

ANGUILLA COURT OF APPEAL SITTING HELD
IN SAINT LUCIA
Monday 23rd March, 2009

CORAM

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

JUDGMENTS

Case Name

Caribbean Pharmaceuticals Supplies Ltd. v Dr. Alvin G Edwards
[Civil Appeal No. 18 of 2006] Antigua and Barbuda

Appearances:

Appellant: Mr. Eghan Modeste holding papers for Sir Richard Cheltenham, QC
Respondent: Mr. Hilford Deterville, QC holding papers for Ms. E Ann Henry

Issues:

Civil Appeal – Contract Law – whether there was a novation or variation of the agreement – guarantor – right of indemnification
Interest – whether the learned judge erred in exercise of discretion

Result:

The appeal and counter-appeal were dismissed with costs to the Respondent.

Reason:

It was held that:

1. Novation denotes the rescission of one contract and the substitution of another. By contrast, a variation merely qualifies the rights and obligations of the parties to a contract, which continues to exist in an altered form. In order to determine whether there has been a novation or variation, the court must have regard to the intention of the parties as determined by an examination of the terms of the subsequent agreement and from all the surrounding circumstances of the case.
2. The earlier agreement cannot be said to have become extinguished, as the basis for the Bank's requirement that the Doctors pay the remaining accumulated interest was pursuant to their obligations arising in respect of the guarantees. The New Agreement merely repeated the guarantors' obligations which were already in existence and quantified the amount due. The New Agreement did not therefore bring about a novation but constituted a variation of the terms of the earlier agreement.
3. A guarantor's right to indemnification is a right to be reimbursed the amount which he has actually paid for the principal debtor with interest and any costs incurred in reasonably defending an action brought by the creditor. There was no express or implied term in the New Agreement to the effect that the Doctors agreed to forego their rights of indemnification.

The learned judge did not accordingly err in finding that Dr. Edwards was entitled to be reimbursed the sum of \$162,500.00, with interest. *Brook's Wharf and Bull Wharf Ltd. v Goodman Brothers* [1936] 3 All ER 696 and *In re Fox, Walker & Co. ex parte Bishop* (1880) L.R 15 Ch. Div. 400 applied.

4. In awarding interest at the rate of 5% instead of 12.5%, as claimed, the learned judge did not exceed the generous ambit of her discretion within which reasonable disagreement is possible. There was therefore no basis for interfering with the learned judge's award.

Dictum of Sir Vincent Floissac, CJ in *Michael Dufour et al v. Helenair Corporation et al Saint Lucia Civil Appeal No. 4 of 1995* followed.

Case Name Cable & Wireless (WI) Limited v Conrad Tonge et al represented by the Antigua and Barbuda Workers' Union [Civil Appeal No. 10 of 2007] Antigua and Barbuda

Appearances:

Appellant: Mr. John Benjamin holding papers for Ms. E Ann Henry

Respondents: Mr. Dexter Theodore holding papers for Mr. Charlesworth Brown

Issue: Civil Appeal – Industrial dispute – redundancy – severance pay – computation of severance pay – tenure of employment – from what date shall severance payments be paid – whether a miscarriage of justice has occurred

Result: The decision of the Industrial Court was affirmed. The order that all severance payments shall be paid from 1st January 2001 was set aside and substituted with an order that the employees are entitled to severance pay simultaneously upon termination of their employment in accordance with the Labour Code of Antigua and Barbuda, (Edwards, JA dissenting).

Reason: It was held (Edwards JA dissenting) that:

1. Having referred to section 10(3) of the Industrial Court Act, it must be inferred that the Industrial Court was guided by the principles of fairness and good conscience and considered the issues of appropriateness, reasonableness, fairness and adequacy in coming to its conclusion.
2. The Court cannot be criticised for the approach it took when it relied, to a large extent, on the prevailing practice of other similar business entities with respect to the quantum of the severance pay.
3. Upon examining the evidence and taking into consideration the purpose of section 10(3) of the Industrial Court Act, the decision of the Court to award a higher rate of severance pay for those with more years of service and a lower rate of severance pay for those with shorter years of service seemed fair and was not outside of the general ambit of reason such as to warrant interference by this Court.
4. In this present appeal I do not consider that any substantial miscarriage of justice has occurred to substitute my discretion for that of the trial Court. *Sundry Workers of Antigua Port Authority v Antigua Port Authority Civil*

Appeal No. 8 of 2001 – judgment delivered on 28 January 2003 [unreported] cited.

Case Name Bradford Noel v First Caribbean International Bank (Barbados) Limited [Civil Appeal No. 27 of 2007] Grenada

Appearances:
Appellant: Mr. John Benjamin holding papers for Mrs. Celia Edwards, QC
Respondent: Mr. Al Elliott holding papers for Mr. Richard Williams

Issue: Civil Appeal – Agreement for sale of a property – offer and acceptance of purchase price – financing by way of mortgage – commitment letter - resubmitting an offer under a sealed bid process – whether releasing the bank from prior legal or moral obligation except financing constitutes a waiver of rights under the agreement – specific performance – breach of contract – damages – Counter Notice of Appeal – whether there was a valid or binding contract – prescribed costs

Result: The decision of the lower court was affirmed and the counter-appeal dismissed. Costs in the court below was affirmed and costs of the appeal awarded at two-thirds of the costs in the lower court.

Reason: It was held:
1. That the learned judge correctly held that although the appellant had a binding contract for the sale of the property with the respondent, his subsequent representations to the respondent discharged that contract of sale.
2. That even if the second bidding process was done in bad faith, that would not have the effect of re-creating the contract of sale or entitle the appellant to the relief that he is seeking.
3. That the appellant has not advanced a good reason to show why this court should interfere with the exercise of the judge's discretion on costs.

APPLICATIONS

Case Name Oliver Mac Donna v Benjamin Wilson Richardson [Civil Appeal No. 3 of 2005]

Appearances:
Appellants: No appearance
Respondent: No appearance

Issue: Application for adjournment of Application for review of costs and relief from sanction

Result: The hearing of the appeal is traversed to the next sitting of the Court in Anguilla.

Reason: At the request of Counsel for the parties.

CORAM Hon. Ms. Janice George-Creque, Justice of Appeal (President)
Hon. Ms. Rita Joseph-Olivetti, Justice of Appeal (Ag.)
Hon. Mr. Michael Gordon, QC, Justice of Appeal (Ag.)

APPLICATIONS

Case Name Bryan Stephen v Disciplinary Committee of the Bar Association et al
[Civil Appeal No. 34 of 2008]

Appearances:
Appellant: Mr. Alberton Richelieu
1st Respondent: Mr. Dexter Theodore

Issue: Application for Stay of Execution
Application for leave to withdraw a party to proceedings

Result:

1. The Application for Stay of Execution is granted.
2. Leave is granted to the Appellant to withdraw the appeal against the Disciplinary Committee of the Bar Association, the First Respondent.
3. Costs awarded to the First Respondent in the agreed sum of \$1000.00.

Reason: The Application for Stay of Execution was not opposed. The parties agreed to withdraw the appeal against the Disciplinary Committee.

HIGH COURT CIVIL APPEAL

Case Name Dorina Joseph et al v Nora St. Louis
[Civil Appeal No. 25 of 2008]

Appearances:
Appellant: Mrs. Petra Nelson with Ms. Lydia Faisal
Respondent: Mr. Andie George with Mr. Ermin Moise

Issue: Prescription under the Civil Code of Saint Lucia

Result: The decision is reserved.

Tuesday 24th March, 2009

CORAM Hon Ms. Ola Mae Edwards, Justice of Appeal (President)
Hon Ms. Rita Joseph-Olivetti, Justice of Appeal (Ag.)
Hon Mr. Michael Gordon, QC, Justice of Appeal (Ag.)

HIGH COURT CIVIL APPEAL

Case Name Leeward Isles Resorts Limited v Charles C. Hickox
[Civil Appeal No. 3 of 2008]

Appearances:
Appellant: Mr. David Phillips, QC with Mr. John Benjamin and Mr. David Fisher
Respondent: Mr. Roald Henriques, QC with Mr. William Roger

Issue: Company Law – res judicata in the context of a preliminary issue trial – construction of promissory notes and loan agreements – whether simple, compound or default interest agreed - the Duomatic Principle and ratification – directors’ fiduciary duties – rule against self-dealing – restitution – applicable interest rate on grant of restitutionary relief – costs

Result: The decision is reserved.

Wednesday 25th March, 2009

CORAM Hon Mr. Hugh Rawlins, Chief Justice
Hon Ms. Ola Mae Edwards, Justice of Appeal
Hon Ms. Rita Joseph-Olivetti, Justice of Appeal (Ag.)

HIGH COURT CIVIL APPEAL

Case Name Edwin M. Hughes v La Baia Limited
[Civil Appeal No. 8 of 2006]

Appearances:
Appellant: Dr. John Anthony Roberts, QC with Ms. Jenny Lindsay
Respondents: Mr. Saul Froomkin, QC with Mr. Kenneth Porter and Ms. Michelle Smith

Issue: Land Law – Alien’s Land Holding Licence – whether agreement for sale was rendered void or voidable for failure to obtain a licence – validity of the first and second agreements – whether the learned judge erred in granting decree of specific performance and injunctive relief – whether the Limitation Act applies

Result: The decision is reserved.

JUDGMENTS

Case Name Antigua Commercial Bank Limited v Hilroy Humphreys
[Civil Appeal No. 21 of 2007]

Appearances:
Appellant: Ms. Tina Mensah holding papers for Sir Clare Roberts
Respondent: Mr. Alfred Alcide holding papers for Mr. Septimus Rhudd

Issue: Claim for damages for breach of contractual and/or fiduciary duty against a bank – whether the bank disclosed information relating to claimant’s accounts to a third party – whether judge erred in holding that the Bank could not have lawfully disclosed the information - whether the judge erred in finding the claim proved on the evidence – the Money Laundering (Prevention) Act 1996 - the Banker’s Book (Evidence) Act, Cap 39 of the 1992 Revised Laws of Antigua and Barbuda - the Banking Act, Cap 40 of the 1992 Revised Laws of Antigua and Barbuda

Result: The appeal was allowed with costs to the appellant bank to be assessed, if not agreed.

Reason: It was held that:

1. The trial judge was correct in her decision that the Bank was not lawfully entitled to disclose any information relating to Mr. Humphreys' accounts to a third party without his consent or an order of the court.
2. The trial judge erred in holding that Mr. Humphreys proved his claim on the evidence that was adduced at the trial.

Case Name Kyon Frederick v The Queen
[Criminal Appeal No. 8 of 2006]

Appearances:

Appellant: Mr. Alfred Alcide

Respondent: Ms. Tina Mensah holding papers for Mrs. Victoria Charles-Clarke, the Director of Public Prosecutions

Issue: Criminal Appeal - Unlawful Carnal Knowledge - Section 216(i) of the Criminal Code 1992 - Appeal against conviction – whether unsafe or unsatisfactory – whether the verdict is against the weight of the evidence – whether the direction on truthfulness of witnesses is adequate – whether lies go to the evidence of guilt as opposed to credibility - whether a Lucas direction was necessary - whether judge obliged to give a corroboration warning under section 15 (4) of the Evidence Act 2002 – whether a corroboration warning under section 136 of the Evidence Act was called for in relation to the alleged victim's evidence – victim's evidence unreliable - whether judge obliged to give reasons for not giving the warning under section 136 – effect of judge's failure to give this warning and to articulate reasons for not doing so - whether judge's direction on the accused's right to remain silent when questioned by the police and his adverse comments on the accused's failure to give an explanation to the Police had the effect of nullifying the right - effect of failure to give a direction on expert evidence - whether such failures are fatal to conviction – whether proviso should be applied - whether re-trial should be ordered

Result: The appeal was allowed and the conviction quashed.

Reason: It was held that:

1. In a case involving an offence of a sexual nature, the judge has a discretion whether or not to give a corroboration warning and specific directions in relation to the victim's evidence in accordance with section 136 of the Evidence Act 2002. The judge was however obliged to articulate reasons if he determined that the corroboration warning and specific directions were not necessary. Therefore his failure so to do, coupled with an absence of reasons renders the verdict unsafe and unsatisfactory.
2. The admission of improper identification evidence, the omission to give a direction on expert witnesses, and suggestions by the Prosecution in cross-examination that threats were made to the defence witnesses in the

absence of the Prosecution adducing any evidence to establish that those threats were made, render the trial unfair and the resulting verdict unsafe and unsatisfactory.

3. The duty to give the jury a corroboration warning under section 15(4) of the Evidence Act, only arises where a child of 12 and over has been examined as to his or her competence and is allowed to give evidence. The judge did not admit the victim's evidence under section 15(2) of the Evidence Act, and therefore there was no need for a corroboration warning under section 15(4) of the Act.
4. The comments made by the judge in his direction on the accused's right to silence might have nullified this right and may have had the effect of shifting the burden of proof from the Prosecution to the appellant in the jury's mind.
5. Having regard to the date of the alleged offence, the quality of the Prosecution's evidence and the time already spent in custody by the appellant, it is not in the public interest to order a re-trial.

Thursday 26th March, 2009

CORAM

**Hon. Mr. Hugh Rawlins, Chief Justice
Hon. Ms. Ola Mae Edwards, Justice of Appeal
Hon. Ms. Rita Joseph-Olivetti, Justice of Appeal (Ag.)**

APPLICATION

Case Name

**Marius Wilson v Julienne James et al
[Civil Appeal No. 6 of 2009]**

Appearances:

Appellant: Mr. Marius Wilson in person

Respondent: Mr. Hilford Deterville, QC with Ms. Samantha Charles

Issue:

Application to adduce fresh evidence – whether the tri-partite requirements of Ladd v Marshall [1954] 1 WLR 1489 are met – whether the evidence raises the issue of fraud which can cause the register to be corrected under section 98(1) of the LRA 1984

Result:

The decision is reserved.