

## Court of Appeal solidifies its position on fact based appeals

O'Neal Webster recently represented Scrub Island Development Group Limited, and Flagship Properties Limited in the Court of Appeal of the Eastern Caribbean Supreme Court in the recent cases of **Chiverton Construction Limited v Scrub Island Development Group Limited** BVIHCVAPP 2009/028 and **Betteto Frett v Flagship Properties Limited**. The decisions canvass the authorities and definitively set out the legal position on when a Court of Appeal will entertain challenges to factual findings of a trial judge.

In the **Chiverton** case, the Court of Appeal found in favour of Scrub Island Development Group on all points, and dismissed the appeal in its entirety in August 2011. The claim was for unlawful termination and breach of contract, and also sought rectification of the contract to include sums for certain matters that Chiverton claimed were normally included in preliminaries. Originally heard in the BVI Commercial Court, the claim sought almost \$500,000.00 in special damages, and further sums for general damages. The Commercial Court judge found that except for delay, the contract claim failed in its entirety, and there had been no repudiatory breach of contract by Scrub Island Development Group Limited. On appeal, the court rejected all of Chiverton's claims stating that on the facts, Chiverton had an "uphill task". Baptiste J.A. in delivering the judgment stated –

“Unlike the Court of Appeal, the trial judge had the great advantage of seeing the witnesses give their evidence and was well placed to assess their credibility. The judge was able to do so against the available documentary evidence. In that situation, the Court of Appeal would undoubtedly pay deference to the judge's factual findings and his inferences from primary facts. He had “a greater feel for the atmosphere of the trial and matters such as that”. The judge's findings of fact were rationally explained. His findings were based on a particular assessment of the evidence and he could properly make such findings. It cannot be said that the judge was plainly wrong more so as his conclusions depended to a large extent upon the view he formed of Mr. Chiverton's evidence. In the premises this Court cannot interfere with the judge's findings even if it were to take the view that by itself, it might have taken a different view of the evidence. In my view there was adequate evidence to support the judge's finding and I agree with them. I agree with the process of reasoning which led the trial judge to make his finding. Further, the learned judge did not misapprehend the facts or misdirect himself in law.”

On the rectification issue the Court of Appeal held that the remedy was only available where both parties agreed that the contract did not reflect their true intention, and it was not the function of the Court to rectify an agreement merely because one party has been tough or successful in negotiations and the other has been unwise, missed a point or has failed to appreciate the likely consequences of the agreement.

In the **Flagship** judgment delivered in September 2011, Mr. Frett's appeal was also dismissed in its entirety. Justice of Appeal Ola Mae Edwards pointed out that: -

“A Court of Appeal should attach the greatest weight to the opinion of the judge who saw the witnesses and heard the evidence, and consequently should not disturb a judgment of fact unless they are satisfied that it is unsound. In this case, the learned judge had the advantage of seeing and hearing the witnesses testify, and was in a position to assess their credibility. Mr. Frett has not been able to show us that the learned trial judge did not take proper advantage of having seen and heard the witnesses, or that the reasons given by the trial judge for the findings of fact which are the subject of the appeal are unsatisfactory.”

The Court of Appeal has therefore reaffirmed the position that factual findings of a trial judge would not be disturbed unless it can be shown that such findings are unsound.

Willa Tavernier, head of the Property & Business Practice Group was lead counsel in both cases.

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**January 2012**

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