Appearances:

**Respondent/
Applicant:** Mr. Terrence Williams, Director of Public Prosecutions

**Appellant/
Respondent:** Dr. Joseph Archibald, QC

Issue: Application for adjournment

Result: The hearing of the Application was adjourned to the sitting of the Court in St. Kitts and Nevis during the last week of October, 2008.

Reason:

**BERNICE GREEN v MARGUERITE HODGE (as next friend for Wellington Todman, deceased)
[Civil Appeal No. 13 of 2008]**

Appearances:

**Respondent/
Applicant:** Ms. Shelly Rosan

**Appellant/
Respondent:** Mr. Herbert McKenzie

Issues:

1. Appeal against order of Master refusing to vary a consent order for want of jurisdiction
2. Costs

Result:

1. The appeal against the order of the Master in which she refused an application to vary a consent order between the parties for want of jurisdiction was dismissed.
2. The appeal against the Master's direction by which she awarded \$500.00 costs to be paid by the Applicant/Claimant was dismissed.
3. The appeal against the Master's direction that the \$500.00 costs to be paid by the Applicant/Claimant's Counsel was allowed.
4. The Applicant in these appeal proceedings shall pay \$1,500.00 costs to the Respondents in these appeal proceedings.

Reason: The Master was correct to determine that the Court had no jurisdiction to vary a consent order in the circumstances.

24th September, 2008

Coram: Hon. Justice of Appeal Mr. Denys Barrow, SC (President)
Hon. Justice of Appeal (Ag.) Ms. Ola Mae Edwards
Hon. Justice of Appeal (Ag.) Mr. Michael Gordon, QC

HIGH COURT CRIMINAL APPEALS AGAINST

CONVICTION

LEON QUEELEY v THE QUEEN [Criminal Appeal No. 15 of 2001]

Appearances:

Appellant: Mr. Hayden St. Clair Douglas

Respondent: Mr. Terrence Williams, Director of Public Prosecutions

Issue: Murder: Referral from Privy Council

Result: The conviction for murder was quashed and manslaughter substituted. Sentence of 12 years commencing on 11th August 2000 imposed. Time deemed to already have been served.

Reason:

TIFFERN HENLEY v THE QUEEN [Criminal Appeal No. 6 of 2007]

Appearances:

Appellant: Ms. Anthea Smith

Respondent: Ms. Tiffany Scatliffe

Issues: Rape – whether the learned judge failed to put the defence to the jury adequately – whether the learned judge failed to properly direct the jury when they sought guidance during their deliberation as to discrepancies in the Crown’s opening and the evidence of the virtual complainant – whether proper direction was given to the jury.

Result: The appeal was dismissed.

Reason: There would have been no significant difference had the judge directed the jury accordingly for the prosecution’s case was clearly that the virtual complainant indicated that there was no consent and the appellant used actual force.

APPLICATION

**ELENA COLLONGUES V ANDREW LYNCH AND OLGA
MERMSKAYA
[Civil Appeal No. 1 of 2007]**

Appearances:

Appellant: Mrs. Tana'ania Small-Davis

Respondent: Mr. Terrance Neale with Mr. John Carrington

Issues:

Application for leave to appeal to Privy Council – whether value of claim in below £300 – whether issues to be decided are of great or general public importance

Result:

Application for leave dismissed with costs to be agreed. If not agreed, submissions by counsel on costs to be filed within 28 days.

Reason:

The Application was fundamentally flawed in that it was not in accordance with Privy Council Rules.

MAGISTERIAL CIVIL APPEAL

**JENNIFER MEYERS v THE ATTORNEY GENERAL
[Magisterial Criminal Appeal No. 9 of 2007]**

Appearances:

Appellant: Mrs. Willa Tavernier

Respondent: Mrs. Grace McKenzie

Issues:

**Appeal against conviction of driving without due care and attention
Appeal against conviction of failing to stop at the sound of siren**

Result:

The appeal was dismissed.

Reason:

There was enough evidence for the Magistrate to have found that the Appellant had heard the siren.

25th September, 2008

Coram: Hon. Justice of Appeal Mr. Denys Barrow, SC (President)
Hon. Justice of Appeal (Ag.) Ms. Ola Mae Edwards
Hon. Justice of Appeal (Ag.) Mr. Michael Gordon, QC

HIGH COURT CIVIL APPEAL

**QUORUM ISLAND (BVI) LIMITED AND ATTORNEY
GENERAL v VIRGIN ISLANDS ENVIRONMENTAL
COUNCIL
[Civil Appeal No. 4 of 2008]**

Appearances:

**Appellant/
Interested
Party:** Mr. Gerard Farara, QC with Mrs. Tana'ania Small-Davis

**Appellant/
Defendant:** Ms. Vereen Vanterpool

Respondent: Mr. Stephen Hockman, QC with Ms. Megan Thomas

Issues: Whether the filing of Application for leave to apply for judicial review constitutes an action or other proceeding as required by the Public Authorities Protection Act, Cap. 62.

Result: Decision reserved.

Reason:

Coram: Hon. Justice of Appeal (Ag.) Ms. Indra Hariprashad-Charles

APPLICATION

**MARBLE POINT ENERGY LIMITED v MULTIPERILS
INTERNATIONAL INC ET AL
[Civil Appeal No. 26 of 2007]**

Appearances:

Applicant: Ms. Arabella di Lorio

Respondent: No appearance

Issues:

Ex parte application for permission to be granted to the Applicant to serve Rheal Bougie and William Ballarchey personally in Canada with the application seeking costs order against them (the non-party costs application)

Result:

- 1. The Application by Marble Point to serve on Mr. Bougie and Mr. Ballachey in Quebec, Canada the application seeking a costs order against them (hereinafter the “non-party costs application”) attached to its notice of application for leave to serve out, was granted.**
- 2. Service of the non-party costs application shall be effected on Mr. Bougie and Mr. Ballachey personally or in any other manner permissible under the laws of Quebec.**
- 3. This order, the application notice dated 10 September 2008 and the affidavit of Michael Pringle dated 8 November 2007, shall be served together with the non-party costs application.**
- 4. Mr. Bougie and Mr. Ballachey shall receive no less than 28 days notice of the non-party costs application.**
- 5. Proof of service to be by affidavit.**
- 6. The non-party costs application will be considered on 11 December at 10:00am at the Supreme Court Building before a single judge of the Court of Appeal in Tortola, British Virgin Islands at which Rheal Bougie and William Ballachey may attend to show cause why the order should not be made.**
- 7. Costs of this application are reserved to the judge hearing the non-party costs application.**

Reason:

Coram:

**Hon. Justice of Appeal Mr. Denys Barrow, SC (President)
Hon. Justice of Appeal (Ag.) Ms. Ola Mae Edwards
Hon. Justice of Appeal (Ag.) Mr. Michael Gordon, QC**

HIGH COURT CIVIL APPEAL

OCEAN CONVERSION LIMITED v ATTORNEY GENERAL

[Civil Appeal No. 30 of 2007]

Appearances:

Appellant: Dr. J.S. Archibald Q.C. with Mr. Sydney Bennett Q.C. and Ms. Michelle Worrell

Respondent: Ms. Kathleen Quartey with Mr. Baba Aziz

Issues:

Contract - Application to Adduce Fresh Evidence- whether the learned judge was wrong to grant a stay of proceedings

Result:

The matter was adjourned. The parties are invited to make an application to the Registrar to have this matter heard in another jurisdiction if the delay causes any problem. Documents sought to be admitted are admitted and may be relied on at the hearing. Costs of these proceedings are in the appeal.

Reason:

Discussions are currently taking place in relation to the matter.