[2018] JMCA Civ 17

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 79/2014

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA

BETWEEN	**HERBERT COCKINGS**	**APPELLANT**
AND	**GRACE GERTRUDE COCKINGS**	**RESPONDENT**

Written submissions filed by the appellant in person and Robert Fletcher, *amicus* for the appellant

Written submissions filed by Samuel Smith for the respondent

29 June 2018

MORRISON JA

[1] I have read in draft the judgment of my sister Phillips JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

PHILLIPS JA

Introduction

[2] This is an appeal from the judgment of Dunbar-Green J (Ag) ('the trial judge'), given on 28 July 2014. The appellant and the respondent were once husband and wife and there are two children of the marriage.

[3] The matter before the trial judge concerned the beneficial ownership of two properties formerly held by them as joint tenants. The first property, known as 10 Sharrow Drive, Kingston 8 in the parish of Saint Andrew ('Sharrow'), is registered at Volume 1382 Folio 891 of the Register Book of Titles. The second property, described as land part of Maverly and called Queen Hill in the parish of St Andrew ('Queen Hill'), is registered at Volume 1448 Folio 912 of the Register Book of Titles.

[4] The trial judge granted the declaration sought by the appellant, but resisted by respondent, that he was beneficially entitled to a half interest in Queen Hill and made certain consequential orders accordingly. There is no appeal from this finding and nothing now turns on it. This appeal is therefore entirely concerned with Sharrow. In this regard, the trial judge found, in effect, that contrary to the appellant's contention, the respondent had become the sole beneficial owner of Sharrow by virtue of an Instrument of Transfer ('the transfer') executed by him in her favour dated 15 January 1994.

[5] There was no dispute between the parties that the transfer was in fact executed by the appellant. However, the appellant maintained that the purchase of Sharrow was substantially funded by him from his own earnings as the main breadwinner for the family. But he contended that, with the knowledge and agreement of the respondent, he signed the transfer to protect Sharrow from the possibility of confiscation by the United States of America ('USA') government authorities during a period when it was expected that he would be away from Jamaica. This was done on the basis of advice he

had received, given the fact of his involvement in criminal activities and his previous incarceration in that country. Accordingly, he said, he signed the transfer with the intention that it "was only to be processed and registered if we were at imminent risk of losing the property because of my activities". In the event, the need never arose and the transfer was never "processed".

[6] The respondent gave a completely different account of the circumstances which led to the execution of the transfer. On her account, Sharrow was identified by her in 1986 and its purchase substantially funded out of her own resources and mortgage financing provided by Victoria Mutual Building Society ('VMBS') and Jamaica Citizens Bank ('JCB') respectively. Because of a shortfall in the amount needed to complete the purchase, the respondent was obliged to borrow the sum of $30,000.00 from the appellant, in return for which he insisted that his name be put on the title as part owner. In that capacity, he also subscribed to the mortgage deeds with VMBS and JCB, and both parties were accordingly registered as joint tenants on 10 April 1987. However, the understanding between the parties was that, as soon as the loan of $30,000.00 was repaid, the appellant would "do whatever [was] necessary to remove his name from the Title". It was pursuant to this understanding, the respondent said, she having fully repaid the $30,000.00 loan by the end of 1993, the transfer was prepared by her attorney-at-law and sent to the appellant in the USA for execution. In due course, the transfer was returned by him, fully executed and witnessed by a notary public, bearing the date 15 January 1994. She did not see to its registration on the title at that time because mortgage moneys were still outstanding on the property and she

could not afford to pay the transfer costs. She was therefore advised that it was not necessary to register the transfer immediately and that the transfer would remain valid for registration at any time, subject only to any payment of penalties for late registration. The respondent maintained that she was and remained in exclusive possession of Sharrow from the time it was purchased.

[7] It is common ground that, in November 2004, the parties co-operated to secure a loan from the Jamaica National Building Society ('JNBS'), on the security of Sharrow, for $500,000.00. The ostensible purpose of the loan was to effect repairs to the property, it having been damaged as a result of hurricane activity that year. It is also common ground that, in December 2009, the parties wrote a joint letter to JNBS requesting the addition of their children's names to the title for Sharrow.

[8] The trial judge identified three principal issues for decision. First, whether the appellant's claim was statute-barred. Second, whether the non-registration of the transfer affected the vesting of full ownership of Sharrow in the respondent. And third, whether the admitted illegality on the part of the appellant would be a bar to a finding of a resulting trust in his favour.

[9] On the first issue, the trial judge found that the appellant's half interest in Sharrow had not been extinguished by virtue of the Limitation of Actions Act. There is no appeal against this finding and no further mention need be made of it.

[10] On the second issue, the trial judge found that: (i) non-registration of the duly executed transfer did not make it void; (ii) the execution of the transfer by the

appellant had the effect of severing the joint tenancy in the property; and (iii) the execution of the transfer was intended by the appellant to pass his beneficial interest in Sharrow to the respondent, and that having done so, he was thereafter deemed to continue to hold his interest in trust for her until such time as the transfer was registered.

[11] On the third issue, the trial judge found that "since the [appellant] has come to equity with 'bare-faced' reliance on illegality, the Court will not assist him". There was therefore no possibility of a resulting trust arising in his favour in these circumstances.

The issues on appeal

[12] The appellant challenges the trial judge's decision on the following three grounds:

> "1) The learned trial judge failed to have regard to the acts of the parties subsequent to the execution of the Instrument of Transfer on January 15, 1994, particularly to the following:-
>
> a) that in November 2004 both parties took out a mortgage loan with [JNBS] on the security of the said Sharrow residence, for the purpose of effecting repairs thereto,
>
> b) that in December 2009 both parties wrote a joint letter to [JNBS] requesting the addition of their children's names to the title for the Sharrow residence. In the said letter they described themselves as 'joint tenants' of the property.
>
> 2) The learned trial judge failed to consider that the conduct of both parties after the Instrument of Transfer was executed, constituted recognition by

them that the appellant was still a joint tenant and registered proprietor of the Sharrow property.

3) The learned trial judge failed to appreciate that the Appellant was not relying on any illegal activity as the reason for his execution of the Instrument of Transfer. The Appellant will seek to add to these grounds of appeal if so advised."

On 13 May 2016, the appellant filed an additional ground of appeal namely:

"4) The learned trial judge erred by failing to declare that the Appellant is entitled to a half interest in 10 Sharrow Drive, Kingston 8 in the parish of Saint Andrew, Lot 2B and registered at Volume 1382 Folio 89 in the Register Book of Titles."

[13] On 21 July 2016, when the matter came before the court for hearing, the court ordered, with the consent of the parties, that the appeal is to be considered on paper. The court also granted the appellant permission to file and serve further written submissions by 27 July 2016, through Mr Fletcher who appeared *amicus* for the appellant. The respondent was at liberty to file submissions in response on or before 3 August 2016. Pursuant to the order of the court Mr Fletcher filed further submissions. Mr Fletcher's further submissions focused on the trial judge's: i) error in not finding that the respondent was estopped from registering the transfer; ii) failure to take into account that a resulting trust was presumed to have arisen in favour of the appellant and that the presumption was not rebutted; iii) error in making a distinction between **Tinsley v Milligan** [1993] 3 All ER 65 ('**Tinsley**') and the instant case in considering the effect of illegality on the rights of the parties; and iv) in light of the illegal purpose

not being realized, error in the way she considered the appellant's evidence of illegality and in dismissing his claim on the basis of the maxim *ex turpi causa non oritur actio*.

[14] The grounds of appeal gave rise to two broad issues. The first was whether, in coming to her decision, the trial judge gave any or any sufficient effect to the conduct of the parties subsequent to the execution of the transfer on 15 January 1994; in particular, the joint mortgage given by them to JNBS in November 2004 and their letter to JNBS in December 2009. This discussion would also include the further submissions relating to whether the respondent was estopped from registering the transfer. And the second is whether the trial judge was correct in finding that the appellant's case involved reliance on illegality. In respect of this ground I will embrace the further submissions relating to whether the judge failed to take into account the resulting trust; whether the presumption of that resulting trust has been rebutted; and whether the principle in **Tinsley** applied. I will also address the effect of the illegality on the rights of the parties, and whether the illegal purpose had not been realized. I will refer to these issues as 'the subsequent conduct issue' and 'the illegality issue' respectively.

The subsequent conduct issue

[15] This issue arises in this way. After the execution of the transfer in January 1994, the respondent and the two children of the marriage continued to occupy the property as their home. During this period, the appellant remained in the USA and, while visiting Alabama in the summer of 1996 on, as he described it, "drug business", he was arrested for the second time. He remained in prison in Alabama until 2003, when he

was deported to Jamaica and was picked up at the airport by the respondent. He then took up residence at Sharrow, where he continued to live up to the date of trial.

[16] As regards the mortgage loan from JNBS in November 1994, the appellant first said this (in paragraph 8 of his affidavit sworn to on 27 September 2011, after giving his account of how the original mortgage loans were repaid):

> "We took out another mortgage loan of $400,000.00 secured against the residence in 2004. This loan was mostly for my benefit. It is being repaid from rental income earned from rental of a self-contained section of the residence."

[17] In her affidavit in response sworn to on 24 October 2011, the respondent first challenged the appellant's account of how the original mortgage loans were repaid. She then said this (at paragraphs 44-45):

> "44. That in or around 2004 the roof of the residence was destroyed by the hurricane and I approached the [JNBS] for a loan of $500,000.00 to assist with the repairs thereof. It was at no time contemplated that this loan was to be of any benefit to the [Appellant]. That said loan was approved and since the loan was secured by a mortgage, the deeds for which bore the [Appellant's] name jointly with mine as his name was still on the title as legal joint owner.
>
> 45. That it was a pre-condition to the disbursement of the mortgage proceeds that I opened an account in the joint names of myself and the [Appellant] to which the proceeds of the mortgage was credited. That shortly after the said funds were credited to the account the [Appellant] unilaterally debited all the moneys and converted same to his own use. As a consequence of his wrongful and illegal act, the money could not be applied to the purpose for which

> it was borrowed. That nevertheless I have to be repaying said loan as the [Appellant] refuses to refund the money."

[18] The appellant returned to the topic of the JNBS loan as follows (at paragraph 35 of his affidavit sworn to on 16 July 2012):

> "When the [respondent] collected me from the airport ... after my deportation, she took me home to our property at Sharrow Drive. Since the year 2004 she continued to acknowledge my interest in this property when we both obtained a loan of $500,000.00 from [JNBS]. I aver that this money was mostly for my benefit ... We were not totally honest when we represented to the [JNBS] that the money was for house repairs. I signed the mortgage deeds as a clear owner of the half interest in it. ..."

[19] This drew an angry response from the respondent (see paragraphs 29-31 of her affidavit sworn to on 18 September 2012):

> "29. That I categorically say in relation to the [Appellant's] claim that I acknowledge him as part owner as contained in paragraph 35 of his Affidavit, or at all, said claim is denied in its entirety.
>
> 30. That in particular, in answer I will refer to my previous Affidavit filed herein and further say that I applied for a mortgage to finance repairs to the residence. That the [Appellant's] name was on the title as owner of a legal interest and I was instructed by the mortgagee that his name would have to be placed on the Mortgage deed as such. The [Appellant] well knows that I never acknowledged him as owner of any beneficial interest in said property.

> 31. That in any event the [Appellant] stole the part of the mortgage disbursed, never contributed or asked to assist with the repayment of the mortgage, as it was always intended that I was borrowing said loan to repair my property."

[20] In relation to the December 2009 letter to JNBS, the appellant said this (at paragraph 37 of his affidavit sworn to on 16 July 2012):

> "... [I]n December 2009 when the [respondent] and I were having talks about how we would deal with our property at Sharrow Drive, we thought of adding the names of our children to the title for it with all of us being joint tenants. In pursuance of this we wrote a joint letter to [JNBS] of our intention because as mortgagee, that entity had to consent to our doing so. At no time did the [respondent] act in any way to remove my name or have my name removed from [the title]."

[21] The appellant exhibited the letter to JNBS dated 14 December 2009 to his affidavit:

> "10 Sharrow Drive
> Kingston 8
> December 14, 2009.
>
> The Manager
> Mortgage Department
> Jamaica National Building Society
> 2-4 Constant Spring Road
> Kingston 10.
>
> Re: Addition of names to title of 10 sharrow Dr., Kingston 8.
>
> We, the undersigned Herbert Keith Cockings and Grace Gertrude Cockings, joint owners of 10 Sharrow Drive, Kingston 8 (Volume #1051 & Folio #919) wish to advise you

> that we wish to add our children's names Kristi Annmarie Cockings and Christopher St. George Cockings to the title as joint tenants.
>
> Respectfully yours,
>
> Signed
> Herbert Cockings
>
> Signed
> Grace Cockings"

[22] The respondent made no comment on this letter.

[23] The trial judge made no finding specifically directed to the appellant's current contention, which is that the evidence of the parties' subsequent conduct was a relevant factor in the analysis of the true status of the transfer. What the judge did say, in the context of her discussion on the then live issue of whether the appellant's interest in the property had become statute-barred, was this:

> "[70] Their close relationship continued up to 1994 when the [respondent] arranged for the [appellant] to execute a Power of Attorney and the Transfer was done. Accordingly, there was no evidence up to then of any abandonment. In any event, only seven years would have run since the purchase of Sharrow. The issue of extinction of title would not have arisen then.
>
> [71] I find no credible evidence since 1994 to suggest that the [respondent] had the animus possidendi. Except for the 7 years following, when the [appellant] was imprisoned, the two parties did joint transactions in relation to Sharrow. Together, they negotiated and received a loan from [JNBS] in November 2004 for the purpose of repairing the Sharrow property. Since 2004, the [respondent] has also been sharing the proceeds of rental of parts of the property with the [appellant]. They also wrote a letter, jointly, in 2009 requesting consent from [JNBS] to add their children's

> names to the titles, as joint-tenants. I find these actions to be inconsistent with the intention to dispossess the [appellant]."

Submissions - subsequent conduct issue

[24] In endeavouring to show that the trial judge had failed to appreciate that the subsequent conduct to the creation of the transfer demonstrated that the appellant owned one-half of the Sharrow property, and that the respondent had acknowledged and accepted that, the appellant posited the issue as "Was the Transfer a Sham?". The appellant answered the question in the negative and submitted that the signing of the transfer was never meant to be an absolute transfer to the respondent, but as indicated previously, was prepared and executed to protect the family assets. If there had been a transfer of his interest to the respondent, then, he argued, she would have held his interest in trust for him. The non-registration of the transfer was meant to have the effect, and did have the effect of protecting the appellant's potential incapacities and up and until the transfer needed to be registered, he remained a true legal and beneficial owner of one-half of the Sharrow property.

[25] The respective interests in the property at the time of the signing of the transfer were he said, very important. So too was the production of the Power of Attorney. Both documents were prepared for signature and dispatched to the appellant in the USA but were never stamped, registered and/or utilized. In these circumstances, the appellant submitted that the court should have found that the subsequent conduct indicated and underscored his legal and beneficial interest in Sharrow, as he remained

registered on the certificate of title for Sharrow while the subsequent conduct was taking place. The appellant submitted in paragraph 18 of his submissions that:

> "18. An agreement between parties can be subject to a subsequent event, that may or may not occur in the future, a contingent condition or condition precedent. Such condition goes to the root of the agreement/contract as it is the basis upon which the agreement was reached. Without it there would have been no agreement. A condition may not be represented in the document but may be implicit to the agreement, and in disputed cases the condition may only be deduced from the actions of the parties."

[26] As a consequence, the appellant contended that nothing had occurred which required the appellant to act on the transfer, and further, the non-registration of the transfer was supporting evidence that there was a condition precedent to the agreement not to effect the transfer unless certain conditions arose. There was also no credible evidence from the respondent with regard to the position taken by her, as to the acquisition of her share in Sharrow and the production of the transfer. So, the appellant maintained that the subsequent conduct in which the respondent had participated, at a time when he remained registered on the certificate of title, to her knowledge, confirmed his continuous beneficial interest in the property, which he relied on with some conviction, and in respect of which counsel argued, the trial judge had failed to consider in her deliberations.

[27] Mr Fletcher submitted that despite the judge's findings that the appellant's half interest was not extinguished by the Limitation of Actions Act, and that there was evidence of joint ownership since 2004, she had failed to recognize that the mutual

conduct of the parties "demonstrated a clear recognition of the unbroken nature of their joint tenancy", and that the actions taken by the appellant, by signing the transfer, indicated the end of whatever intent he may have had. He submitted further that the transfer document itself, being executory, was without efficacy until it was registered and as such, had been extinguished in intent, purpose and legal value by the actions of the parties. The respondent, he said, should be estopped from asserting the validity of the transfer by way of registering it. Further, no consideration ought to have been given to the issue of whether the transfer was valid and any order declaring it valid was "fatally flawed".

[28] Counsel for the respondent did not address this issue on the "subsequent conduct" in any great detail. He stated that it was not a part of the conflict in the court below, which is why counsel posited that the court had not made any specific finding on whether the subsequent conduct of the parties after the execution of the transfer, although it had not been registered, meant that the appellant was still beneficially entitled to an interest in Sharrow. Counsel submitted that the real controversy in the court below was whether the joint legal registered interest of the appellant and the respondent in Sharrow could have been severed by the transfer, in circumstances where the transfer could have been void, it having not been registered. Additionally, if the transfer was void, whether it could vest the appellant's interest in the property in the respondent.

[29] The trial judge found, based on the principle enunciated by Wolfe J (as he then was) in **Brynhild M Gamble v Hazel Hankle** (1990) 27 JLR 115 that section 88 of the Registration of Titles Act ('ROTA') was directory and not mandatory; and that section 63 did not operate to make the unregistered instrument void, but only postponed the passing of the interest created by the instrument until the interest was registered. There was no appeal from this finding, correctly in my view, and no more need be said on it. Counsel submitted that there was no evidence or legal basis to support the appellant's position that the conduct of the respondent subsequent to the execution of the transfer had the effect of voiding the transfer, and or its true purpose. It is also instructive that in cross-examination, the appellant admitted that he had intended to transfer his interest in Sharrow to the respondent at the time the transfer was executed.

[30] The respondent maintained that the registered legal ownership of Sharrow did not reflect the true beneficial ownership of the property, which was hers alone. It was her contention that no trust had arisen in the circumstances of this case. It would therefore be left to this court to interpret the subsequent conduct as inconsistent with or contrary to her position of owning the entire beneficial interest in Sharrow, particularly when these arguments on this issue had not been raised, articulated and or pursued in the court below.

Analysis – the subsequent conduct issue

[31] It is understood why the appellant relies on the fact that: (i) up until the time that the mortgage was obtained from JNBS on 24 November 2004; (ii) the letter to

JNBS was written on 14 December 2009 making enquiries for the addition of his children's names on the certificate of title for Sharrow; and (iii) his name was still registered on the said certificate of title as a joint owner of Sharrow, to say that as he participated with the respondent in those activities, then she would be precluded from denying that he was a part owner of Sharrow. If he was viewed as a registered owner and treated as such by the respondent in respect of those joint endeavours, he argued, then that subsequent conduct to the execution of the transfer clearly underpinned his claim of joint registered legal and beneficial ownership of Sharrow, and belied her claim of having in hand a valid transfer of his interest. However, the Torrens system which operates in Jamaica under ROTA is a well recognised system of ownership of land by registration that does not necessarily depict the true beneficial ownership of the land. If the parties wished however to take out a loan, and the appellant's name remained registered on the title, he would have had to facilitate the transaction and execute the relevant documentation, and on the face of it, assume the obligations and responsibilities stated therein.

[32] There was nothing however that prevented the beneficial owner from assuming the entire obligation to repay the loan. There was evidence that this was what the respondent did. It was her contention that the funds were to be used to repair the home that had been damaged by the hurricane. However, she stated that the appellant had used the funds duplicitly otherwise, and left her with the responsibility to repay the sums borrowed although the purpose for the loan had not been fulfilled. The appellant's contention was that the funds were really for him in the main and that he had utilised

the same. The purpose for the loan stated to the mortgagee, he said, was untrue. In my opinion therefore, there was evidence on which a court could rely that the subsequent conduct was not inconsistent at all with the respondent's claim that: (i) the instrument of transfer was valid; (ii) the appellant's interest had been severed; and (iii) the respondent owned the entire beneficial interest in Sharrow and operated and treated with the property as her own. The appellant was not prejudiced in any way in participating in the loan as he had not repaid the funds, and the children's names had not been added to the certificate of title, which could have diminished his alleged interest. It only remained for his name to be removed from the title to reflect the severance of the same by way of the valid transfer when registered.

Submissions - the illegality issue

[33] The appellant submitted that the trial judge erred in focusing on the admitted illegal activities in which he had been engaged. Instead, it was submitted that her focus should have been on whether at the time of the signing of the transfer, the appellant had intended an absolute gift to her, or whether it was, as he had stated, a strategic act to try to protect the family assets. Equally, the appellant submitted, which was telling, the case was not based on the financial contribution each party had made in respect of the acquisition of Sharrow. The appellant pointed out that the respondent had claimed in the court below that his interest had been extinguished pursuant to the Limitation of Actions Act, and stated that there had been no evidence to support that claim, and as a result, it had not found favour with the court. The appellant submitted also that the respondent had not produced any credible evidence to support the loan

that she claimed that she had obtained from him in the sum of $30,000.00 to pay the closing costs to acquire Sharrow, which she said had resulted in the production of the transfer.

[34] The appellant was thus relying on the fact that he was legally registered on the title, and jointly beneficially entitled to his interest in Sharrow. He referred to the fact that in any event, he had contributed to the purchase of Sharrow in that he had made the initial payment on the purchase price and the balance of the price had been financed by mortgage. As a consequence, he submitted that he did not have to rely on his illegal activities to explain why his interest in Sharrow as a joint tenant had been registered on the title. He therefore stated that in those circumstances, the subsequent conduct, which he had referred to previously and relied on, only confirmed his ownership of Sharrow, acknowledged by the respondent. He reiterated that the important time to assess any interest in property is at the time of acquisition, and additionally, in this case, there was no evidence that the appellant had at any time relinquished his interest in Sharrow.

[35] Counsel for the respondent submitted that there was a reason why the trial judge had focused on the illegal activity of the appellant. This was because even in respect of his alleged contribution to the acquisition of Sharrow, the appellant gave the court, and relied on detailed evidence of how he had gone about supporting his family, which related to his nefarious activities in dealing in drugs. Also, he had indicated that that was how he had acquired funds to make his contribution to the purchase of

Sharrow. However, for the purposes of this aspect of the appeal, it was the respondent's contention that the appellant no longer held any beneficial interest in the property as the executed transfer was not void and was effective to transfer his interest to her. The fact that it was unregistered only postponed the passing of the legal interest by the transfer until it was registered. As already indicated, it was only if the transfer was void that it would have been ineffectual to alienate the appellant's interest in favour of the respondent. The appellant could not claim that he owned the property having executed the transfer. It was therefore contended by counsel for the respondent that the only way the appellant could attempt to defeat the respondent's claim to the whole beneficial interest in Sharrow, was to depone as he had done that he had executed the transfer in order to avoid confiscation of Sharrow by the United States Federal Authority or any other legal power ('Federal Authorities'), because of his previous convictions for and his continued dealing in drugs. Counsel argued that the appellant by his own evidence had sought direct or tacit enforcement by the court of an alleged arrangement that he had engaged in expressly, for an illegal purpose.

[36] Counsel relied on the well known case, **Chettiar v Chettiar** [1962] AC 294 (**'Chettiar'**), for the principle that "no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act"; and on **Scott v Brown, Doering and others** [1892] 2 QB 724 for the principle that "no party can recover what he has given to the other under an illegal contract if in order to substantiate his claim he is driven to disclose his illegality". He submitted further that the appellant's reliance on **Tinsley** did not assist him, as in that case, the claimant did not have to rely on a illegal purpose to

prove her entitlement to her one half interest in the home, whereas in the instant case, the appellant has to rely on his illegal activities to explain his position with regard to the execution of the transfer. Counsel submitted therefore that the trial judge's finding on this issue cannot be faulted.

[37] Mr Fletcher, in further submissions on the illegality issue, submitted that as a consequence of the presumption of a resulting trust, the appellant retained his interest in Sharrow and as such the illegality was irrelevant to the claim. According to him, any argument that could be offered to support the presumption of advancement was severely weakened by the parties divorce and subsequent remarriage, and by the finding by the trial judge that the relationship between them subsisted up to 1994 when the transfer was made. Further, he submitted that the transfer must be perceived as passing only the appellant's legal interest and as such, the respondent ought to be viewed as a trustee of the appellant's interest. The reference by the trial judge to the concept of a resulting trust was primarily in relation to the illegality. However, the resulting trust could have arisen from the time the transfer was made and was therefore current and active.

[38] Counsel also submitted that the trial judge's findings that there was a dispute as to joint ownership in the instant case, whereas in **Tinsley** it was not, was contrary to her prior settled position that there was joint ownership between the parties. He submitted that joint ownership was therefore not in dispute. That finding, according to him, made **Tinsley** indistinguishable from the instant case and was therefore

applicable. In the light of this, the appellant was entitled to the presumption of a resulting trust in his favour without any regard to the illegality.

[39] Mr Fletcher also argued that even if the trial judge was correct in taking into account the illegality, she misconstrued the law on illegality and the resulting effects. He submitted that the illegal purpose had not materialized as the fact that the transfer of Sharrow had not been effected was an indication that the instrument of transfer had not been used for the purpose for which it was contemplated and as such, called for an examination of the doctrine of *locus poenitentiae* (see **Tribe v Tribe** [1996] Ch 107 '**Tribe'**). Based on this doctrine, counsel submitted that the appellant could lead evidence of the illegal purpose whenever it was necessary for him to do so, provided that he had "withdrawn" from the transaction prior to the illegal purpose being partially or wholly effected. Mr Fletcher also submitted that the judge should have taken into consideration that the appellant, having transferred his interest without consideration, could have recovered the property as the illegal purpose had not been carried out. In the instant case, the fact that the transfer was incomplete, he submitted, meant that the illegal purpose was not, and could not, be carried out and as such, the appellant was entitled to lead evidence of the illegal purpose to demonstrate his intention to retain his beneficial interest. As a result of this, Mr Fletcher submitted that the trial judge erred in disqualifying his evidence and claim on the basis of *ex turpi causa,* and should have instead considered it in the light of *locus poenitentiae* which would have resulted in the trial judge concluding that there was a resulting trust in the appellant's favour.

[40] Counsel relied on the United Kingdom Supreme Court ('UKSC') decision in **Patel v Mirza** [2016] UKSC 42 ('**Patel'**), which was delivered subsequent to the decision of the trial judge in the instant case, to fortify his submission. He submitted that the decision in **Patel** confirmed that a more flexible approach is required in illegality cases in keeping with the general principle that a claimant was entitled to the return of money paid to a defendant pursuant to a contract tainted with illegality and by extension, as in this case, property transfers. According to him, the overriding consideration is the public interest rationale in safeguarding the integrity of the legal system which is to be assessed by considering, *inter alia,* whether the denial of the claim would be a proportionate response to the illegality. Counsel asserted that: i) given certain findings of fact by the trial court that underscored the appellant's beneficial interest in Sharrow; ii) in the absence of any finding that it was a gift to the respondent; and iii) in the context of the non-implementation of the illegal purpose, the trial judge's refusal to consider the evidence of the illegality cannot be justified in law and further, the refusal to lend the court's assistance to the appellant resulted in him being unfairly dispossessed of title and the respondent being unjustly enriched. The issues considered by the trial judge and her findings of facts and law were therefore incomplete and resulted in legally insupportable conclusions.

Analysis – the illegality issue

[41] As indicated in the further submissions to this court, counsel for the appellant relied on the decision in **Patel** where the majority of that court departed from the

"reliance test" that was at the core of **Tinsley**, in favour of a broader "public interest/public policy" test proposed by Lord Toulson who gave the leading judgment.

[42] The facts in brief are that Mr Patel paid £620,000.00 to Mr Mirza, for the purpose of betting on the price of shares using advance insider information which Mr Mirza expected to obtain from his contacts. The agreement amounted to a conspiracy to commit an offence of insider dealing under section 52 of the Criminal Justice Act 1993. The insider information did not materialize and so the intended betting did not take place. Mr Mirza failed to repay the money to Mr Patel and Mr Patel claimed for recovery of the sums he had paid. The claim, according to him, was put on various bases such as contract and unjust enrichment. In order to establish his claim for recovery of the money paid, Mr Patel had to explain the nature of their agreement. Applying the "reliance principle" in **Tinsley**, the judge at first instance held that Mr Patel's claim to recover the sum paid was unenforceable because he had to rely on his own illegality to establish it, unless he could bring himself within the exception of the "doctrine known, misleadingly, as locus poenitentiae" and that "he could not bring himself within that exception since he had not voluntarily withdrawn from the illegal scheme" (see paragraph 14 of **Patel**).

[43] The Court of Appeal, by a majority, agreed with the judge on the reliance issue but disagreed with respect to the application of the *locus poenitentiae* exception, and held that it was enough for the claim to succeed as the scheme had not been executed. Despite being in agreement with the majority, Gloster LJ took a different approach. She

rejected the view that **Tinsley** should be interpreted as laying down a rule of universal application that the defence of *ex turpi causa* must apply in all circumstances where a claim involves reliance on the claimant's own illegality. Instead, she was of the view that consideration should be given as to whether the policy underlying the rule which made the contract illegal in the first place would be "stultified by allowing the claim". She suggested several factors which ought to be examined and was of the opinion that if the illegal activity had not occurred, then there was no public policy barring Mr Patel from recovering his money. Mr Mirza appealed to the Supreme Court.

[44] At paragraph 9, Lord Toulson summarized the issue in the case as follows:

> "In this case the issue is whether Lord Mansfield CJ's maxim precludes a party to a contract tainted by illegality from recovering money paid under the contract from the other party under the law of unjust enrichment (to use the term now generally favoured by scholars for what used previously to be labelled restitution and, before that, quasi-contract). On one side it is argued that the maxim applies as much to such a claim as to a claim in contract, and that the court must give no assistance to a party which has engaged in any form of illegality. On the other side it is argued that such an approach would not advance the public policy which underlies Lord Mansfield CJ's maxim, once the underlying policy is properly understood."

[45] In dismissing the appeal, Lord Toulson stated that:

> "*Summary and disposal*
>
> 120. **The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear**

and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than [sic] the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.

121. A claimant, such as Mr Patel, who satisfies the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason only of the fact that the money which he seeks to recover was paid for an unlawful purpose. There may be rare cases where for some particular reason the enforcement of such a claim might be regarded as undermining the integrity of the justice system, but there are no such circumstances in this case. I would dismiss the appeal." (Emphasis applied)

[46] Before disposing of the appeal, at paragraph 110 he stated that the reliance rule in **Tinsley** should no longer be followed. He said:

"I agree with the criticisms made in **Nelson v Nelson** (1995) 184 CLR 538 and by academic commentators of the reliance rule as laid down in **Bowmakers Ltd v Barnet Instruments Ltd** [1945] KB 65 and **Tinsley v Milligan** [1994] 1 AC 340, and I would hold that it should no longer be followed. Unless a statute provides otherwise (expressly or by necessary implication), property can pass under a transaction which is illegal as a contract: **Singh v Ali** [1960] AC 167, 176, and **Sharma v Simposh** [2013] Ch 23, paras 27-44. There may be circumstances in which a court will refuse to lend its assistance to an owner to enforce his title as, for example, where to

> do so would be to assist the claimant in a drug trafficking operation, but the outcome should not depend on a procedural question."

[47] In **Tinsley**, T and M, who were lovers, purchased a house jointly. However, the house had been registered in T's name only as the sole legal owner. The house was used as a lodging house, run as a joint business venture and provided most of the parties' income. It was common ground that, although the house was owned jointly, it had been registered in T's name alone so that M (with the knowledge and assent of T) could make false claims to the Department of Social Security for benefits. The money so obtained was shared by the parties. Subsequently, M admitted her unlawful conduct and thereafter continued to obtain benefits lawfully without prosecution. The parties quarrelled and T moved out, while M remained in occupation of the house. T brought an action for possession of the house and asserted ownership of it. M counter-claimed for an order for sale and a declaration that the house was held by T in trust for both of them in equal shares. T contended in court that: (i) pursuant to the doctrine of *ex turpi causa non oritur actio,* M was precluded from denying T's ownership because the purpose of registering the house in her name alone was to facilitate a fraud on the Department of Social Security and so the claim to joint ownership was tainted by illegality; and (ii) that applying the equitable principle that he who comes to equity must come with clean hands, "the court ought to leave the estate to lie where it fell since the property had been conveyed into the name of one party for a fraudulent purpose which had been carried out and in those circumstances the court ought not to enforce a trust in favour of the other party". T's claim was dismissed by the judge at

first instance and by the Court of Appeal. On her appeal to the House of Lords, it was held by a bare majority that:

> "Where property interests were acquired as a result of an illegal transaction a party to the illegality could recover by virtue of a legal or equitable property interest if, but only if, he could establish his title without relying on his own illegality even if it emerged that the title on which he relied was acquired in the course of carrying through an illegal transaction. Where the presumption of advancement applied, the plaintiff was faced with the presumption of gift and therefore could not claim under a resulting trust unless and until he rebutted the presumption of gift, in which case he would have had to rely on the underlying illegality and would therefore fail. ... On the facts, M had established a resulting trust by showing that she had contributed to the purchase price of the house and that there was a common understanding between her and T that they owned the house equally. M had no need to allege or prove why the house was conveyed into the name of T alone since that fact was irrelevant to her claim, and, on the facts, M had raised a presumption of resulting trust which was not rebutted by any evidence to the contrary. In those circumstances M was entitled to succeed in her counterclaim. The appeal would therefore be dismissed."

[48] In the instant case, the appellant executed the transfer to the respondent of all his fee simple interest on 15 January 1994. The consideration stated in the transfer was that it was for the natural love and affection he bore for her. That evidence would suggest that the transfer was by way of a gift by the appellant to the respondent. In these circumstances, the appellant could not claim by way of a resulting trust, unless he could rebut the evidence of a gift by way of the transfer. To do so, he would have to explain the illegal purpose of the execution of the transfer which was to hide his assets from the Federal Authorities, and even in the light of the broad criteria outlined in

Patel, it would be harmful to the integrity of the legal system if the claim was enforced. The law still would not countenance his benefitting from his own illegality. The trial judge could therefore not be faulted for rejecting his coming to equity with 'bare-faced' reliance on that illegality.

[49] I must mention briefly the case of **Tribe** on which Mr Fletcher relied for the proposition that the transfer, being incomplete, meant that the illegal purpose for which it was contemplated did not materialize and as such the doctrine of *locus poenitentiae* should have been applied. In **Tribe**, the plaintiff had transferred shares to his son in an effort to deceptively improve his negotiating position in relation to upcoming claims by the landlord. The claim did not materialize and the plaintiff requested that the defendant retransfer the shares in the company back to him.

[50] The judge at first instance found that the transfer had been made for an illegal purpose but since the illegal purpose was not carried into effect, the plaintiff was entitled to lead evidence to rebut the presumption of advancement that would require the transfer to be treated as a gift, and that there had been an agreement that the defendant would hold the shares on trust for the plaintiff pending the settlement of the claims. The plaintiff was granted the relief sought.

[51] On appeal by the defendant, the Court of Appeal dismissed the appeal and held that since the transfer of the shares was a voluntary transfer between father and son for no consideration, the presumption of advancement applied unless the transferor could rebut it. The court went further to state that i) an action for restitution could be

brought by the transferor either at common law or equity but would fail if it would be illegal for the transferor to retain any interest in the property; ii) in a case where no presumption of advancement arose a transferor could recover property transferred without consideration if he could do so without reliance on an illegality and could show an intention to retain a beneficial interest in the property; and iii) the exception to the general rule applied where the presumption of advancement arose, but the illegal purpose which the transferor had to rely on in order to rebut the presumption had not been carried into effect in any way and therefore the plaintiff was entitled to lead evidence of the agreement with the defendant to rebut the presumption of advancement.

[52] Millett LJ, in addressing the applicability of the doctrine of *locus poenitentiae* at page 133, described it as an exception which operates to mitigate the harshness of the primary rule which precludes the court from lending its assistance to a man who founds his cause of action on an illegal or immoral act. The justification for this primary rule, he said, is not a principle of justice but a principle of policy. According to Millett LJ, the doctrine enables the court to do justice between the parties, even though in order to achieve this, the court has to allow the plaintiff to give evidence of his dishonest intentions and that he withdrew from the transaction while the dishonesty remained as an intention only. In the light of this, the doctrine is therefore not inconsistent with the policy which underlies it.

[53] The case of **Tribe** is distinguishable from the instant case in that the presumption of advancement was applicable in **Tribe.** In the instant case, the appellant and the respondent had been divorced since 1984 and the property was acquired in or around April 1987. The presumption of advancement therefore does not specifically arise, although the transfer was stated as having been made by way of a gift. The appellant, however, having stated that he intended to transfer his interest in Sharrow to the respondent, and having executed a valid transfer of his fee simple interest, would only be able to recover the share in Sharrow that was the subject of the transfer, by relying on his confessed illegality, and by showing that he intended to retain a beneficial interest in Sharrow, both of which he was unable to do. Further, the appellant did not withdraw at any time from his unlawful plan prior to the execution of the transfer or subsequently. Instead, he has sought to rely on the subsequent conduct because his name remained on the title.

[54] In **Patel**, Lord Toulson opined at paragraph 44 that the *locus poenitentiae* exception "has given rise to difficult and conflicting case law" and that its importance has arisen as a result of the strictness of the basic rule which has been applied by the courts. In relation to the applicability of *locus poenitentiae,* Lord Toulson said that:

> "116. In place of the basic rule and limited exceptions ... I would hold that a person who satisfies the ordinary requirements of a claim in unjust enrichment will not prima facie be debarred from recovering money paid or property transferred by reason of the fact that the consideration which has failed was an unlawful consideration. I do not exclude the possibility that there may be particular reason for the court to refuse its assistance to the claimant, applying the kind of exercise which Gloster LJ applied in

> this case, just as there may be a particular reason for the court to refuse to assist an owner to enforce his title to property, but such cases are likely to be rare. ... No particular reason has been advanced in this case to justify Mr Mirza's retention of the monies beyond the fact that it was paid to him for the unlawful purpose of placing an insider bet."

[55] As already mentioned, the decision in **Patel** was handed down subsequent to the lower court's decision in the instant case and also the filing of the appeal. The further submissions filed on behalf of the appellant by Mr Fletcher were framed along the guidelines contained in **Patel**. In the light of this, the trial judge's decision will be reviewed in the context of **Patel.**

[56] This court has stated in numerous cases that it will not lightly disturb findings of fact made at first instance by the tribunal charged with that responsibility. This approach was endorsed by the Privy Council in **Industrial Chemical Co (Ja) Ltd v Ellis** (1986) 23 JLR 35 ('Industrial Chemical') and **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21. Brooks JA referred to these authorities in **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7 ('**Rayon Sinclair'**), where he gave a comprehensive outline of the law relating to the findings of fact at paragraphs [7]-[10]. At paragraph [10], he cited the following guiding principles stated by K Harrison JA at page 15 of **Eurtis Morrison v Erald Wiggan and Another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 56/2000, judgment delivered 3 November 2005:

> "The principles derived from the previously decided cases on the point of findings of fact] can therefore be summarized as follows: (a)

> Where the sole question is one of credibility of the witnesses, an appellate court will only interfere with the judge's findings of fact where the judge has misdirected himself or herself or if the conclusion arrived at by the learned judge is plainly wrong. (b) On the other hand, where the question does not concern one of credibility but rather the proper inferences that ought to have been drawn from the evidence, the appellate court may review that evidence and make the necessary inferences which the trial judge failed to make."

[57] Based on these guiding principles, the court, in the instant case, based on the "public interest" test outlined in **Patel**, is now required to:

(a) consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim;

(b) consider any other relevant public policy on which the denial of the claim may have an impact; and

(c) consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.

(a) The underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim

[58] At paragraph 109 of **Patel**, Lord Toulson observed that because the question is whether the relief should be granted, in the statutory context, the court "must obviously abide by the terms of any statute". Where the common law doctrine of illegality was being considered by the court however, the court "must have regard to the policy

factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed".

[59] His lordship highlighted the importance of taking into account the statutory context by citing the case of **Hardy v Motor Insurers' Bureau** [1964] 2 QB 745 ("**Hardy**"). In that case, the Road Traffic Act 1960 required a motorist to be insured against the risk of causing death or personal injury through the use of a vehicle on a road. A subsequent line of authorities established that contracts were unenforceable where they indemnified a person against the consequences of a deliberate criminal act. In **Hardy**, the plaintiff was injured by the driver of a van who was uninsured, and therefore sued the defendant under an agreement between the defendant and the Minister of Transport, by which the defendant had agreed to satisfy any judgment against a motorist for a liability required to be covered under a motor insurance policy. In rejecting the defence's reliance on the maxim *ex turpi causa*, that a contract purporting to insure the driver against his own deliberate criminal conduct would have been unlawful, Diplock LJ observed that the purpose of the relevant statutory provision was for the protection of persons who suffered injury on the road by wrongful acts of motorists and the purpose would have been defeated if the common law doctrine of illegality was applied to bar the claim.

[60] In the instant case, the trial judge found that not only did the transfer sever the joint tenancy, but also accepted the respondent's claim that the appellant intended to

pass his legal and beneficial interest to her, and that based on section 63 of the ROTA that was applicable in **Gamble**, the appellant continued to hold his interest on trust for her until she ended the 'postponement' of her interest by registering the transfer. This court is bound to abide by the provisions of the statute and based on the authorities of **Industrial Chemicals** and **Rayon Sinclair**, I find that the trial judge was thorough in her analysis of the evidence and her understanding and application of the law in this regard. Accordingly, I would not disturb her finding.

[61] In relation to the applicability of the common law doctrine of illegality, **Patel** requires the court to have regard to policy factors involved, and the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in the denial of the appellant's claim. The trial judge at paragraph [93], having explored the relevant authorities on the treatment of illegality cases involving equitable considerations, stated that the court would be reluctant to help a party seeking to establish a resulting trust by relying on his illegal intention behind the execution of a transfer, "based on the requirements of justice and public policy". At paragraph [94], she concluded that the appellant "has come to equity with 'bare-faced' reliance on illegality" and as such, the court would not assist him. She also went further to find that there was "no cogent evidence in support of the [appellant's] assertion that the [respondent] participated in his criminal activities" and the parties not being in *pari delicto*, there would have been no basis for the court to consider the issue of unjust enrichment. In this regard, I would not disturb the findings of the trial judge as, despite not being impressed with the

witnesses, she made findings that I find accord with the **Patel** test and also with provisions in ROTA.

(b) to consider any other relevant public policy on which the denial of the claim may have an impact

[62] It is the appellant's evidence that he was involved in drug trafficking and he had a concern that the authorities intended to confiscate his assets. The transfer was his way to keep the property away from the law. Like the trial judge did in the instant case, Lord Toulson also made reference to **Hall v Herbert** [1993] 2 SCR 159 to highlight that their concern was about the integrity of the legal system. In this regard, I find myself in agreement with the trial judge's decision not to grant the relief sought by the appellant.

(c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts

[63] In considering proportionality, Lord Toulson set out a list of relevant factors for the court's consideration that included the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability" (para 107).

[64] In contrast to the respondent's account of the circumstances leading to the transfer outlined at paragraph [6] of this judgment, the appellant's evidence was that it was money from his drug dealing that paid for Sharrow and as such, his name was added to the title as a clear and beneficial owner. He denied the existence of a shortfall of $30,000.00 as he claimed that he had paid any shortfall that existed between the

sale price, costs and the mortgage amounts. According to him, he had not made any loan to the respondent for $30,000.00 or any other amount towards the purchase of Sharrow.

[65] The trial judge remarked at paragraph [88] that the appellant had "grounded his case entirely on his criminal conduct" to rebut the respondent's claim that he had lent her money and was not a genuine co-purchaser. At the end of the trial, having had the opportunity to observe the demeanour and hear the evidence of the witnesses, the trial judge concluded that there was no evidence linking the respondent to the appellant's criminal activities, the parties were not in *pari delicto* and declined to grant the relief sought by the appellant. In the circumstances, the trial judge's decision could not be considered to be disproportionate as based on her findings, it was the respondent who had undertaken substantially all the expenses in relation to Sharrow, repayment of the mortgages, renovation, maintenance and taxes.

[66] As far back as the 18th century, Lord Mansfield in **Holman v Johnson** (1775) 1 Cowp 341 said that "[n]o court will lend its aid to a man who founds his cause of action on an immoral or an illegal act … if the cause of action arises ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted". The maxim has been relied on and explored for the past two centuries in cases such as **Scott**, which was cited in the cases of **Chettiar** and **Mistry Singh v Serwano Kulubya** [1964] AC 142 ("**Mistry**") with different results. In **Scott** and **Chettiar**, the court refused to assist the plaintiffs as the court, having been notified

about the illegal nature of the transactions at the heart of the plaintiffs' claim, refused to assist them in their claim before the court. On the other hand, in **Mistry Singh**, the respondent who was the registered proprietor of the land, required no aid from the illegal transactions to found his claim. In short, the respondent was not in *pari delicto* with the appellant, who was, on the other hand, obliged to pray in aid the illegal transactions in order to establish his case. This conclusion, according to their Lordships, is "reinforced when the scope and purpose of the legislative provisions are considered". The oft-cited case of **Tinsley** followed these cases and the Law Commission (England) in its review of **Tinsley**, commented that the case "exemplified the problems of arbitrariness, uncertainty and potential for injustice. … It had the potential to force the court into unjust decisions because, by focusing on procedural matters, the reliance principle precluded the court from paying attention to the policies that justified the existence of the defence, or taking into account such matters as the seriousness of the illegality and the value of the interest at stake" (para 24 of **Patel**). This criticism ultimately led to Lord Toulson's decision outlined in paragraph [45] of this judgment, that **Tinsley** should no longer be followed.

[67] There seems no doubt that, despite the wider-ranging test stated in **Patel**, the appellant could not raise a defence to the claim by the respondent that the transfer severed the joint tenancy and that non-registration of the transfer only postponed the passing of his interest to her until registration, without raising the question of the purpose of the execution of the transfer, that is, to protect his assets from forfeiture by the Federal Authorities as a result of his illegal activities. This confirmed that the

transfer had been executed for an illegal purpose. When the **Patel** test is applied to the appellant's case in this regard, that is, considering the underlying purpose of the prohibition, the impact on public policy and proportionality, I am of the view that the trial judge was correct to conclude as she did that his case could not succeed. Once the trial judge accepted that the transfer was valid and effectual to vest the appellant's interest in Sharrow in the respondent, and the respondent was not estopped from registering the transfer, in my view, the subsequent conduct prayed in aid by the appellant would not affect the respondent's claim to being the owner of the entire beneficial interest in the property. The subsequent conduct was not inconsistent with the respondent's position in my opinion.

Disposal of the appeal

[68] The appellant having failed on both issues, I would therefore dismiss the appeal, with costs to the respondent to be taxed if not agreed.

SINCLAIR-HAYNES JA

[69] I have had the opportunity to read in draft the judgment of my learned sister Phillips JA and I agree with her reasoning and conclusion.

MORRISON P

ORDER

1. Appeal dismissed.
2. Costs to the respondent to be taxed if not agreed.