

19-11-96 J.A.

2/11/96

Legal Dept.

Dee -

8Am 18/11/96.

Circulate.

19/11/96

CHR 2/11/97

CB 28/2/97
Kyl 4/3

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO:224/96

BETWEEN : (1) BENSON O. EBANKS
(2) O. GRAHAM EBANKS PLAINTIFFS

AND : (1) JAMES FLOYD REYNOLDS
(2) JAMES BARTLETT REYNOLDS
(3) BLANCHE O. REYNOLDS
(4) BURTON EBANKS
(5) DALKEITH BOTHWELL DEFENDANTS

6 November, 1996

APPEARANCES: G. Giglioli for plaintiffs/applicants
S. Collins for defendants/respondents

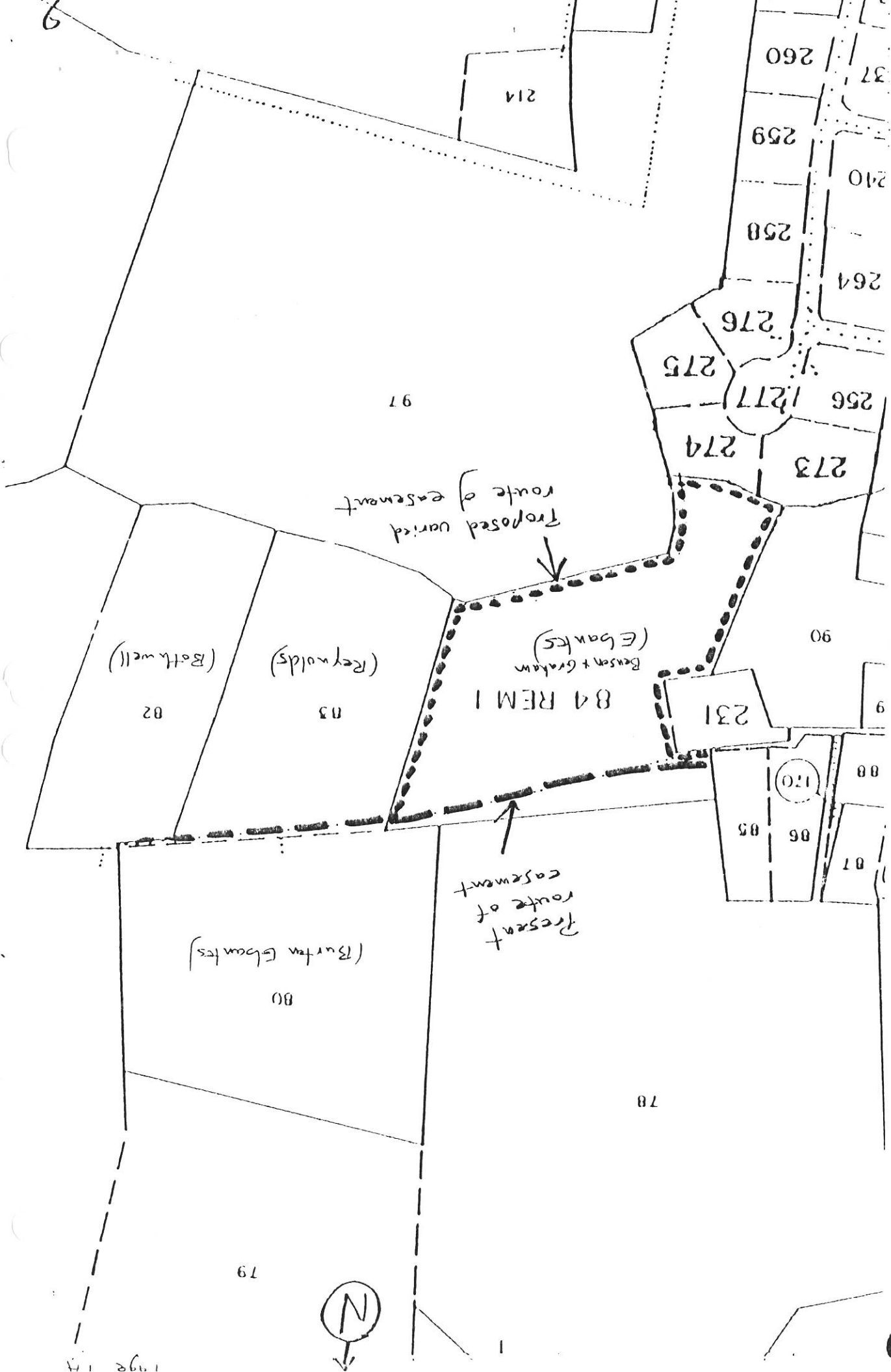
BEFORE MURPHY J.

REASONS FOR DECISION

This is an originating summons filed by the plaintiffs seeking an order varying the pedestrian right of way currently enjoyed over their property (West Bay registration section, Parcel 84 REM 1, Block 5C) by the defendants.

Attached to these reasons is a sketch plan showing the servient tenement, parcel 84, together with surrounding parcels which include the dominant tenements, parcels 80,82 and 83. The plaintiffs are the registered owners of parcel 84. The first, second, and third defendants are the joint proprietors of parcel 83. The fourth defendant is the owner of parcel 80. The fifth defendant is the





214

260

259

258

240

264

276

275

217

256

274

273

Proposed varied route of easement

(Bothwell)

(Reynolds)

(Ebanks)
Benson & Graham

84 REM 1

231

90

9

170

88

85

86

87

Present route of easement

(Burtan Ebanks)

80

78

79



1/4

owner of parcel 82. All of these parcels benefit from the pedestrian right of way in question.

The existing easement is shown on the sketch plan by means of a straight broken line. The variation in the route of the easement proposed by the plaintiffs, and sought in this application, is indicated by a dotted line that essentially follows the perimeter of parcel 84 instead of cutting across it. Both the original easement and the proposed variation commence at a point on the westerly boundary of parcel 84 where an existing roadway ends. This can be seen immediately to the north of parcel 231.

The existing easement forms part of the Land Adjudication Record for parcel 84. The easement was registered on 19th February 1974. The plaintiffs became proprietors of parcel 84 in September 1986.

Parcel 84 and surrounding area consist largely of grassland and scrub bush. There is no development as yet.

The present easement provides the only legal access to the defendants' land, namely parcels 80, 82, and 83. The defendants' counsel very frankly pointed out that parcel 97 to the south is in fact owned by a company whose principals are the fifth defendant and his wife. Arguably, this would provide the fifth defendant with a means of access to his parcel 82, and so in that regard this application might be of lesser importance to him. However, there can be no doubt that the other defendants are affected by the proposal to vary the route of



the easement.

This application is made because the plaintiffs propose to sell parcel 84 to a developer known as Shoreline Development Ltd. Shoreline Development Ltd. is in the process of assembling land in the area and has in fact already purchased a number of nearby parcels. It appears that the agreement by the plaintiffs to sell to Shoreline Development Ltd. is conditional upon variation of the easement. As a practical matter this sale will not take place unless the route of the easement is varied in the manner shown on the sketch plan. That is, the easement must be rerouted so that it will meander in a southerly, thence easterly, thence northerly direction hugging the lot lines. This, presumably, is so that it will not impair the future use of parcel 84 in any significant way.

To comply with the wishes of its prospective purchaser, the plaintiffs bring this application pursuant to section 96 of the Registered Land Law (1995 Revision).

I pause to query, parenthetically, whether there might be a preliminary legal issue that could go to the very heart of the nature of an easement as an interest in land. I suggested in argument that the "easement" proposed by the plaintiffs was such that it might not amount to an easement at all. That is, by varying the route so that the easement simply circled the boundaries of the parcel, it might be argued that the application was tantamount to one for an



extinguishment of the easement itself. This line of argument was not pursued, and because of my ultimate disposition of this matter, I do not intend to develop that issue further.

Section 96 of the Registered Land Law (1995 Revision) is as follows:

"96. The court shall have power, on the application of any person interested in land affected by an easement, restrictive agreement or profit by order wholly or partially to extinguish or modify any such easement, profit or restrictive agreement (with or without payment by the applicant of compensation to any person suffering loss in consequence of the order), on being satisfied that-

- (a) by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the court deems material, the easement, profit or restrictive agreement ought to be held to be obsolete;
- (b) the continued existence of the easement, profit or restrictive agreement impedes the reasonable user of the land for public or private purposes without securing practical benefits to other persons or, as the case may be, will unless modified so impede such user; or
- (c) the proposed discharge or modification will not injure the person entitled to the benefit of the easement, profit or restrictive agreement."

The plaintiffs' case was based on clauses (b) and (c). They were not prepared to go so far as to assert that the easement had become "obsolete" within the meaning of clause (a).

It is apparent to me that the onus of establishing the matters set out in clauses (b) and (c) lies upon the applicants, the plaintiffs.

In a nutshell, the plaintiffs contend that the easement impedes their



ability to sell the land, without securing practical benefits to the defendants, and that the proposed modification would not cause any real injury to the defendants. On the basis of the "balancing exercise" plaintiffs' counsel argues I should adopt, he submits that it would be "reasonable" to grant an order in the terms sought.

Clause (b) - "impedes the reasonable user"

Clause (b) and clause (c) appear to me, as a matter of statutory interpretation, to be disjunctive. That is, the plaintiffs will succeed if they can establish either one. However, defence counsel argues, correctly it seems to me, that there are two limbs to clause (b). Not only must the plaintiffs establish that the continued existence of the easement impedes their reasonable user, but also that, at the same time, there are no practical benefits to the defendants in retaining the existing right of way. In considering clause (b), I intend to focus primarily upon whether the existing easement impedes the plaintiffs' reasonable user.

Plaintiffs' counsel takes the position that their "user" is, quite simply, their right to do with the land as they wish - in this case to sell it. This became known in submissions before me as the "sale as user" argument. There was no other evidence of actual user. In particular, there was no evidence of any development plan relating to parcel 84, either devised by the plaintiffs or by the proposed



purchaser. (One may contrast in this regard the situation in The Proprietors, Strata Plan No.41 v Universal Securities Limited, Grand Court 445/90, unreported, August 1990.) There was nothing to indicate whether the easement in its present form would be incompatible with further development of the property. As a consequence, there was no evidence at all as to what user of the land is, or would be, contemplated by either the plaintiffs or the proposed purchaser.

The plaintiffs' counsel was unable to cite any authority whatever in support of the proposition that the mere right to sell the servient tenement was sufficient "user of the land" for purposes of the test in section 96.

I do not accept that it is sufficient for purposes of clause (b) simply to demonstrate that a sale of the servient tenement will be rendered difficult or impossible. It will be noted that this easement was registered against this parcel long before the plaintiffs purchased it. To give effect to plaintiffs' counsel's argument in this regard effectively means that the test under clause (b) can be satisfied merely by recognizing and acceding to the "dictates and desires of a proposed purchaser", as defence counsel put it. To suggest that the mere need to sell the servient tenement is sufficient to justify the drastic modification of the easement as is proposed here, is to me tantamount to emasculating this long - established interest in land. It would do away with much of the law of easements.



In my view, the plaintiffs cannot succeed under clause (b) without establishing that their user will be impeded, on evidence that goes beyond the mere indication that a proposed purchaser will not complete a transaction if the easement remains in place.

I am supported in this view by the following passage from the judgment of former Chief Justice Collett in Murmarson Limited et al v K.D. Eldermire and A.C. Eldermire [1988-89] CILR 61 at 72 where he said:

"In this connection I must bear in mind the observations of Farwell, J. in In re Henderson's Conveyance when he held ([1940] 1 Ch. at 846) that the comparable section of the English statute was not designed, at any rate prima facie, to enable one owner to get a benefit by being freed from the restrictions imposed upon his property in favour of a neighbouring owner merely because in the view of the person who desires the restriction to go, it would make his property more enjoyable or more convenient for his own private purposes. That observation was cited with approval by Romer, L.J. in giving the leading judgment in a unanimous decision of the English Court of Appeal in In re Truman, Hanbury, Buxton & Co. Ltd's Application. It was again cited with approval by a differently constituted Court of Appeal in In re Ghey. It is difficult to avoid drawing from the totality of the evidence in the present case an inference that the primary purpose of the defendants' proposed modification of the easements here is to make his residential property more enjoyable or more convenient for his own private purposes than it would be if the far less considerable modification entailed



by the plaintiffs counter-proposal
were to be adopted instead".
(emphasis added)

In the view I take of clause (b), there is strictly no need to consider the second limb thereof. However, if there is a need to do so, it seems to me that that is totally subsumed in a consideration of the clause (c) test in any case, and I move to a consideration of that now.

Clause (c) - "will not injure the person entitled to the benefit".

The evidence before me is that the existing easement is infrequently used, though discernible topographically. At best it is a pedestrian walkway or foot path. There is no suggestion that vehicular traffic would be possible along it.

Only the fifth defendant actually lives in the Cayman Islands. The others are residents of Florida. These other defendants have other properties in Grand Cayman and apparently look after their interests in all their properties when they visit. The evidence of the fifth defendant was that the easement, while not used constantly, was used "regularly" by the defendants.

The plaintiffs' position is captured in paragraph 10 of the first



affidavit of Benson Ebanks in which he deposes that "on balance whilst the modifications of the Pedestrian Right of Way may require the Defendants to walk further on the few occasions any of them wish to visit their properties, the failure to modify the Pedestrian Right of Way will result in our being unable to complete this sale which will cost my brother and I an opportunity which is unlikely to be repeated". Plaintiffs' counsel argued that without vehicular access the defendants could not do much with their land anyway, and so on a "weighing process" more concern should be had for the plaintiffs who at least have a commercial opportunity.

I do not agree that section 96 contemplates such a "weighing process". On the contrary, under clause (c), the plaintiffs must satisfy me that the defendants will not be injured.

In a nutshell, the defendants say they are injured because (to extract from the first Dalkeith Bothwell affidavit) the proposed route "will not only result in substantially further distance which has to be covered in order for the Defendants to get across the Property, but also, much of the Proposed Route is through low lying swampy land which will make access difficult or impossible during the rainy season".

Even if, as plaintiffs' counsel argues, the defendants' user is only "infrequent", there is authority (in the context of the parent English section dealing with restrictive covenants) to suggest that whether objectors do in fact take advantage of the benefits in



question is not always an essential factor: Gilbert v Spoor [1982] All E.R. 576 at 580. In any case, I find that the defendants do derive a benefit from having the easement in its present location.

Here, it is undisputed that the proposed variation would result in a circuitous route at least two and a half times the length of the present easement which now cuts directly across the parcel. The portion of the proposed easement along the southerly boundary of parcel 84 would travel through thick vegetation and low swampy land. By Cayman Islands standards at least, there is a striking difference in elevation between the existing easement, which is high and dry, and the proposed route which, for the most part, is in low lying land flanked on all sides by higher land, which accounts for its tendency to flood and its swampy nature. An estimate obtained by the fifth defendant of the cost of land filling in this area was stated by the contractor to be conservative "due to the swampy terrain of the property". Plaintiffs' counsel frankly conceded that a planning application would be needed for the filling and clearing of the southerly portion of the proposed route. It appears from paragraph 4 of the Benson Ebanks reply affidavit that the furthest the plaintiffs would go would be to "make a reasonable contribution towards the cost of filling the low lying section of the varied Pedestrian Right of Way" and "would be prepared to initially clear the thickly vegetated section of the varied Pedestrian Right of Way (emphasis added)".

It seemed to me that the sorts of "safeguards" proposed by plaintiffs' counsel, such as allowing the Registrar of Lands to approve and even



inspect the variation (even assuming these were within his powers) before varying the registration, must be of cold comfort to the defendants. Indeed, the more terms and conditions plaintiffs' counsel proposed for my order, the more it became apparent that in that scenario the defendants would inevitably be undertaking a substantial monitoring role to police the maintenance of any new easement to be constructed.

In the Strata Plan No.41 case referred to above the plaintiffs obtained planning permission to build a hotel, having submitted a layout of the proposed development which indicated a car park on the land which was subject to the defendants' vehicular right of way. It was a condition of the planning permission that the easement should be relocated before a certificate of occupancy could be granted.

Harre J. (as he then was) pointed out the degree of overlap between clause (c) and the second limb of clause (b):

" the second half of s.96(b) - that the impediment to the reasonable user must be without securing practical benefits to other persons - raises questions which reflect those falling to be answered under paragraph (c) in that if no practical benefits are secured for him, the person entitled to the benefit of the easement is not injured if it is discharged or modified".



What strikes me in particular about the Strata Plan No. 41 case, where it was demonstrated that the existing easement impeded reasonable user, was that very little was necessary to establish injury:

"What is proposed is that instead of having a 20 foot right of way shared with the guests of the hotel for the purpose of parking their cars and having access to them without having to cross the road, the second defendant shall have a 22 foot right of way which those guests will not only use for driving in and out but will also have to cross in order to gain access to their cars...

There is no independent evidence before me with regard to the problems which this may cause to the second defendant in the future. The plaintiff has not satisfied me that the proposed modification will not injure the second defendant, or that its existing right of way impedes the Plaintiff's reasonable user of the land without securing any practical benefit to the second defendant". (page 3)

In Murmarson Collett C.J. was of the view that the burden on the plaintiffs of establishing that the defendants will suffer no injury as a result of the proposed modification is not an easy one to discharge. As he put it at pages 71-72:

"Although the word "injure" in s.96 (c) of the Cayman Law is not qualified by the word "substantially" as it is in the comparable wording of the English s.



184, Mr. Ritch submitted that upon the true construction of it, such a qualification might be implied. However, in Re Mason, a New South Wales decision where the applicable statute included the word "substantial," Jacobs, J. observed that the word does not in context mean a large or considerable injury but rather an injury which has present substance, that is to say, not a theoretical injury but something which is real and which has present substance. I am content to adopt this formulation and to approach the present question with a view to deciding whether the defendants' proposed modification will entail any real injury to the legitimate interests of the plaintiffs or whether, as Mr. Ritch contends, the injury suggested is purely theoretical because, properly considered, the plaintiffs will be getting as good or better and a more convenient right of way than that which the present registered easements afford to them in every material respect". (emphasis added)

I observe that in Murmarson the variation proposed would have compelled the owners of the dominant tenements to "approach the sea shore by a longer and more circuitous route, [and] to stop their cars and reverse them in an area which will afford them no view of the sea whatsoever". This, said Collett C.J., would relegate them "to the status of being second class residents".

Some dicta in Re Ghey [1957] 3 All E.R. 164 is also noteworthy. Lord Evershed M.R. said at 168:

"...that what has to be done if an



applicant is to succeed, is something far more than to show that to an impartial planner the applicant's proposal might be called as such a good and reasonable thing. An applicant must affirmatively prove that one or other of the grounds for the jurisdiction has been established; and, unless that is proved, the person who has the proprietary right, as covenantee, of controlling the development of the property as he desires and protecting his own proprietary interest, is entitled to continue to enjoy that proprietary right".

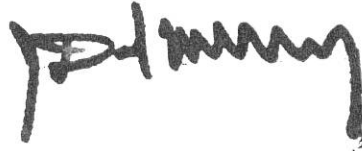
In the present case I am of the opinion that the plaintiffs have not been able to prove that the proposed variation will not injure the defendants. Indeed, even if the plaintiffs bore all the costs of creating a new route, there would still be injury to the defendants.

As defence counsel effectively put it, to grant this application would mean that as a result of the "mere dictates and desires of a proposed purchaser" the defendants would have to give up their existing route and "run all around the boundary". For the reasons given above, I do not accept that that is the sort of situation for which the section 96 provisions were meant to afford relief.



Notwithstanding the very able submissions of Mr. Giglioli, this application must be dismissed with costs to the defendants.

Dated this 12th day of November, 1996.



J.D. Murphy

Judge of the Grand Court

