[2016] JMCA Civ 57

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 100/2011

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

BETWEEN	**KENNETH GUY THOMAS**	**APPELLANT**
AND	**IRENE VICTORIA THOMAS**	**RESPONDENT**

Wilwood Adams instructed by Robertson Smith Ledgister & Co for the appellant

Miss Lilieth Deacon and Trisian Robinson instructed by Taylor, Deacon & James for the respondent

3, 4, 16 December 2015 and 29 November 2016

PHILLIPS JA

[1] This is an appeal from the decision of R Anderson J, delivered on 16 August 2011, in which he *inter alia*, declared that the respondent was entitled to a 95% interest in property located at 155 Eve Close, Balvinie Heights, Mandeville in the parish of Manchester, registered at Volume 1210 Folio 46 of the Register Book of Titles (the property), which was to be valued by a reputable valuator. The judgment had been issued on an application filed by the respondent against the appellant, wherein she sought a declaration that, pursuant to the provisions of the Property (Rights of Spouses) Act (PROSA), she was entitled to the sole legal and beneficial interest in the property and she also sought a transfer of the appellant's interest in the property to

her. The appellant swore to an affidavit in response in which he stated that both parties held the property as tenants in common in equal shares. He sought an order that the property be valued and that his half share in the value thereof be assigned to him. Being wholly dissatisfied with the learned judge's declaration that he only had a 5% interest in the property, the appellant filed an amended notice of appeal on 2 September 2011.

Background

[2] In order to grasp the issues on appeal, I think it would be prudent to outline the interesting history of the relationship between the parties as it unfolded in the court below. It is unfortunate that this court was not provided with an official transcript of the notes of the evidence adduced before R Anderson J. What we eventually received were agreed truncated notes of counsel which, although helpful, were incomplete. We were therefore at a disadvantage since the matter before the court involved certain crucial issues in respect of which the parties' credibility depended, and to date, no details of the cross-examination of the parties have been provided for our limited review.

[3] The respondent, in an affidavit filed in support of the fixed date claim form, sworn to on 15 October 2009, deponed to the fact that having been born in Resources District in the parish of Manchester, she had always wanted to reside in Mandeville, the capital of the parish, and so when the opportunity arose for her to purchase land there, she did so. At the time she purchased the said property, she was residing in New York in the United States of America, having emigrated to that country from Jamaica in 1966. The respondent stated that she purchased the property entirely at her expense

and from her own resources, between 1994-1995, in the amount of US$18,182.00 (or J$600,000.00) and attached receipts evidencing payment for the property, the agreement for sale, and the certificate of title in relation thereto, registered in her sole name.

[4] The respondent further deponed that at the time of negotiating the purchase of the property, she had already met the appellant and had developed a relationship with him. However, having been laid off from his job, the appellant was unemployed at the time, and so had no funds to contribute to the purchase of the property, and contributed none. He later moved in to live with her in one of the homes she owned in New York.

[5] She further deponed that she had completed the purchase of the property, received letters of possession dated 26 October 1995, and had also received instructions to commence paying property taxes dated 4 June 1996, which she also attached. It was her position that it was never her intention to purchase the property with the appellant as she had contemplated putting her children's names on the title, but had been advised by her attorneys that it could be done later by way of a deed of gift. She was registered on the certificate of title for the property on 4 October 1995.

[6] She stated that as soon as the appellant learnt that she had obtained the certificate of title for the property, and that she had not put his name on the title, "he became angry and threatened to end the relationship", if she did not include his name on the title. She said that she told him that she did not have the money to do so, and

reminded him that she had paid for the property in instalments. She deponed that the appellant had indicated that he would borrow the money to effect the transfer and so, she signed the transfer by deed of gift, and from 17 June 1996, the title reflected their names as "tenants in common". She said that she also did the transfer "yielding to the encouragement from a cousin of his, who is also one of my friends, Archie Wint".

[7] The parties got married in 1999, after being in a relationship for nearly ten years. When the respondent met the appellant she owned two homes in Brooklyn, New York, namely 629 East Street, and 3112 Snyder Avenue. She initially received US$1,000.00 rental monthly from the Snyder Avenue property. However, when the appellant persuaded her to permit him to renovate the basement so that he could operate a bar and restaurant, she charged him US$500.00 monthly, so that she could pay the mortgage monthly in respect of Snyder Avenue, in the amount of US$2,000.00. She stated that she had received no funds from the business that he operated there.

[8] She became dissatisfied with the marriage and the operation of the business as the appellant returned to his former lifestyle of staying out late at nights and operating "a gambling den" at Snyder Avenue.

[9] Shortly after the wedding, the respondent said that she tried to urge the appellant to build a home with her on the property but she said that he wished to build a home in Florida. She proceeded therefore to build her house on the property using her own resources and with the help of loans from members of her family and friends. She sold Snyder Avenue and put the entire proceeds thereof amounting to

US$140,000.00 into the construction of a house on the property. She transferred the property at 629 East Street to her daughter, by way of refinancing, and also placed the entire proceeds of that transaction amounting to US$20,000.00 into the construction and completion of the house. The construction of the house took about four and one half years to complete. During that time, the respondent worked three jobs to assist with the financing of the construction and her own living expenses, and sent cheques to Jamaica, which she also exhibited to her affidavit. She travelled to Jamaica frequently, taking cash and other items needed for the house, and stated that she had spent sums totalling approximately J$20,000,000.00, inclusive of labour and supplies on the property. She exhibited to her affidavit some of the receipts in relation thereto.

[10] The respondent said that the appellant had little or no interest in the house on the property, other than a small contribution to the construction thereof totalling US$7,000.00, made in two tranches, both of which were the result of "partner draws", and were paid only after she had pleaded for a contribution towards construction of the house. Also, as previously indicated, he had made no contribution to the purchase of the property, but he had managed to secure his interest "by twisting" her arms to transfer an interest in the property to him. As a consequence, she vehemently objected to his claim in the petition for divorce that the property was the matrimonial home and that it should be sold and the sale proceeds divided equally. She stated that she had no wish to sell her home, having worked so hard to purchase and to build it with the assistance of family and friends.

[11] Upon arrival at the Snyder Avenue property one evening, the respondent discovered that the doors were padlocked and her car missing. After going home, she found the keys to the Snyder Avenue basement there, with her car, and two letters addressed to her from the appellant indicating that he would be away for a while. He stated that he was "taking a walk," for the "betterment" of their relationship, recognising that they were going through difficult times including financial ones, but that he still cared for her, and hoped that they would get together again. He gave information as to the time of payment of her "partner draw" and promised to send money in respect of his "partner draw" each week.

[12] He communicated with her two days later stating that he was in Georgia intending to work as a taxi driver. Thereafter, the appellant's visits to New York were sporadic, and he showed no interest in shipping furniture or any other items to Jamaica. In fact, he contributed only US$2,000.00 towards the cost of shipping two containers with personal items to Jamaica when the cost of so doing was US$8,000.00. The respondent deponed that she later discovered that the appellant had resumed a relationship with someone with whom he had had a child some 30 years previously. She stated that since June 2005, he had not been to the property while she was there. She therefore placed a notice in the Daily Gleaner on 13 July 2006, stating that they had separated, and that she was not responsible for any debts incurred by him.

[13] She deponed that her health had deteriorated over the years and she had had to reduce her hours of work and spend more time in Jamaica, resulting in a reduction in her income.

[14] As a result of all of the above, she claimed that she was solely entitled to the property and requested the court to so order.

[15] The appellant, in his affidavit in response filed 16 December 2009, denied that the respondent purchased the property from her own resources, and stated that he and the respondent had made "EQUAL contributions of the money consideration" to purchase the property. He stated further that he had given the respondent his share of the purchase money and she had effected the transaction and caused the receipts to be issued in her sole name. Although he accepted that he had met the respondent in 1990, and that he had moved into her home, he stated that at the time, he had still been employed as he had not been laid off from work until 1993.

[16] He admitted that the purchase of the property was completed in 1995, but stated that the letters of possession and other documentation were issued in the respondent's sole name as she had been trying to cheat him out of his interest in the property. As a consequence, he accepted that when he realised that his name was not on the title, he became angry and threatened to end the relationship, and in his words, he "literally raised hell" and insisted that the title be amended to reflect his interest and he paid the costs to have that done.

[17] He accepted that the respondent owned the two homes in Brooklyn, New York as stated by her, that she had obtained the monthly rental that she claimed, and that she had charged him rental for the basement which he had encouraged her to renovate. However, he stated that the value of the renovation was US$11,000.00 which he had

undertaken solely. He stated that he had also paid US$2,000.00 monthly, towards the utility costs for both premises owned by the respondent, which he considered a reasonable contribution from the business he operated at Snyder Avenue.

[18] He denied that he had not shown any interest in the construction of the house on the property or that he had indicated a preference to construct a house in Miami, as he did not like that city. While he did accept that the respondent had assumed the financial burden of the construction with the assistance of her children, her cousins in Florida and friends, he nonetheless contended that the net proceeds received from the sale of Snyder Avenue was less than US$20,000.00 and he indicated that he was not aware of any refinancing arrangements between the respondent and her daughter in respect of 629 East Street with regard to the construction of the house on the property.

[19] He denied that his contribution towards the construction was only US$7,000.00. In fact, he averred that his direct contribution was in excess of US$30,000.00 and in addition he had made "indirect contributions like paying utility bills, helping with groceries and assisting with and spending on our foster children so that [the respondent] could have a larger share of her income to save".

[20] He agreed that the respondent had worked three jobs at times, but indicated that this was done so that she could accelerate her savings. He also stated that the monies that she had sent home to Jamaica included his contribution to the construction of the house on the property. He was unable to address her statement that she had spent approximately J$20,000,000.00 on costs in respect of the project.

[21] He acknowledged that he had filed a petition for divorce, but made no comment with regard to: (i) her unwillingness to sell the property that she said she had purchased on her own, and which she said that she had worked hard to build and in respect of which she was still repaying loans from friends and family; (ii) her claim that on an evening in 2003 he had locked up Snyder Avenue and left with her car, and upon her arrival at home, she found keys to the Snyder Avenue basement and letters containing information of his whereabouts; (iii) that he assisted very little with the shipping of their possessions to Jamaica; (iv) that he had visited the home infrequently and not when she was present; or (v) that he had resumed a relationship with the mother of his child. He did however admit that he had made a contribution of US$2,000.00 towards the shipment of the two containers costing US$8,000.00.

[22] He insisted stridently that the property was always intended to be their matrimonial home, and stated that "given the circumstances of our relationship" the property was properly held by the respondent and himself as tenants in common in equal shares. He therefore asked that the home be valued and that his half share in the value thereof be rightfully assigned to him.

[23] The respondent filed an affidavit in reply, sworn to on 10 March 2010, where she joined issue with the statements made by the appellant in his affidavit save where there were admissions and or agreements on the facts stated in hers. She specifically denied that he was working at the time that he had come to live with her, and that he had made any contribution to the purchase of the property, as he had no money with which to do so. She also categorically denied any attempt to cheat him out if his interest in

the property, but acknowledged that he raised hell and "twisted" her arm to cause her to transfer an interest in the property to him in order, "to be at peace, as his constant nagging had become unbearable".

[24] The respondent maintained that it had never been her intention that the appellant and herself would hold the property in equal shares, as the only contribution that he had made to the property was to pay the cost for his name to be transferred to the title as a tenant in common. She reiterated that she had been impelled to work three jobs in order to be able to finance the building on the property. The appellant has shown, she said, very little interest in the construction and the development of the property, and had spent part of his time in the state of Georgia, where he worked, whilst she had continued to defray costs of the house and the grounds. Indeed, in her further affidavit sworn to on 20 April 2010, the respondent indicated that the property had been purchased by way of a split contract with an agreement for land, and another for chattels. She deponed that hurricane Gustav had destroyed the roof on the house in 2008, and she had been constrained to pay the sum of J$1,014,800.00 in respect of repairs and re-roofing of the house.

The *viva voce* evidence

[25] The respondent was cross-examined on her affidavits and in summary stated that when she met the appellant in 1990, he was working at a store called "Little Pingling's" and she was living at 629 East Street, having just moved there from Snyder Avenue, where she had previously resided. The appellant lived at Snyder Avenue for one year and six months and started to do business within six months of the parties

living together. She testified about the children who were in her foster care at Snyder Avenue, and the payments made to her in relation to that undertaking. She testified that the appellant was added as a foster parent since he lived at Snyder Avenue, but that he had done very little in relation to the care of the children. However, she did state that they were recommended by the State Borough for good work and were named foster parents of the year. She confirmed the payment made by the appellant in relation to the renovation of the basement and the repayment he made to himself from the "partner draw". She stated that she married the appellant in 2000 and that construction had started on the house in Jamaica about the same time.

[26] The appellant first amplified his affidavit. He stated that at the time that he met the respondent in 1990, he was living at 91st Street in Brooklyn, New York, and he had been working as a stock manager for a store, where he "received goods, trucking and otherwise, distribute [sic] to stores, accounts and priced articles", and was "in a position to hire and fire as needed". He testified that he was earning "US$500.00 per week less rent, utilities and food". He stated that he first took a course in foster care in 1991, and later submitted the required documentation to the agency. Having been accepted by the agency, the respondent and himself were paid US$3,000.00 monthly in relation thereto. He said that Snyder Avenue was renovated in 1993 and he operated a bar, restaurant and later a domino club there, from which he earned US$1,000.00 per week. From this earning he contributed US$600.00 per month, towards the mortgage, light bill, water rate, gas bill, repairs such as plumbing, and annually paid insurance, licence and gas.

[27] In cross-examination, he stated that he had participated actively in the construction of the house although he could give no indication as to how the respondent had spent money he said that he had given her towards construction of the house. He said that he had visited the property many times, indeed nearly 20 times and yet, could not recall if he had been in Jamaica when the agreement was signed. He indicated that his contribution to the purchase of the property and the construction of the house was US$600.00 monthly, that "all went to the two houses, the roof and her car". He clarified that to say that the purpose of the US$600.00 was to pay rent, as he was aware that the respondent had been experiencing problems. He said that he had no desire to live in Florida, indeed it was the worst place to live due to "the storm". He stated that Snyder Avenue was sold because the marriage had broken down.

[28] When asked to quantify the money contribution that he had made, he responded by saying that "I made the money, gave it to her. I don't know what she does with it". When asked further how the payments for the purchase of the property had been made, he answered that "she transferred all the money, our money and I can't recall transferring any money to Jamaica for purchase and construction". He maintained that it was not true to say that he had not been a part of the process to purchase the property, as he had visited the property with the respondent.

[29] In answer to the court, the appellant made the following statements recorded as points 104 to 138 in counsel's notes. I prefer to set out his evidence as recorded, rather than attempt to paraphrase or to summarize his testimony.

"104. When was the first time you became aware that the property was being purchased? Same time it was being purchased.

105. I became aware of it when my wife and I were on vacation and my wife told me that she was going to look at a piece of land and she left.

106. I got a call from her to meet her at a lawyer's office in Mandeville. I don't recall the name of the lawyer.

107. She said sign this, sign this, I said what, she said sign this I got the land sign this. I said that I will not sign for anything until I see the land. She did not want me to see the land but the man who sold the land took me there and I went back and we both signed.

108. Don't recall the cost of the land but US$18,000 and given one year.

109. Do you know the name of the vendor? No Sir

110. Was it the vendor who took you to see the land? Not sure he could be the vendor.

111. I take it that the first day Mr. Thomas knew of the land was the day he was taken to see the land and sign the Agreement for sale.

112. Do you know Mr. Archibald Wint? I know him, he is not my cousin, I think he is Irene's cousin.

113. Did you know the arrangements for paying the purchase price? I think we were given a year.

114. I don't know how much it was to be paid per month or quarterly.

115. I don't know from personal knowledge when or how much was paid towards the purchase price.

116. When did you come to Jamaica? A week before we got married; we got married February 26, 2000

117. Did you know that Mrs. Thomas intended to sign a building contract? I know she wanted to start building but I did not know specifically.

118. I was not aware that she was signing building agreement and met [sic] I met Mr. Smith after.

119. I can't recall how long after, maybe about a week or two.

120. I met him because he is the brother of one of my friends, we met having drinks. I did not meet him in connection with the building of the house.

121. I became aware at the end of the year that he was the contractor because I met him at the house.

122. I did not ask how much it would cost. I had no reason for not asking the cost of the building.

123. Am I to understand that the house was being built for both of you and both were to be involved in the cost of the building and in spite of everything it never crossed your mind to ask?

124. Irene likes to be involved in those things I trust her to deal with that.

125. The idea that it may be costing too much never cross [sic] your mind? Not at all

126. Whatever the cost you were expected to make contributions? Most naturally yes, it never crossed my mind to say that I may not be able to afford it.

127. Do you know when the house was completed in 2005?

128. How much did it cost to complete? Never got the total cost.

129. How could you have made a substantial contribution then? I am sure I contributed over US$50,000 towards the construction of the house.

130. Mrs. Thomas operated a partner draw with about 20 to 30 people in the draw you could get 2/3 draws per year at US$4000 per draw.

131. Over the five years you would get 5/6 times and all that money you gave to Ms. Butler? Yes

132. When you left and went to Georgia did you remain in the partner? Yes

133. How would you send the money? Through western union and when I came up personally.

134. $50,000 would be about a ¼ of the cost of construction.

135. Do you know Mr. Dennis Smith well? Yes Sir I have spoken to him after the suit was filed.

136. How much time have you lived in the house? The split level was complete in 2004; we stayed there every year we came down together. I came for the house opening January 2006. I stayed for Christmas and left in February.

137. Have you been back there? Yes but not to live.

138. Are you aware of damage done to the roof by Gustav and that it was repaired? I just gave Irene the money and she fixed it. Maybe I am a little confused I know about the hurricane that damage the roof."

[30] In further cross examination by counsel, the appellant seemed unsure as to whether: (i) the sum referred to in paragraph 17 of his affidavit relating to his financial contribution toward construction of the house on the property, was really US$30,000.00 or US$50,000.00; or (ii) how many times he had stayed in the house on the property; and (iii) the extent of the damage to the house caused by Hurricane Gustav.

[31] In re-examination, he explained the agreement between himself and the respondent was for them "to hold the land and to pay for it in a year".

The judgment of R Anderson J

[32] Having set out the facts as stated above the learned judge noted that it was the respondent's contention that the parties' main place of residence was 629 East Street, Brooklyn and in respect of the property in dispute, the period of cohabitation there was for a short duration. Counsel for the respondent therefore urged R Anderson J to either treat the property in dispute as "other property" under PROSA or vary the equal share rule under section 6 of PROSA, which applied to the family home, (and which was inapplicable in the instant case) having regard to the factors set out in section 14 of PROSA, and assess the parties' intention and the extent of their respective contributions financial and otherwise. It was suggested that the appellant's contributions did not exceed 10% of the value of the property.

[33] The learned judge noted the appellant's contentions based on the facts as stated. The appellant claimed that the respondent was able to pay the instalments on the purchase price for the property as he had undertaken the payment of the utilities in respect of both properties owned by the respondent in Brooklyn, New York. The appellant claimed at first that the property was the parties' matrimonial home, and then conceded that as it was not their principal place of residence, PROSA was therefore inapplicable, and the principles of law and equity should obtain. As a consequence, he was entitled to a 50% of the value of the property. It was acknowledged though, that he had no documentary evidence to support his contention that he had made substantial contributions to the purchase of the property, and to the construction of the house thereon, but he claimed that a 50% share of the property had been transferred

to him as a gift, and that that gift could not be recalled. He relied on the case of **Paul v Constance** [1977] 1 WLR 527 to submit further that the gift had been perfected by valuable consideration, once the costs of transfer had been paid by him, and the court should therefore find that he was entitled to a 50% share of the value of the property.

[34] The learned judge pointed out that he was unsure whether the application for division of property under section 13 of PROSA had been filed within the 12 month stipulated period. However, he indicated that the court had the power to extend time to file such an application and he was of the view that this was a proper case in which to do so and he therefore extended the time. He further stated that the matter could "be adequately disposed of by reference to the terms of PROSA". He then referred to sections 2 6, 7, 11 and 14 of PROSA.

[35] He found as a fact, that the property was not at anytime the family home (section 2 of PROSA), and stated that the evidence established, and the parties agreed, that prior to their marriage, and thereafter, the parties resided at 629 East 81 Street, Brooklyn. He stated that section 6 of PROSA (equal share rule) therefore did not apply, and there was thus no need to invoke section 7 of PROSA (variation of the equal share rule). He found that although sections 6 and 7 of PROSA were inapplicable, that did not mean that other sections of PROSA did not apply. He accepted the submissions of counsel for the respondent that the property should be treated as "other property" under section 14 of PROSA.

[36] The learned judge accepted that the respondent had purchased the property with her own money, without any assistance from the appellant. He referred to the sale agreement in her sole name, and the certificate of title which was transferred from her name into their joint names, only after she had received threats from the appellant to end the relationship. He appeared to accept that, despite the transfer, the respondent had never intended that the appellant should have an interest in the property, as she had intended her children to benefit from the same. He accepted the evidence of the respondent's witness, Curtis Thomas (her cousin), that the monies for the construction of the home had been supplied entirely by the respondent, and the evidence of Archibald Wint, that he had encouraged her to sign the transfer of the land to herself and the appellant as tenants in common. The learned judge made this bold finding which was very instructive, he said:

> "...having had the opportunity of observing the demeanour of both the [respondent] and the [appellant] as they were cross examined, where there is any conflict between the evidence given by both, I accept that of the [respondent] and reject the [appellant's]."

[37] He found that the case of **Paul v Constance** supported the contention of the respondent, particularly since the appellant was not claiming that a trust had been established in his favour. He accepted the evidence of the respondent that the purported transfer had been "effected in response to threats of the [appellant]". The learned judge stated that "it is trite law" that where property was purchased solely by one party, in the names of two parties, then there is a resulting trust in favour of the

party who provided all the funds. He therefore found as a fact, at paragraph 37 of his judgment, that:

> "the [respondent] in the instant case provided the funds for the purchase and almost all funds for the construction of the house. It is difficult to see how a transfer in the circumstances of threats, which I accept as fact, could put the [appellant] into a better position than he would have been if the property had originally been purchased in both names with no contribution from him."

[38] The learned judge noted that although the appellant claimed that he had paid the utilities in respect of the respondent's homes in New York, he had provided no evidence to support that assertion. Moreover, he stated that there was no evidence of the relationship of any such payments, if indeed they had been made, to the acquisition of the property and the construction of the home on the property. The learned judge also found that there were material inconsistencies in the appellant's case since, on the one hand, he was claiming an interest in the property by way of contributions he claimed to have made, for which he had provided no evidential support, while on the other hand, he was claiming an interest in the property by way of a gift from the respondent. Additionally, he rejected the appellant's claim that an imperfect gift had been given to him that had been perfected, as in his opinion no consideration had moved from the appellant to the respondent.

[39] The learned judge therefore found that the appellant had not contributed to the purchase of the property in equal shares or otherwise. He accepted the respondent's evidence that she had been unduly influenced by the appellant or otherwise subject to duress to insert the appellant's name on the certificate of title. The submission that

there had been a gift by the respondent was rejected. He reviewed the contribution made by both parties towards the construction of the house, and accepted that the appellant made a US$7,000.00 contribution, while the respondent's contribution was in excess of US$160,000.00. The learned judge therefore assessed the appellant's contribution at 5% of the value of the property and made orders:

1. declaring that the respondent was entitled to a 95% interest in the property and that the property was to be valued by a reputable valuator;
2. that once the valuation was done within specific time frames, the appellant shall transfer his interest in the property to the respondent upon payment of 5% of the value of the property;
3. that the cost of the transfer was to be borne by the parties in the ratio of 95% by the respondent and 5% by the appellant;
4. that the respondent was granted 95% of the costs of the application; and
5. that there was liberty to apply.

The appeal

[40] The appellant filed his amended notice of appeal on 2 September 2011, and a supplemental notice and grounds of appeal on 9 April 2015. The grounds of appeal and the order sought of this court are set out in detail below.

The grounds of appeal:

"1. The reasoning of the court which led to the conclusion that the [appellant] made no contribution to the purchase of the land or construction of the house is flawed.

2. The facts of the case provide no evidence of threats or intimidation made by the [appellant] to the [respondent].

3. There is no evidence in the case whatsoever that allows for a finding of duress or undue influence which is alleged to have been used by the [appellant] to induce the [respondent] to put his name on the title.

4. The Court erred when it found that no consideration was provided for a purported gift made [by] the [respondent] to the [appellant].

5. The Court failed absolutely to take into consideration the increased value of the Snyder Avenue property in New York which was owned by the [respondent] which resulted from the renovation of the basement by the [appellant] from his own resources at a cost of over Eleven Thousand United States Dollars (US$11,000.00); the property was later sold and the net proceeds was used to assist with the construction of the house in Jamaica.

The order sought:

"A variation of the order made by the Honourable Justice Anderson to distribute the interest in the property between the [respondent] and the [appellant] in a ratio of Ninety Five Percent (95%) to the [respondent] and Five percent (5%) to the [appellant] be varied to Eighty Percent (80%) to the [respondent] an twenty Percent (20%) to the [appellant].

That the cost of the Appeal be the cost to the [respondent] or that it be agreed or taxed."

Appellant's submissions

[41] Counsel sought and obtained leave from this court to file and argue supplemental grounds of appeal. In his supplemental arguments, it was counsel's contention that that the central question to be decided in this appeal was the manner in which the appellant's name had been added to the title. The learned judge, counsel submitted, found that the appellant had his name placed on the title by dishonest means, in the form of fraud and undue influence. However, according to counsel, such a finding was erroneous since the court had failed to analyse or identify the evidence required to prove duress and undue influence, and furthermore, neither concept was pleaded in the instant case.

[42] In relation to the issue of undue influence, counsel argued that the appellant had exerted some 'pressure' but noted that in his view such 'pressure' could not be construed as undue influence. He asserted that for there to be undue influence, there must be a relationship between the parties involved. Undue influence can be divided into two kinds: (i) express undue influence and (ii) undue influence presumed from a confidential relationship. Counsel argued that the presumed undue influence did not arise since there was no confidential relationship between the parties.

[43] Based on the definition of expressed undue influence cited by Lord Scarman in **National Westminister Bank plc v Morgan** [1985] UKHL 2; [1985] AC 686, it was counsel's submission that R Anderson J seemed to be suggesting that the expressed undue influence limb was appropriate. This was evident in paragraph 37 of his judgment where the learned judge emphasised the use of threats made by the

appellant to the respondent in order to secure his name on the title when he said he "literally raised hell". Counsel contended that the parties were not married at the time of the transfer and so this limb was inapplicable and while counsel accepted that there was an argument between the parties because the appellant's name was not placed on the title, he submitted that the appellant's so-called threat could not be taken seriously in a court of law and was not sufficient to cause the respondent to give the appellant a 50% interest in her property.

[44] Counsel posited that since the respondent transferred her interest in the property to the appellant by deed of gift, this transfer could only be construed to be as a result of undue influence if the respondent gave the appellant more than her share and not where she gave him equal shares. In reliance on **National Westminister Bank plc v Morgan** and **Goldsworthy v Brickell and others** [1987] 1 All ER 853, counsel argued that for a gift to be obtained by undue influence, it must result in a manifest disadvantage to the donor. Transferring her 50% share was not manifestly disadvantageous to the respondent and so, counsel argued, she had not been unduly influenced to do so.

[45] Counsel asserted that the learned judge's finding on the presence of duress could not stand because that had not been specifically pleaded. In reliance on **Alexander Barton v Alexander Ewan Armstrong and others** [1976] AC 104, counsel asserted that duress in criminal law was different from duress in civil law, and noted that where duress was to be examined, the nature of the threats existing at the time must also be examined. Counsel urged this court to consider whether the

respondent had transferred the property to the appellant out of fear or whether she had been prompted by her conscience to give the appellant what they had agreed to. Counsel posited that there was no specific incident of threats in the respondent's affidavit or in the evidence before the court. Counsel submitted that the fact that the appellant told the respondent that he was going to leave her was not a threat in law, and moreover, the court had not been directed to occasions where those threats had been made, the circumstances under which they had been made, the form those threats had taken and how serious they were. He distinguished the instant case from **Alexander Barton v Alexander Ewan Armstrong and others**, in which all threats were before the court and the court had decided which ones were valid and which were not. Counsel argued that there was only one so-called threat and yet the learned judge found, in the instant case, that "but for the threats the appellant would have placed her children's name on the title." Furthermore, in counsel's view, there was no evidence of any mental torment by the respondent and thus no evidence of duress.

[46] Counsel argued that the learned judge erred when he found that there had been no consideration for the proposed transfer, since where title is transferred using a deed of gift the consideration is one of "love and affection". Consideration, according to counsel goes both ways, and furthermore the appellant paid the fees, came to Jamaica and retained an attorney-at-law to effect the transfer, so there was, indeed consideration.

[47] It was also counsel's contention that no thought had been given by the learned judge to the increase in value of the Snyder Avenue property. The appellant spent

US$11,000.00 to renovate the basement of the Snyder Avenue property and he said that he had also paid the respondent rent, although the respondent said that he had been unemployed at the time when she purchased the property. The value of the property was US$18,000.00 and the appellant spent US$11,000.00 on the respondent's property in the United States. He had therefore spent more than half the value of the property on the respondent's house at Snyder Avenue, in which he had no interest.

[48] In all the circumstances, counsel asserted that the learned judge erred in his findings and he urged this court to allow the appeal and vary R Anderson J's order so that the appellant is given a 20% share in the property and the respondent an 80% share.

Respondent's submissions

[49] On the issue of undue influence and duress, counsel for the respondent argued that the respondent was subjected to constant nagging and had been harassed and threatened that the relationship would end if she had not facilitated a transfer of the property to the appellant. Counsel posited that the respondent succumbed to the appellant's demands because at the time "she was a woman in her 40's and on her second marriage and she was desirous of preserving her marriage". Counsel pointed out that the respondent had not been cross-examined with regard to the threats. She relied on **Royal Bank of Scotland Plc v Etridge (No 2) and other appeals** [2001] UKHL 44; [2001] 4 All ER 449 to show that there was some amount of trust and confidence between the parties since they were living together and they were in a relationship. Moreover, pressure not amounting to duress, may give rise to the

equitable claim of undue influence. Consequently, counsel submitted that the learned judge was correct to have found that the transfer to the appellant had been effected by undue influence and duress.

[50] Counsel submitted that, in any event, the learned judge had placed little or no weight on the principles of undue influence and duress in respect of the facts in this case, but rather had examined in detail the contributions the appellant had made to the property pursuant to section 14 of PROSA. Counsel asserted that the appellant had failed to show that he had made any contributions to the purchase of the property. On the basis of the contributions towards the construction of the house, the appellant had correctly been awarded a 5% share of the property with the respondent being awarded a 95% share. Counsel emphasised that when the appellant met the respondent, she had owned two houses in New York. The appellant had failed to show that when he refurbished the basement of the Snyder Avenue property, it had increased the value of the property, so that when it had been sold, the proceeds could have contributed to the construction of the house on the property.

[51] In reliance on **Bevon March-Brown v Xavier St Michael Brown** Claim No HCV 0886 of 2004, delivered 9 September 2008, counsel argued that the appellant had failed to show that there was a common intention between the parties that monies he had paid for rental and utilities would be used by the respondent to purchase the property and construct the house on the property. Counsel submitted that in light of these factors, the elements and principles of undue influence or duress did not seem to be the gravamen of the learned judge's decision. Consequently, counsel posited, the

learned judge's finding that the appellant had made no contribution towards the purchase of the property was correct and ought not to be disturbed.

[52] Counsel submitted that the learned judge had examined the various contradictory statements in the appellant's evidence, and with particular reference to his alleged contribution, he had found the appellant's evidence to be unreliable. Counsel submitted further that the learned judge was correct to find that the deed of gift was imperfect, as no consideration had passed from the appellant to the respondent and the appellant had made no contribution towards the purchase of the property.

[53] In all these circumstances, counsel urged this court not to disturb the findings of the trial judge and to dismiss the appeal with costs to the respondent.

Analysis and decision

[54] It is well settled by the authorities, and particularly well enunciated in the House of Lords case of **Watt (Or Thomas) v Thomas** [1947] 1 All ER 582 that, without having seen or heard the witnesses, the appellate court ought to hesitate to come to a different position on the facts, than the trial judge who had that opportunity. Indeed, the principle is clearly set out in the oft-cited speech of Lord Thankerton at page 587, where he stated:

> "I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.

> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

[55] In the more recent Privy Council case of **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd** [2014] UKPC 21, Lord Hodge, in delivering the judgment of the Board, indicated that it was important to recall the proper role of an appellate court in an appeal against the findings of fact by a trial judge, and specifically endorsed the speech of Lord Thankerton in **Watt v Thomas.** He noted that it had often been said that the appeal court must be satisfied that the judge at first instance had gone "plainly wrong" and "directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole", which he said the court had to do knowing that it only had the printed record of evidence. He stated further that "the court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions" and "occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence". Lord Hodge went on further to endorse the principles which had been settled in earlier decisions in the House of Lords (as it then was) and in the Judicial Committee of the Privy Council. He stated:

"13. More recently, in *In re B (A Child)(Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2003] 3 All ER 929, [2013] 1 WLR 1911, Lord Neuberger (at para 53) explained the rule that a court of appeal will only rarely even contemplate reversing a trial judge's findings of primary fact. He stated:

> 'This is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it. This can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different, opinion is no more likely to be right than the first).'

14. The Board has adopted a similar approach in this jurisdiction. See *Harracksingh v Attorney General of Trinidad and Tobago* [2004] UKPC 3, 64 WIR 362, [2004] 3 LRC 290 in which it referred (at para 10) to the formulation of Lord Sumner in *SS Hontestroom (Owners) v SS Sagaporack (Owners)* [1927] AC 37, 47, 25 Ll L Rep 377, 95 LJP 153

> '…not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the

> witnesses and of their own view of the probabilities of the case.
>
> … If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should … be let alone.'"

[56] I have dealt with the role of the appellate court in detail because, as I had mentioned previously, we had not received a transcript of the evidence adduced before the learned trial judge, and I had also indicated that that would have impeded this court significantly in our deliberations. It is also the reason why I had endeavoured to set out, with as much detail as possible, the evidence disclosed in the affidavits and the evidence adduced *viva voce* before the learned judge as set out in the notes, such as they were, which had been submitted by counsel. In my opinion, the issues on appeal are as follows:

1. Did the appellant contribute directly or indirectly to the acquisition of the property?
2. In the circumstances of this case was he entitled to an interest in the property and, if so, what is the extent of that interest?

Issue 1: Acquisition of the property

[57] There is certainly evidence from which the learned judge could have found that the respondent purchased the property with her own funds. She exhibited documents in support of her contribution, and had submitted the agreement for sale which was in her name only, the certificate of title which had also been issued in her name alone and the

documents of possession. On her evidence, it was never her intention to put the appellant's name on the title and moreover, the property was not their family home, nor where they had ever resided as a family. It was her evidence, which the court accepted, that the appellant had not been working at the time the property was acquired and had been laid off from his job and therefore had no funds to contribute to its purchase. The appellant accepted that he had been laid off from his job in 1993 and that the property was purchased between 1994 and 1995. The appellant claimed that he operated the restaurant and bar at Snyder Avenue, but the respondent said that she received no monies from that business. It was also the respondent's evidence that any funds that the appellant may have made he used to repay himself from drawings from the business. The learned judge clearly believed this. He did not accept that any funds, if paid for the utilities in respect of the respondent's two houses in New York, had anything to do with the acquisition of the property.

[58] With regard to the monies paid for the children held in foster care by the parties, it was the respondent's position that the appellant had little to do with the arrangements and the work relating to the children, but as he resided at 629 East Street with her, he received accolades as foster father in residence. Her evidence was that there had been no contribution from him to the household or the property in respect of funds paid with regard to foster care financial arrangements and so he could not claim that any funds paid in relation to the children in foster care, represented contributions made by him towards the acquisition of the property. The learned judge had obviously been moved by the respondent's lifelong desire to own a home in the

parish of her birth, as against the appellant's disinterest in so doing, and his inability or unwillingness to have made any contribution to the acquisition of the property at the material time.

[59] The appellant's position that he had contributed equally to the purchase of the property was rejected by the learned judge, as he was entitled to do, after seeing and hearing the parties give *viva voce* evidence, and especially since the appellant's evidence was that he did not recall the cost of the land, the name of the vendor, or if it was the vendor who had allegedly taken him to see the land. Even more importantly, he could not give any details with regard to payments in respect of the purchase price. As a consequence, it is clear on the evidence, and as the learned judge correctly accepted, that in 1995 the respondent was the sole legal and beneficial owner of the property.

Issue 2: Was the appellant entitled to an interest in the property and if so what is the extent of that interest?

[60] The next important question is how did the appellant become registered on the certificate of title for the property and what are the legal consequences of that registration? Did the judge get it right?

[61] The learned judge was faced with the evidence of the respondent that she had bought the property on her own and that it had never been her intention to purchase the property with the appellant. She had only put his name on the certificate of title as tenants in common due to his insistent nagging which she said had become unbearable and as a result of his threats to end their relationship. The appellant's case was that he

had paid equally with the respondent for the property, but as the respondent had control of the transaction, she had put her name on the title in an effort to cheat him out of his interest in the property. He did not claim that the respondent had intended to give him an interest in the property out of love and affection. In fact, he said that he had "raised hell" when he realised that his name was not on the title for the property and that the respondent was attempting to cheat him out of his interest in the same. However, if he had not made any financial or other contribution to the acquisition of the property (as the learned judge so found) and the property was not being given to him for love and affection, the question would be: what would have been his entitlement to an interest in the property at the time? As indicated, the evidence was that he had not been working at the time of the acquisition of the property, and there was no other credible evidence that he had been making any other contribution to the household so that the property could have been purchased.

[62] By this transfer, allegedly by way of gift, as recorded on the certificate of title, the respondent would have lost some portion of her legal and beneficial interest and the appellant would have gained some interest in the property which he would not have had previously. The learned judge found, as stated in paragraph [37] herein, that the purported transfer was effected in response to threats from the appellant and such a transfer ought not to enure to the appellant's benefit. At paragraph 43 of his judgment, R Anderson J said:

> "The [appellant] has failed to prove that he contributed anything towards the purchase price of the land and the [respondent's] evidence that she was unduly influenced by

> the [appellant], or otherwise subject to duress, to insert his name of [sic] the Certificate of title is accepted and the submission made by Counsel for a [sic] [appellant] regarding a gift by the [appellant] to the [respondent] is rejected."

As a consequence, the question is, was it an unreasonable finding of fact, by the learned judge, that for the respondent to have placed the appellant's name on the title in those circumstances, it was due to undue influence and threats which had been imposed on her? Was it a voluntary act or something she wished to do on her own accord?

[63] Undue influence can be either actual or presumed. I agree with counsel for the appellant that presumed undue influence does not arise in the instant case. The learned authors of Halsbury's Laws of England, 2015, Volume 49, at paragraph 670 state that in order to prove actual undue influence, a claimant must show affirmatively that:

> "...(1) the other party to the transaction (or someone who induced the transaction for his own benefit) had the capacity to influence the complainant; (2) the influence was exercised; (3) its exercise was undue; and (4) its exercise brought about the transaction... There must be something in the nature of the conduct complained of which is unfair and improper, whether it takes the form of coercion, overreaching or cheating, before equity will intervene."

[64] I accept the dictum of Lord Nicholls of Birkenhead in **Royal Bank of Scotland Plc v Etridge (No 2)** at paragraphs 10, 11, 13 and 14 where he made the following statement:

> "[10] The law has long recognised the need to prevent abuse of influence in these 'relationship' cases despite the absence of evidence of overt acts of persuasive conduct. The types of relationship, such as parent and child, in which this principle falls to be applied cannot be listed

exhaustively. Relationships are infinitely various. Sir Guenter Treitel QC has rightly noted that the question is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type (see Treitel, *The Law of Contract*, (10th edn, (1999), pp 380-381). For example, the relation of banker and customer will not normally meet this criterion, but exceptionally it may (see *National Westminster Bank plc v Morgan* [1985] 1 All ER 821 at 829-831, [1985] AC 686 at 707-709).

[11] Even this test is not comprehensive. The principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place.

...

[13] Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. This is the general rule. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case.

[14] Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can

> only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn."

[65] In the instant case, the evidence clearly supported the vulnerability of the respondent and the exploitation of that state of affairs. The parties were in a relationship in which the appellant appeared to have had some dominion or influence over the respondent as a result of which she was prepared to add his name to the certificate of title in respect of property which she had purchased solely, and for which she had received no financial or other contribution from the appellant in respect of its acquisition. The explanation given by the appellant that he had made equal contribution to the purchase of the property was not accepted by the judge. It certainly was not prima facie a transaction to her benefit. In my view, the evidence addressing the question as to whether the appellant's threats and actions amount to undue influence and or duress is borderline. However, bearing in mind the manner in which I believe the instant case ought to be resolved on appeal, I do not think a definitive position on that argument needs to be made. This is so, particularly since neither undue influence nor duress had been particularised in the fixed date claim form and also since the appellant would not have been surprised that the respondent was saying, as stated in her affidavit, that his name had been placed on the certificate of title by threats or coercion. In fact, I am uncertain as to why the learned judge made reference to these principles,

as they did not form any significant part of the substantial issues between the parties in the proceedings before him.

[66] I accept, as concluded by the learned judge, that the subsequent endorsement on the title of the appellant and the respondent's names as tenants in common by way of gift would not have placed the appellant in any better position than if the property had originally been purchased in both names with no contribution from him. It was incumbent on the court to examine the extent of the appellant's beneficial interest in the property.

[67] On the evidence in this case, even if the transfer by the respondent to the appellant remained extant, the registration of their interest was as "tenants in common". There was no indication as to how the beneficial interest was to be shared by the parties. On the basis of all the authorities, the presumption would be that the interest would be shared equally. However, that presumption is rebuttable by evidence to the contrary, for example, "evidence of an agreement that the title was to be held in trust or to an examination of the contributions which each party made to the purchase of the house and to its upkeep and improvement during their relationship" (see Lord Hope in **Stack v Dowden** [2007] UKHL 17 at paragraph 8). One would also have to examine the general intention of the parties by the conduct of their affairs throughout the marriage with particular regard to this disputed property (see **Stack v Dowden** and **Abbott v Abbott** [2007] UKPC 53). It is of significance that in the notice and grounds of appeal, the order sought by the appellant is that R Anderson J's order be varied so that the interest in the property between the respondent and the appellant be

in a ratio of 80% to 20% as opposed to a ratio of 95% to 5%, as ordered by the learned judge, although in his oral submissions before this court, he sought division of the property in a ratio of 50% to 50%.

[68] The learned judge having found that the appellant had made no financial or other contribution to the acquisition of the property it found it necessary to examine the evidence with regard to the contribution made by the parties to the construction of the home on the property. The learned judge found that the respondent had spent in excess of US$160,000.00 and the appellant had spent US$7000.00. The evidence that the appellant had spent between J$30,000.00 or US$50,000.00 had been rejected. In answering questions posed by the court to him during his testimony, the appellant stated that he did not know the cost of construction of the house and he had no reason for having not asked about the cost of the same. Indeed, he said that the idea that it may have been costing too much had not crossed his mind at all. In fact, he finally concluded that he had never obtained the total cost of the construction of the house. In my view, there was clearly sufficient evidence for the learned judge to conclude that his contribution was limited to US$7000.00 and as a consequence, to assess his interest in the property at 5%.

[69] Examining the matter through the prism of section 14(2) of PROSA, would not have had any different result. This property, as indicated, was not the family home and therefore would have to have been dealt with as "other property". One would therefore have to review the factors set out in section 14(2) of PROSA which constitute contribution under PROSA. I have already dealt with the fact that the appellant had

made no contribution to the acquisition of the property and the court has found, based on credible evidence, that he had made a 5% per cent contribution to the improvement of the property through the construction of the house. The learned judge did not accept that there was any evidence indicating any other contribution by the appellant to the household or by way of the factors set out in section 14(2) of PROSA relevant to this matter. The amount of 5% contribution to the improvement of the property would therefore, in my view, be a proper assessment of the appellant's interest in the property under PROSA. I do not see how that conclusion can be disturbed.

Conclusion

[70] The finding of the court that the appellant had made no contribution to the acquisition of the property was a matter of fact for the learned judge and there was evidence to support that finding. The learned judge found as a fact that there were threats issued by the appellant to the respondent. The appellant had not denied that allegation by the respondent and accepted that he had "raised hell" with her. There was evidence from which the learned judge could have found that the transfer had not been willingly done and would not have been done without the harassment of the respondent by the appellant.

[71] The learned judge correctly found that there was no consideration for the purported gift. The payment for the cost of transfer was not consideration moving from the appellant to the respondent for her benefit. There was no evidence to ground the contention that funds spent by the appellant on the refurbishment of the basement at Snyder Avenue, on the sale of Snyder Avenue, represented his contribution to the

construction of the house on the property. There was no evidence that the refurbishment of the Snyder Avenue basement to construct a restaurant and bar increased the value of Snyder Avenue and would therefore have increased the proceeds of sale. In any event, the evidence was that the appellant had reimbursed himself in respect of the funds he had used to refurbish the restaurant and bar at Snyder Avenue, which therefore negated any claim that those funds represented his contributions to construction of the house on the property. The appellant's contribution to the property was therefore properly assessed at 5%.

[72] Ultimately, as stated in paragraph 37 of R Anderson J's judgment, and as set out in paragraph [36] herein, wherever there was a conflict in the evidence between appellant and the respondent the learned judge accepted the evidence of the respondent and rejected that of the appellant. In keeping with the principles set out in the Privy Council case of **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd**, an appellate court should hesitate to interfere with the findings of fact of the trial judge when he has seen and heard the witnesses. Therefore, in the circumstances of this case I would not disturb his findings.

[73] I would dismiss the appeal and award costs to the respondent both here and in the court below, to be taxed if not agreed.

McDONALD-BISHOP JA

[74] I have read in draft the judgment of my sister Phillips JA and agree with her reasoning and conclusion. I have nothing further to add.

F WILLIAMS JA

[75] I too have read the draft judgment of Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

PHILLIPS JA

ORDER

1. Appeal dismissed.
2. Costs to the respondent both here and in the court below to be taxed if not agreed.