[2020] JMCA Civ 44

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 132/2010

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE STRAW JA (AG)

BETWEEN	**WINSTON NEWELL**	**APPELLANT**
AND	**TASTEY NEWELL**	**RESPONDENT**

Keith Bishop and Andrew Graham instructed by Bishop & Partners for the appellant

Alexander Williams instructed by Alexander Williams & Company for the respondent

29, 30 November 2017, 31 July and 25 September 2020

PHILLIPS JA

[1] I have read, in draft, the reasons for judgment of my sister Sinclair-Haynes JA and agree with her reasoning and conclusion, as they accord with my reasons for concurring with the order of the court. I have nothing further to add.

SINCLAIR-HAYNES JA

[2] This is an appeal from the decision of Evan Brown J, in which he declared *inter alia* that Winston Newell (the appellant), was not entitled to recover from Tastey Newell

(the respondent), the sum of $375,713.00 as one half of the legal fee payable to Messrs Bishop and Partners for the transfer of his one-half interest to her. On 31 July 2020 we dismissed the appeal and affirmed Evan Brown J's judgment with costs to the respondent to be agreed or taxed.

The background

[3] The marriage between Winston and Tastey Newell broke down irretrievably. Mr Newell consequently instituted proceedings for the dissolution of their marriage in 2007. With divorce proceedings pending, Mrs Newell also instituted proceedings by way of fixed date claim form on 18 July 2007 in the Supreme Court, pursuant to the Property (Rights of Spouses) Act, in which she sought declarations of her interest in three of the four properties the parties owned together.

[4] Endeavouring to resolve the matter amicably, on 2 November 2007, before the hearing of the fixed date claim form, the parties met in New Kingston with their respective counsel, Messrs Alexander Williams and Keith Bishop. That meeting fructified into what was dubbed by the parties as the "New Kingston agreement". That agreement resolved the parties' dispute regarding the three properties, the subject of Mrs Newell's application. The agreement was written by Mrs Newell's attorney-at-law, Mr Williams and soon thereafter typed by Mr Newell's attorney-at-law, Mr Bishop. Both parties were signatories to that agreement and their attorneys witnessed the agreement on the same day.

[5] By virtue of the New Kingston agreement, the properties were shared between the parties. Mrs Newell was given the first option to purchase Mr Newell's interest in property situate at Liguanea Avenue known as "Harlecon Manor".

[6] Subsequently, the parties entered into an agreement for sale on 14 February 2008, for the sale of Mr Newell's interest in Harlecon Manor to Mrs Newell, which ironically was referred to as the "Valentine agreement". By virtue of the New Kingston agreement and the sale agreement, Mr Bishop had carriage of sale. A disagreement, however, arose regarding the deduction of one-half of the vendor's legal fee by Mr Bishop, from monies to be paid over to Mrs Newell.

[7] Mr Bishop contended that by virtue of the sale agreement, both parties were vendors, and therefore both should share his legal fee as the attorney with carriage of sale. He sought to rely on the New Kingston agreement in furtherance of his contention that Mrs Newell was obliged, as a vendor to bear one-half of the legal fee for the transfer of Harlecon Manor. Mr Williams however contended that, as the purchaser, she ought not to have contributed to the vendor's attorney's legal fee. Mr Bishop, notwithstanding Mr Williams' objection, deducted the sum of $375,713.00 which represented one-half of his legal fees, from monies to paid to Mrs Newell.

[8] Consequently, on 10 September 2008, Mrs Newell sought by way of fixed date claim form, the following relief:

> "1) A determination of the question as to whether or not [Mr Newell] is entitled to recover one half of the attorney's fee having carriage of sale under the

agreement for sale between the parties on 14th day of February 2008.

2) A declaration that [Mr Newell] is not entitled to recover he[sic] sum of $375,713.00 as one half of the legal fee payable to Messrs. Bishop & Fullerton.

3) An order requiring that [Mr Newell] pay the said sum to [Mrs Newell].

4) Costs."

[9] The learned judge acceded to her requests, and Mr Newell's application for a stay of his orders was refused.

The judge's reasons

[10] The learned judge's decision was influenced by the agreement for sale (the sale agreement), specifically the paragraph under the heading, "Title and Cost of Transfer" which read:

> "Under The Registration of Titles Act. Transfer to be prepared by Vendor's Attorneys-at-Law. The Purchaser shall pay one half Stamp Duty and one half Registration Fees. Transfer Tax to be borne by the Vendor. Vendor and Purchaser will each bear their own Attorneys-at-Law costs on the Transfer and General Consumption Tax thereon."

[11] The learned judge was also cognizant of the "Special Conditions" of the sale agreement which specifically addressed the parties' respective costs in the sale. He relied on Mrs Newell's affidavit, in which she averred that she was the true purchaser and Mr Newell was the true vendor. He, however, rejected Mr Newell's contention by way of his affidavit, that they both had agreed to pay the vendor's legal fee and that no issue had been taken by Mrs Newell with paying one-half of the transfer tax which is payable only by a vendor.

[12] Mr Williams' submission as to the importance of the applicability of the literal rule of interpretation and surrounding circumstances to ascertain the true intention of the parties, found favour with the learned judge. So too his further submission that the parties' intention was to bear their separate attorney's legal fee.

[13] The learned judge found that Mr Bishop did not act for Mrs Newell, hence she was not liable for one-half of the vendor's legal fee. He rejected Mr Bishop's submission that both parties as joint tenants of Harlecon Manor, signed the sale agreement as vendors, therefore his 3 % legal fee was payable by both parties as vendors.

[14] In rejecting Mr Bishop's submissions, the learned judge indicated that if Mr Bishop's interpretation were to be accepted, Mrs Newell would pay legal fees as both vendor and purchaser. He questioned the veracity of Mr Bishop's assertion that that was the true intention of the New Kingston agreement and the sale agreement.

[15] The learned judge found that there was no mention in the terms outlined in the sale agreement under sections "Title and Cost of Transfer" and "Special Conditions", that Mrs Newell was required to pay carriage of sale fees as a vendor. He found that throughout the sale agreement, all references to "vendor" and "purchaser" referred to Mr Newell and Mrs Newell, respectively.

[16] Having examined the New Kingston agreement, the learned judge held that Mrs Newell was given the first option to purchase Mr Newell's interest, which he found to have been "an unequivocal indication that the parties intended for Mrs Newell to be the purchaser and Mr Newell, to be the vendor".

[17] The learned judge also found that although the parties were joint tenants, Mrs Newell was not selling her interest in Harlecon Manor. It was Mr Newell's interest that was the subject of the sale agreement and only he could sell his interest. The learned judge further observed that there was no evidence that Bishop & Fullerton represented Mrs Newell as a vendor. She, therefore, had no obligation in law to pay one half of their legal fee.

[18] The learned judge concluded that Mrs Newell was not a true vendor in the sale of the Harlecon Manor. Mr Newell was the sole vendor. He consequently declared, *inter alia* that the appellant was not entitled to recover the sum of $375,713.00 as one-half of the legal fee payable to Bishop & Fullerton.

The appeal

[19] Dissatisfied with the learned judge's decision, Mr Newell has appealed on the following grounds and has asked this court to set aside the judgment and enter instead, judgment in his favour.

The grounds of appeal

> "a. The learned Judge erred in finding that the fees were paid to Bishop & Partners instead of Bishop & Fullerton although it was Bishop & Fullerton which had Carriage of Sale in the matter pursuant to the Agreement for Sale, which the learned Judge relied on.
>
> b. The learned Judge erred in finding that the written agreement made between the parties and witnessed by their Attorneys-at-Law did not govern the arrangements as it relates to fees payable to Attorneys-at-Law on behalf of the parties acting

together as Vendors although there is no dispute that the agreement provides that the Vendors should pay legal fees of three (3) per cent.

c. The learned Judge erred in finding that the Appellant was the only Vendor although the Respondent signed the Agreement for Sale as both Vendor and Purchaser.

d. The learned Judge erred in law in law [sic] in finding that the Appellant is not a Vendor and could not be a Vendor and Purchaser at the same time despite clear and unchallenged evidence that the Respondent did not challenge her status as Vendor with respect to sums payable to the Commissioner of Stamp & Estate Duty and the Registrar of Titles.

e. The learned judge erred in law in finding that the Appellant should pay 100 per cent of the legal fees while the said Appellant had only owned 50 per cent of the share of the premises."

The appellant's submissions

[20] Mr Bishop, on behalf of Mr Newell, submitted that the learned judge's conclusion that Mrs Newell was not a "true vendor", was arrived at without reference to the rules of statutory interpretation or case law. He relied on section 3 of the Transfer Tax Act which imposes transfer tax on transferors, whom, he submitted, were Mr Newell and Mrs Newell in the instant case. He indicated that there is no reference in the Transfer Tax Act to a "true vendor". In reliance on section 3(2) of that Act which speaks to "joint tenants", he argued that one joint tenant would not be exempt from the payment of transfer tax.

[21] Counsel contended that both parties held the premises as joint tenants. The unchallenged evidence, he submitted, was that they both signed the sale agreement as the vendors. The essence of joint tenancy, he posited, was that "each joint tenant is

wholly entitled to the whole". Mrs Newell ought therefore to have been treated as a vendor, as Mr Newell was.

[22] Mr Bishop indicated that the New Kingston agreement outlined that Bishop & Fullerton had carriage of sale which, he argued, meant that he represented both owners of the property. He referred to his letter of 14 July 2008, which he submitted, had duly advised Mr Williams that one-half of the vendor's legal fee would have been deducted from the monies received from the mortgagee's attorney-at-law. He argued that the learned judge erred in his findings because Mrs Newell was at liberty to have objected to Bishop & Fullerton attorneys-at-law having carriage of sale and representing both parties as the vendors.

[23] It was also his submission that the learned judge erred in finding that there was no evidence that Bishop & Fullerton represented Mrs Newell as a vendor and was therefore not obligated in law to pay legal fees to his firm. He referred to the learned judge's observation that the sale agreement did not specifically state that Mrs Newell should pay one-half of the transfer tax. According to Mr Bishop, it would have been unnecessary to do so because the law clearly provides that transfer tax is to be paid by the "transferors", and Mrs Newell was also a transferor.

[24] Counsel further argued that Mrs Newell as a transferor without an exemption pursuant to the Transfer Tax Act was liable to pay transfer tax as well as legal fees, as a transferor.

[25] The learned judge ought, he argued, to have utilized basic rules of statutory interpretation in order to determine the object and purpose of the Transfer Tax Act and the intention of parliament. Had he done so, in light of the parties' agreement regarding the disposal of their properties, Mrs Newell, having received the benefit of that transfer, would therefore have been estopped from denying important terms of the agreement.

[26] Counsel specifically referred to the New Kingston agreement which named Bishop & Fullerton as the attorneys-at-law with carriage of sale of Harlecon Manor. He directed the court's attention to **Pepper (Inspector of Taxes) v Hart** [1993] AC 593, in which Lord Browne-Wilkinson found that it was for the courts to construe the words of an Act and give effect to the intention of parliament. According to Mr Bishop, the learned judge failed to demonstrate that he went beyond the submissions and reviewed the provisions of the Transfer Tax Act.

The respondent's submissions

[27] Mr Williams adopted an adamantine stance in his submission that the learned judge, in interpreting the sale agreement, correctly considered the literal meaning of section 7 of the Vendors and Purchasers Act. In arriving at his conclusion that Mrs Newell was not a "true vendor" and was therefore not required to contribute to the fees for carriage of sale (which is ordinarily assumed by the vendor), the learned judge could not be faulted in his application of the literal meaning of the words and surrounding circumstances. Mrs Newell was, in the circumstances, obviously not required to pay one-half of the legal fee to the attorney who did not represent her.

[28] Counsel further contended that the learned judge had taken full advantage of the affidavit evidence, which included the sale agreement. This court therefore ought not to disturb the learned judge's decision unless it is found to be plainly unsound or the reasons for his decision are unsatisfactory. He referred the court to **Watt or Thomas v Thomas** [1947] AC 484 in support of that submission.

[29] Counsel argued that the learned judge considered the context in which the sale agreement was made and the actual words used, to discover the intention of the parties; that approach, he submitted, was correct.

[30] In reliance on the Guyanese Court of Appeal case, **Enmore-Hope Village District Council v Mahamood Shaw et al** (1974) 21 WIR 275, particularly relying on Bollers CJ's opinion, counsel submitted that it was appropriate that the context in which a document was made or created should be taken into account in construing that document. At page 288 Bollers CJ said:

> "…it is well settled that in respect of a construction to be placed on a statute, words, and in particular general words, cannot be read in isolation as their colour and content are derived from their context; and every word of a statute must be read in its context in its widest sense which would include not only other enacting provisions of the same statute, but its preamble, the existing state of the law, and other statutes in *pari materia* in order to discern the mischief which the statute is intended to remedy. …"

[31] That statement, counsel submitted, referred to both documentary and statutory interpretation. He posited that the "context", of the instant case, would include other relevant documents made by the parties, and the surrounding circumstances.

Accordingly, he contended that the "context" in which the words were used, indicated that there was only one true "vendor", Mr Newell, and one true "purchaser", Mrs Newell. Regarding the actual words of the sale agreement, counsel directed the court's attention to the fact that whereas the sale agreement did not specifically state who should bear the fee chargeable by Bishop & Fullerton, the attorneys with carriage of sale; it clearly stated that the "singular" vendor and "singular" purchaser would each bear their own attorney-at-law's costs on the Transfer.

[32] According to Mr Williams, the learned judge clearly considered the literal meaning conveyed by the use of the singular tense throughout the agreement. His decision was therefore not only warranted on the evidence before him, it was in keeping with the law, and was also inevitable.

Law/Analysis

Ground a

> a. The learned Judge erred in finding that the fees were paid to Bishop & Partners instead of Bishop & Fullerton which had Carriage of Sale although it was Bishop & Fullerton which had Carriage of Sale in the matter pursuant to the Agreement for Sale which the learned judge relied on.

No argument was advanced in relation to this ground. It is, therefore, treated as having been abandoned.

Grounds b, c, d, and e

> (b) The Learned Judge erred in finding that the written agreement made between the parties and witnessed by their Attorneys-at-law did not govern the arrangements as it relates to fees payable to Attorneys-at-law on behalf of the parties acting together as Vendors.
>
> (c) The learned Judge erred in finding that the Appellant was the only Vendor although the Respondent signed the Agreement for Sale as both Vendor and Purchaser.
>
> (d) The learned Judge erred in law in law [sic] in finding that the Appellant is not a Vendor and could not be a Vendor and Purchaser at the same time despite clear and unchallenged evidence that the Respondent did not challenge her status as Vendor with respect to sums payable to the Commissioner of Stamp & Estate Duty and the Registrar of Titles.
>
> (e) The learned judge erred in law in finding that the Appellant should pay 100 per cent of the legal fees while the Appellant had only owned 50 per cent of the share of the premises.

[33] Grounds b, c, d and e can conveniently be dealt with together, as the crux of those grounds is whether Mrs Newell was a true vendor and should therefore pay one-half of the vendor's legal fee.

[34] The sale agreement referred to both Mr Newell and Mrs Newell as the "Vendors", solely because they were both registered on the Certificate of Title as the joint tenants of Harlecon Manor. As explained by Blackstone Commentaries (4th Edn, 1876) Vol II and referred to by Lord Denning MR in **Burgess v Rawnsley** [1975] 3 All ER 142 at page 146:

> "The properties of a joint-estate are derived from its unity, which is fourfold; the unity of interest, unity of title, the unity of time, and the unity of possession…"

[35] By virtue of their joint tenancy, Mr and Mrs Newell each owned an undivided share in Harlecon Manor. However, severance of that joint tenancy resulted in the parties having separate interests in the property and thus becoming tenants in common. But was the joint tenancy in fact severed?

[36] The circumstances in which a joint tenancy is severed was dealt with in **Burgess v Rawnsley**. At page 146, Lord Denning MR cited with approval Page Wood V-C's statement in **Williams v Hensman** (1861) 1 John & H 558, setting out the manner in which a joint tenancy can be severed. He enumerated them as follows:

> 1) by an act of one of the persons interested operating upon his own share which may create a severance as to that share;
>
> 2) by mutual agreement between the parties; and
>
> 3) severance by course of dealing between the parties.

[37] Morrison JA (as he then was) in **Lawrence & Others v Mahfood** [2010] JMCA Civ 38, adopted that view.

[38] The instant case rests on the mutual agreements between the parties, that is, the New Kingston agreement and the sale agreement. The pertinent clause in the New Kingston agreement read:

> "**Re: Harlecon Manor**
>
> **First option to purchase to Mrs. Newell to purchase Mr. Newell's interest at the price of $10,750,000.00** provided she signs the Agreement for Sale within 14 days of the date hereof, that is to say on or before the 16th instant. …" (Emphasis supplied)

[39] The joint tenancy had been severed by the mutual agreement of the parties, that is, the New Kingston agreement and the sale agreement. By virtue of the New Kingston agreement, the parties expressed and demonstrated, a mutual intention to treat the joint tenancy as severed. Mr Newell not only identified his distinct interest in the property, he also ascribed to it a value of $10,750,000.00. Moreover, by giving Mrs Newell first option to purchase, Mr Newell's intention to dispose of his interest in the property was palpable.

[40] The sale agreement further demonstrated their mutual agreement to sever the joint tenancy and operate instead as tenants-in-common. In light of the foregoing, the joint tenancy axiomatically was severed by the mutual agreement of the parties. Mr Newell ought, therefore, to have been named as the sole vendor in the sale agreement, because it was he who was transferring his one-half interest in Harlecon Manor to Mrs Newell as the purchaser. Had Mr Bishop correctly referred to Mr Newell as the sole vendor, there would have been no dispute as to who should have been responsible for the vendor's legal fees.

[41] The issue of the severance of the joint tenancy, however, was not dealt with by the parties, and so was not addressed by the learned judge in his deliberations. The focus of the parties' attention was instead on the interpretation of the agreements. I, therefore, deem it necessary to address those issues at this juncture.

What constituted one half of the transaction costs?

[42] Mr Bishop contended that, by virtue of the New Kingston agreement, Mrs Newell agreed that one-half of the transaction costs and one-half outstanding mortgage were to be deducted from the purchase price. He understood Mrs Newell's one-half of transaction costs, to include one-half of the vendor's legal fee. According to Mr Bishop, his firm had carriage of sale and therefore represented both owners of the property. Consequently, his legal fee set at three per cent plus general consumption tax (GCT) ought to be shared by both parties.

[43] On the other hand, Mr Williams argued that the one-half of the transaction costs to be deducted from the purchase price, did not include the vendor's attorney's fee. He contended that the fact that Mrs Newell was referred to as a vendor, did not saddle her with the responsibility to contribute to the vendor's legal fees.

[44] He posited that a vendor may not ultimately be a transferor. There is a conceptual difference between a vendor and purchaser, he argued. It was his submission that it is common knowledge that a vendor "sells" and a purchaser "buys", and Mrs Newell was solely purchasing Mr Newell's interest.

[45] Scrutiny of the New Kingston agreement, however, reveals that the transaction costs to dispose of Harlecon Manor were not defined. The relevant paragraph stated:

> "Re: Harlecon Manor
>
> … **Half of transaction cost and half outstanding mortgage to be deducted from purchase price.** Carriage

> of Sale: Bishop & Fullerton (Mr. Keith Bishop) at 3% plus GCT." (Emphasis supplied)

[46] Evidently, the parties were not *ad idem* regarding Messrs Newell's and Bishop's assertion that "transaction cost" included payment by Mrs Newell of one-half contribution to Mr Bishop's legal fee.

[47] The sale agreement specified the manner in which costs were to be appropriated. The parties were at liberty to have included a clause, if they so desired, requiring Mrs Newell to pay one-half of the vendor's legal fee. Worthy of note is that the sale agreement which was prepared by Mr Bishop, did not include that requirement. Regarding the "Costs of Transfer", the agreement read:

> "…The Purchaser shall pay one half Stamp Duty and one half Registration Fees. Transfer Tax to be borne by the Vendor. **Vendor and Purchaser will each bear their own Attorneys-at-Law costs on the Transfer and General Consumption Tax thereon**." (Emphasis supplied)

[48] The sale agreement further stated:

> " **CARRIAGE OF SALE**
>
> **Bishop & Fullerton,** 14-16 Duke Street, Kingston (Attention: Mr. Keith N. Bishop) Tel: 948-3309 Fax: 922-5762
>
> **PURCHASER'S ATTORNEY-AT-LAW**
>
> **Usim, Williams & Company** of 52 Duke Street, Kingston (Attention: Mr. Alexander I. Williams)"

[49] Having carriage of sale is not determinative of who should pay the vendor's legal fee. The parties were entitled, as they so did, to engage their own attorney-at-law, to represent their interest. The learned judge correctly observed that:

> "…There was no evidence that [Mrs Newell] was represented by them as vendor and therefore had no obligation in law to pay them legal fees."

The effect of the reference to both parties as vendors

[50] Throughout the sale agreement, Mrs Newell was referred to as the "vendor" twice**.** She was named as a vendor along with Mr Newell at the beginning of the sale agreement and she signed as a vendor. As already noted, this was so because she was a joint tenant on the Title. In the Special Conditions, vendor and purchaser were referred only in the singular tense. Mr Williams, submitted that the learned judge correctly considered and concluded that the literal meaning conveyed by the use of the singular tense in reference to the "vendor", throughout the agreement, was in reference to Mr Newell.

[51] Section 4 (b) of the Interpretation Act specifically states that the use of the singular tense in documents should be read in the plural tense where the context requires. Section 4 (b) provides:

> "4. In this Act and in all Acts, regulations and other instruments of a public character relating to the Island now in force or hereafter to be made, unless there is something in the subject or context inconsistent with such construction, or unless it is therein otherwise expressly provided-
>
> (a) …

(b) words in the singular include the plural, and words in the plural include the singular."

[52] In light of that standard interpretation, out of an abundance of caution, some practitioners insert a special condition in sale agreements, which specifically states that the words "purchaser" and "vendor" shall be deemed to refer to one or more persons, where the context so admits. Notwithstanding the absence of such special condition in the sale agreement, I am of the view that the use of the singular tense in reference to "vendor" holds no weight in the interpretation of the sale agreement.

[53] In the instant case, an understanding of the purpose of the sale agreement is necessary in determining the parties' intention. The House of Lords in the matter of **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1997] UKHL 28, in relying on the commercial purpose of the agreement, opined that in some instances, the purpose may be prioritized over the literal meaning of the words. In **Kookmin Bank v Rainy Sky SA and others** [2010] EWCA Civ 582, Sir Simon Tuckey (whose statement was approved by the Supreme Court on appeal) held that where there are two possible interpretations, the court should reject the interpretation that flouts business common sense.

[54] In light of the New Kingston agreement, the subject of the sale agreement was Mr Newell's one-half interest in Harlecon Manor. The sale agreement was entered into for one reason, which was the sale of that one-half interest in Harlecon Manor to Mrs Newell**.** Mr Bishop's assertion that Mrs Newell acted as a vendor was, therefore, contrary to the stated purpose. In the context of the sale agreement, Mr Bishop's interpretation which

saddled Mrs Newell with the responsibility of paying one-half of the vendor's legal fee, flouted business common sense.

[55] The assertion that she should share the legal fee for Mr Newell's attorney-at-law, while also being responsible for her attorney's legal fee; in light of the clear agreement that each party would bear his own attorney's costs on the transfer, is also inconsistent with logic.

[56] The learned judge correctly accepted Mr Williams' contention that at all material times throughout the course of the transaction, Bishop & Fullerton represented Mr Newell as the only vendor of the property. His findings cannot be impugned, as there is no evidence that Messrs Bishop & Fullerton were also engaged to represent Mrs Newell as a vendor. The learned judge correctly observed that:

> "… Mr Newell's interest was the subject of the sale agreement and only he could sell his interest. If Mrs Newell was a vendor in these circumstances, then the question may be asked: 'a vendor of what?'."

The effect of Mrs Newell's payment of one half of the transfer tax

[57] In support of Mr Bishop's contention that Mrs Newell accepted that she was a vendor and agreed to pay one-half of the vendor's attorney's costs, he pointed to her failure to challenge her one-half payment of the transfer tax.

[58] Section 3 of the Transfer Tax Act, imposes a tax on the value or consideration for a transfer. That tax is solely the responsibility of the transferor and is payable only on the

interest being transferred, which in the instant case was Mr Newell's one-half interest in Harlecon Manor.

[59] Harlecon Manor was valued at $21,500,000.00. This was erroneously stated as the sale price in the agreement. As it was only Mr Newell's interest that was being transferred the sale price ought to have been stated as $10,750,000.00. The transfer tax was in fact assessed on $10,750,000.00 at the rate of 7.5%, which amounted to $806,250.00. Mrs Newell's "Statement of Account" which was prepared by Bishop & Fullerton and dated 9 June 2008, required her to pay one-half of the transfer tax in the amount of $403,125.00 as a vendor.

[60] Mr Bishop cannot properly rely on Mrs Newell payment of one-half of the transfer tax in support of his contention that she too was a vendor. At that juncture, that may have occurred as her name remained on the title as a joint tenant although the joint tenancy had been severed. Were Mrs Newell considered a true vendor by Mr Bishop, she would have also been required to pay one-half of the vendor's costs for stamp duty, registration fees, preparation of the sale agreement and miscellaneous expenses. The statement of account, however, revealed that her payments were solely the purchaser's share of those transfer costs, while Mr Newell paid the vendor's share of those costs. In the circumstances, the learned judge's conclusion that Mr Newell was solely responsible for the vendor's legal fee, cannot be assailed.

[61] It is observed that Mr Bishop's 3% legal fee was charged on the full value of the property, that is, on $21,500,000.00. It is unchallenged that it was Mr

Newell's one-half interest which was being transferred. Accordingly, the legal fee of 3% of the sale price, should have been calculated on his interest of $10,750,000.00. In the interests of justice, Mr Bishop ought not to benefit from the defect in the drafting of the sale agreement.

[62] In light of the forgoing, we were persuaded that the learned judge correctly found that, Mrs Newell was not obligated to pay one-half of the vendor's legal fee. It was Mr Newell's sole responsibility to pay Mr Bishop's legal fee in the sum of $375,713.00.

Conclusion

[63] As grateful I am for the industry shown by counsel in the preparation of this matter, I regret that most of the authorities cited were not helpful; and I was compelled for reasons earlier expressed to uphold the judge's findings and conclusion. We, therefore, made the order that the appeal be dismissed with costs to the respondent to be agreed or taxed.

STRAW JA

[64] I too have read the reasons for the judgment of Sinclair-Haynes JA in draft, and agree with her reasoning and conclusion. There is nothing further I wish to add.