[2021] JMCA Civ 10

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 123/2017

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA

BETWEEN	**DOUGLAS A B THOMPSON**	**APPELLANT**
AND	**NIGEL MORGAN**	**RESPONDENT**

Bert Samuels and Christopher Dunkley instructed by Phillipson Partners for the appellant

Keith Bishop and Andrew Graham instructed by Bishop and Partners for the respondent

4, 5, 6, 12 June 2019 and 26 February 2021

PHILLIPS JA

[1] I have had the opportunity of reading the comprehensive and detailed analysis of my learned sister dealing with a case concerning rather unusual and interesting facts. I agree entirely with her reasoning and conclusion. There is nothing that I can usefully add.

P WILLIAMS JA

[2] This is an appeal from the decision of Wint-Blair J (Ag) (as she then was) ("the judge"), given on 8 November 2017, in which she gave judgment for Mr Nigel Morgan,

the respondent, who was the defendant in a claim brought by Mr Douglas Thompson, the appellant. Mr Thompson had sued Mr Morgan to recover US$28,000.00 and JA$2,000,000.00 which he asserted he had loaned Mr Morgan in December 2007.

[3] The judge having heard the evidence rejected Mr Thompson's assertion that the money he had handed over to Mr Morgan was a loan. She thereby accepted Mr Morgan's contention that he had received only a manager's cheque in the amount of JA$2,000,000.00 (the equivalent of US$28,409.10) which represented monies handed over to him by Mr Thompson to be invested on his behalf in a foreign exchange club named LA's Private Club, ("the club").

Background

[4] There is no dispute that, on 6 December 2007, Mr Morgan signed and handed to Mr Thompson a receipt acknowledging that he had received from Mr Thompson a sum of US$28,409.10. On the receipt that money was described as a loan. On the same date Mr Thompson also purchased a manager's cheque in the amount of JA$2,000,000.00 made payable to Duke Brown and handed it to Mr Morgan. Copies of these documents were admitted into evidence at the trial.

[5] On that date, Mr Morgan also gave Mr Thompson a document titled 'LA's Private Club – club member agreement form' ("the club member agreement form"). Mr Thompson does not dispute signing one page of a form bearing that name and also providing the details of his United States bank account for inclusion on the form. Mr Morgan retained possession of the form. He in turn handed over to Mr Thompson the

motor vehicle registration certificate and certificate of fitness for his Toyota Land Cruiser Prado motor vehicle. All three documents were also admitted into evidence at the trial.

[6] On 10 July 2013, Mr Thompson filed his claim for US$28,000.00 and JA$2,000,000.00, together with interest of 10% per annum thereon from the day of default to the date of judgment. The total amount claimed, inclusive of interest, was JA$5,115,570.35.

[7] The trial commenced before the judge on 28 September 2017 and she heard evidence from the parties themselves as also from Mr Christopher Townsend and Mr Duke Brown who both testified on behalf of Mr Morgan. On 8 November 2017, the judge gave her decision in a written judgment, **Douglas A B Thompson v Nigel Morgan** [2017] Civ 166.

The evidence before the judge

For the appellant

[8] Mr Thompson in his witness statement stated that he is an attorney-at-law. In his oral evidence, he said he had been practising for 32 years, since 1985. He stated that Mr Morgan approached him in December of 2007 and indicated that he was experiencing financial difficulties and needed assistance to settle some outstanding debts and pay arrears on the mortgage account on his home. He stated that Mr Morgan told him that he needed a loan for a period of six months and would provide a form of guarantee/security for the loan by handing over the original motor vehicle registration

and certificate of fitness for his 2003 Toyota Prado motor vehicle. He stated that he was further told by Mr Morgan that in the event the loan was not repaid within the six months, the vehicle would be transferred to him towards liquidation of the debt.

[9] Mr Thompson asserted that after the six months had passed he made repeated demands of Mr Morgan for the repayment of the debt but Mr Morgan refused to do so. Further, Mr Thompson stated, he believed that Mr Morgan disposed of the Toyota Prado motor vehicle without transferring it to him as agreed.

[10] Under cross-examination, Mr Thompson explained that he and Mr Morgan had had discussions prior to his handing over the monies in December. He was unable to recall exactly when those discussions had taken place but "suspected" it was two weeks before. He further explained that these discussions had taken place at the Half Way Tree Court where Mr Morgan was employed as a clerk of courts, at the time.

[11] Mr Thompson said that Mr Morgan had told him the financial difficulties related to a mortgage on his house and some minibuses that he owned. Mr Thompson admitted that he had not asked Mr Morgan for any proof of the financial challenges he was facing nor did he ask any details about the mortgage. He explained that Mr Thompson was someone he "knew well enough" and "had known him for some years". He therefore did not get into details with Mr Morgan as to what he was going to do with the money.

[12] It was sometime later, within that two-week period after the initial request, that Mr Thompson agreed to lend Mr Morgan the money. He spoke to Mr Morgan on the

telephone and made arrangements about how Mr Morgan would collect the loan. He explained that Mr Morgan asked to borrow in the region of $4,000,000.00 and also asked him "if [he] could afford US$30,000.00".

[13] When questioned about the number of cheques he handed to Mr Morgan, Mr Thompson explained that Mr Morgan had asked him if he "could make a cheque payable to Duke Brown apart from the cash". He was insistent that Mr Brown was not someone whom he knew.

[14] Mr Thompson said he knew that Mr Morgan had a bus, a cash pot shop and "[did] little hustling". He agreed that he had knowledge that Mr Morgan was not paid a lot as a clerk of courts. However, at the time he handed over the money, Mr Thompson was satisfied as to how he would be repaid and, in the event, he was not repaid he could have been able to sell the motor vehicle. He, however, did not get a valuation of the motor vehicle but, having been the owner of that type of vehicle, he had a fair idea of its value. He also never got the title for the motor vehicle neither did Mr Morgan sign a lien form for the motor vehicle or any agreement giving him authority to sell the vehicle, if the loan was not repaid. When asked how he would have been able to dispose of the vehicle without the relevant documents Mr Thompson responded:

> "This arrangement between us someone [sic] whom I knew, I expected an element of honour and I expected that [Mr Morgan] would have repaid the sum and me no[sic] disposing of the vehicle, I held papers to ensure [Mr Morgan] could not dispose of vehicle without them, I still have the originals."

[15] Mr Thompson testified that after they had counted the money in his office; Mr Morgan signed the receipt and gave it to him. He was asked if the amount of US$28,409.10 was withdrawn from a bank and his response was: "not all some came from different sources, some from my house, an entity and some from a bank". He said about a half of the total amount came from the bank.

[16] Mr Thompson acknowledged that he did not write a loan agreement for Mr Morgan to sign. He maintained that he had been given a receipt for the US dollars and that receipt was enforceable and further that he was satisfied that the manager's cheque "acted as a receipt".

[17] Mr Thompson denied being a member of LA's Private Club. He said he "was aware of this company, Olint and Cash plus, all of them". He accepted that he had signed the form used for application for membership to the club and that he had provided Mr Morgan with his bank account number but noted that he had not signed in the space provided for applicants for club membership to sign and his signature had not been witnessed. He had signed at a spot where Mr Morgan had placed an "X". Further he noted that the space provided for contribution was also empty. A single page document was shown to Mr Thompson and he identified his signature and the information.

[18] Mr Thompson explained that he had signed the form because he understood it to mean that Mr Morgan would take it to "one of those now known as a Ponzi scheme [which] would wire money from [Mr Morgan's] account with them to [his] account.". He

said they had had the discussion about this on 6 December 2007, when he signed the form and at that time he had also given Mr Morgan a copy of his driver's licence. He explained that this was done so Mr Morgan could give it to the club in proof of who he was. He also explained that Mr Morgan had said that in order to justify this transfer of the funds, the account details as well as the driver's licence had to be provided to the club. He said there was no specific arrangement for the repayment of the Jamaican dollar portion of the loan. He was satisfied since "there was one for the account the US should go to".

[19] Mr Thompson maintained that he had never seen or spoken to Duke Brown. He had however spoken to Mr Morgan about Orlando Johnson and was advised that Mr Johnson had fled the island. He knew that Mr Morgan was a member of the club but had never met with Mr Brown to discuss involvement in the club. He also denied speaking with Mr Townsend about joining the club.

[20] When pressed about the amount actually recorded as having been received by Mr Morgan and in particular the ten cents, Mr Thompson explained that there were bank charges that had brought the amount up to the US$28,409.10 but he had rounded the amount to US$28,000.00 for the purposes of the claim. He was unable to say if the amount was the equivalent of JA$2,000,000.00 or if the exchange rate at the time was "JA$70.4 to US$1.00". He was unable to recall what the bank charges had been.

[21] Mr Thompson acknowledged that after the six months had passed he did not write to Mr Morgan asking for the vehicle to be transferred to him as promised. He

could not recall if he had done so up to December of 2008 or after the passage of either two, three or four years. He acknowledged that he had never sent Mr Morgan a "reminder letter" however he said that he had several conversations with him for the return of his money.

[22] Mr Thompson was aware that Mr Morgan had opened a bar and jerk centre sometime in June 2013. He, however, had not attended the function held for the opening and had expressly told someone he would not be attending since he was not going to anything with Mr Morgan because he owed him money. He denied that he had called Mr Morgan and told him "you didn't invite me to your thing but I have an invitation for you referring to [the] claim".

[23] Mr Thompson denied that he had seen Mr Morgan sometime after 6 December 2007 and told him that he was satisfied that Mr Brown had been given the JA$2,000,000.00. He also denied promising to return the certificates of registration and fitness for the motor vehicle to Mr Morgan.

[24] He agreed that the receipt did not expressly state whether he had handed over cash or a cheque to Mr Morgan. He insisted that he had given Mr Morgan what was reflected on the receipt. He denied the suggestion that he had only delivered the cheque for JA$2,000,000.00 for the purpose of completing an arrangement he had made with Duke Brown to join the investment club.

[25] Mr Thompson testified that he was in the habit of giving loans to friends and members of the court staff. He said that $4,000,000.00 was not an unusual loan since

Mr Morgan was his friend and had given him the "car to hold". He later under re-examination identified persons to whom he had loaned monies who he eventually had also to sue for the return of those loans.

For the respondent

[26] The first witness to testify on behalf of Mr Morgan was Christopher Townsend, who in his witness statement stated that he also is an attorney-at-law. At the time of the trial he had been an attorney-at-law for 20 years. He knew Mr Morgan from 1987 when they were both assigned duties at the Saint Andrew Parish Court. In late 2007 Mr Morgan told him about attractive returns to be had from investing in an investment club called LA's Private Club.

[27] Mr Morgan introduced Mr Townsend to Mr Brown as a senior officer of the club. Mr Townsend said it was Mr Brown who explained to him how the club operated. Mr Brown also advised him that Mr Orlando Johnson was the owner and chairman of the club.

[28] Mr Townsend said that on 10 January 2008 he completed a LA's Private Club application for membership and invested JA$1,924,080.00, which, at the time, was equivalent to US$27,486.85. At trial, he exhibited the document, consisting of six pages, which he had completed and signed upon applying to join the club. He also identified a photocopy of his driver's licence that accompanied that application.

[29] Mr Townsend further stated that he had given the money to Mr Morgan to be handed over to Mr Brown. Mr Morgan issued him with a receipt, representing the

amount invested in the club as a loan. A copy of this receipt was exhibited at trial. He received monthly returns on his investment until sometime in 2008 when he was made aware that the club was having some difficulties and that the chairman of the club, Mr Johnson, had fled the island.

[30] Mr Townsend testified that he was aware that both Mr Thompson and Mr Morgan were members of the club. He explained, under re-examination, that he knew them to be members because they had told him. He said that he and Mr Thompson tried to recover their monies together.

[31] Under cross-examination, Mr Townsend was taken through the details of the club member agreement form he had completed. This exercise served to highlight that this document consisted of more than just one page. Further, Mr Townsend accepted that the receipt he had been given by Mr Morgan represented that the money he handed over was a loan.

[32] Mr Morgan in his witness statement acknowledged that he had indeed received money from Mr Thompson. He however stated that he had only received the manager's cheque payable to Duke Brown in the sum of JA$2,000,000.00, which was the equivalent of US$28,409.10.

[33] He stated that Mr Thompson, with whom he had had a very cordial relationship, approached him in December 2007 enquiring about the foreign exchange club that Mr Thompson said he heard that Mr Morgan and "other persons of the legal fraternity were part of". Mr Thompson enquired about the returns Mr Morgan was getting on his

investment and Mr Morgan showed him a statement detailing the investment and the returns.

[34] Mr Morgan further stated that Mr Thompson asked him to make contact with Mr Brown, who was at the time acting on behalf of Mr Johnson. Mr Morgan was aware that Mr Thompson and Mr Brown had discussions about Mr Thompson joining the club since some of these discussions were conducted on Mr Morgan's cellular phone and in Mr Morgan's presence.

[35] Mr Brown eventually gave Mr Morgan a membership application form to be given to Mr Thompson to complete and Mr Morgan duly handed the form to Mr Thompson. Mr Morgan stated further that subsequently he visited Mr Thompson in his office, at his request, and was given the form which Mr Thompson signed in his presence. Mr Thompson also handed him a copy of his driver's licence.

[36] Mr Morgan stated that he signed and gave Mr Thompson a receipt for the amount of US$28,409.10. His explanation for this was that Mr Brown had prepared the receipt and given it to him in anticipation of Mr Thompson handing him the money. Mr Brown had not however signed the receipt and Mr Morgan said he signed it upon receiving the money for and on behalf of Mr Brown.

[37] He denied being in any financial difficulties that would necessitate his borrowing money from Mr Thompson. He denied borrowing US$28,000.00 from Mr Thompson. Mr Morgan maintained that in asserting that he required a loan for six months and would provide a form of guarantee, Mr Thompson had lied and had intentionally made a

dishonest statement. He explained that he had handed over the documents for his motor vehicle to Mr. Thompson at Mr. Thompson's request for something "to hold on to" until there was proof that the money had been handed over to Mr Brown. Mr Morgan stated that some days later he saw Mr Thompson who told him he was satisfied that the lodgement had been made with the club. Despite promising to do so, Mr Thompson never returned the documents. He stated that Mr Thompson's excuse for not doing so was that he was unable to remember where he had put them.

[38] Mr Morgan was of the opinion that the reason for, what he regarded as, bald lies by Mr Thompson was the breakdown in the relationship between them. Mr Morgan stated that after he had resigned from his post as clerk of courts in May 2011, his interaction with Mr Thompson became almost non-existent as he deliberately avoided Mr Thompson's company because of his behaviour. It was sometime after Mr Morgan had failed to invite Mr Thompson to a function in June 2013 that Mr Thompson had commenced this action. According to Mr Morgan, this was after Mr Thompson had scolded him for the failure to invite him to the function.

[39] In a further witness statement, Mr Morgan exhibited a statement of his account with the club dated 29 February 2008 with a balance of US$341,886.17 and pointed out that the amount far exceeded the investment Mr Thompson had made in the club. This, he said, demonstrated his liquidity at the time and "rubbished" the assertion that he required a loan to settle any outstanding debts. He also exhibited a receipt, dated 8 January 2008, issued by Mr Brown, for a further investment he had made in the club, in the amount of US$15,000.00. He pointed out that this receipt, which had been issued

and signed by Mr Brown, described the money as a loan. Mr Morgan stated that since 2004 he had operated a reasonably successful wrecking and public transportation business.

[40] At trial, Mr Morgan stated that he was an attorney-at law. Under cross-examination, he agreed that he knew Mr Thompson rather well and described his relationship with Mr Thompson as just a friend "in the loosest meaning, a very good associate". He maintained that he never received any cash from Mr Thompson. He insisted that although it was stated on the receipt that the money was for a loan, in fact it was not.

[41] Mr Morgan denied that he had exchanged the documents for his motor vehicle for the cash. He insisted that he had handed over the documents at Mr Thompson's request for something to hold on to until confirmation that the JA$2,000,000.00 had been handed over to Mr Brown.

[42] Mr Morgan identified the application form that Mr Townsend had exhibited and agreed that he had witnessed it. He acknowledged that he had signed a similar form himself. He was also invited to identify the document that had been completed by Mr Thompson and he accepted that Mr Thompson had not signed in the space provided for persons applying for membership. Mr Morgan subsequently under re-examination explained that the application form for membership in the club consisted of six or more pages and Mr Thompson had signed only the cover page.

[43] Mr Morgan said that at the material time he had a very viable transportation business. He was adamant that it was Mr Brown who had spoken with Mr Thompson and made arrangements for the manager's cheque to be purchased in his name. Further he maintained that the receipt which had been written by Mr Brown was for the US dollar equivalent of JA$2,000,000.00. He denied that Mr Thompson had asked him on several occasions for the return of monies that had been loaned to him. He insisted that the lawsuit was the function of a social slight.

[44] Mr Duke Brown in his witness-statement described himself as a security officer and at the time of the trial he said he was a Minister of Religion. He detailed the origins of his association with and his role in the club. He outlined how, in 2007, the founder of the club, Mr Orlando Johnson, invited him to assist in expanding the membership of the club and promised that in return he would be given a higher return on his investment in the club. He explained that he had been friends with Mr Johnson for some time prior to that and had himself invested US$30,000.00 in the club. Mr Brown detailed the requirement for membership in the club, which included the completing of a membership agreement. He described how a receipt would be issued for the US dollar investment and explained that if the sum to be invested was in any other currency, this amount was calculated at the exchange rate as at the date of the deposit. The receipt would reflect that the money received was a loan.

[45] Mr Brown stated that he met Mr Morgan in 2007 and shortly after introduced him to Mr Johnson. Mr Morgan eventually joined the club and introduced Mr Brown to other members of the legal fraternity who also invested in the club. Two such persons were

Mr Thompson and Mr Townsend. He stated that he spoke to Mr Thompson on the phone in late 2007 about the returns to be made on investments in the club and eventually Mr Thompson expressed an interest in investing JA$2,000,000.00.

[46] Mr Brown supported Mr Morgan's account that he had written the receipt that Mr Morgan handed over to Mr Thompson. He stated that Mr Morgan was present when he had the discussion with Mr Thompson about the investment and he had asked Mr Morgan to collect it and to sign the receipt as receiving same for and on his behalf.

[47] Mr Brown stated that that he gave Mr Morgan the club member agreement form to be given to Mr Thompson and that Mr Morgan subsequently returned the completed form along with the manager's cheque, from Mr Thompson. He stated that he had been shown a copy of the front page of the club member agreement form allegedly written on and signed by Mr Thompson. He however said that page was a part of the whole agreement, which was completed and returned to him by Mr Morgan on Mr Thompson's behalf. He further stated that that page shown to him must have been copied before the signature of a witness and the contribution/deposit amount was endorsed on the agreement. He said that he would have ensured that the original club member agreement form was so endorsed before it was submitted to the club. He recalled that later on the day he had received the club member agreement form and manager's cheque from Mr Morgan he had called Mr Thompson and confirmed having received them. He stated that he recalled that thereafter Mr Thompson received monthly returns.

[48] Mr Brown detailed how in 2008 circumstances arose which resulted in the club coming under tremendous pressure when several members demanded the immediate return on their investments. Mr Johnson fled the island and Mr Brown was left to explain the situation to Mr Morgan, Mr Thompson and other members of the club. Mr Brown stated that he was subsequently summoned by Mr Thompson, to his office, where he was questioned as to the whereabouts of Mr Johnson.

[49] At trial, Mr Brown was shown receipts that had been tendered into evidence and identified his handwriting on those issued to Mr Thompson and Mr Morgan. He confirmed that it was he who had written what was recorded on them.

[50] Under cross-examination, Mr Brown acknowledged that the receipt issued to Mr Morgan was for US$15,000.00 and that it described the money as a loan. He acknowledged that the one issued to Mr Thompson was for US$28,409.10 and that it too stated that the money was a loan. He confirmed that Mr Morgan had "a lot of money in the club".

[51] Mr Brown identified a blank club member agreement form, which consisted of six pages. He testified that if he, as sales representative, carried in a form without a member's signature, he would have to return it for the member to sign or ask that they come in and confirm that they agreed to it. He explained that a member had to sign the bottom of each page "to bind them to the terms". He further explained that it would be difficult for someone to get money from the club without a form properly filled out.

Further, if the form was incorrect or incomplete the office would seek to have it corrected such that any money due could be paid out.

[52] Mr Brown said he knew that a form was sent to Mr Thompson and knew that Mr Thompson had received "payouts". He knew this because Mr Thompson had told him he had received payout. He acknowledged that he had no evidence to prove that Mr Thompson got money from the club. However, he accepted that there would have been challenges making payouts if the form was incomplete. He disagreed with the suggestion that the club had no membership form completed by Mr Thompson. In response to a suggestion that he had never seen any membership form filled out for Mr Thompson, Mr Brown said he could not say he had "seen it filled out". He denied suggestions that he had never met or had discussions with Mr Thompson. He maintained that he was instructed to write up receipts indicating that any money received for investment was a loan but acknowledged that that was a lie.

The decision of the judge

[53] After a review of the evidence presented in the case and a consideration of the written submissions received only on behalf of Mr Thompson, the judge identified the following, as the issues that arose for her determination:

> "1. What was the nature of the transaction on December 6, 2007?
>
> 2. How much money was involved?"

[54] The judge then carried out an analysis, which can best be described as demonstrative of her actual thought processes in grappling with the areas she identified

as being of concern in resolving the issues. In so doing she posited questions and reasoned, at times almost as if engaged in arguing with herself, in her unique style.

[55] Early in her analysis, in considering the issue of the nature of the transaction between the parties, she queried whether Mr Morgan needed a loan as asserted by Mr Thompson, in the following manner:-

> "[22] That [Mr Morgan] had money with LA's Private Club was an accepted fact on the part of [Mr Thompson]. If this was so, it does not accord with logic that [Mr Morgan] having his own reserve of US dollars with the club would not simply have taken the principal sum or part thereof or used the interest which would purportedly be flowing to [Mr Thompson], to satisfy his financial difficulties without the need for a loan."

[56] She returned to a consideration of this issue of at paragraphs [26] and said this:

> "It is illogical that there would be a payment of JD$2,000,000.00 to Duke Brown if this was indeed a loan to [Mr Morgan] who was then and presently in dire straits. [Mr Thompson] has asked this court to accept that [Mr Morgan's] mortgage was in arrears. This would be a matter of some urgency requiring relatively quick action on the part of [Mr Morgan]. [Mr Morgan] would also have to repay the sums borrowed within 6 months. In order to meet this loan repayment schedule it would mean that [Mr Morgan's] interest payments from the club would have had to be significant and in the region of over JD$650,000.00 per month. This sort of payment would signify a substantial investment with the club on the part of a financially challenged defendant which does not accord with common sense."

[57] The judge recognised the significance of the club member agreement form ('exhibit B1') which Mr Thompson admitted signing and considered his explanation for doing so. In that regard she had this to say:-

> "[23] On [Mr Thompson's] part, the evidence was that he completed Exhibit B1 without an intention to join the club. This was tantamount to saying here are my banking details jotted down on a slip of paper for then there was no reason to use the club membership form at all. [Mr Thompson's] explanation was Exhibit B1 constituted instructions to the club and in this way he would receive a repayment of the sums loaned. This begs the question how would page one of a six page membership form secure the release of fund from [Mr Morgan's] account to that of [Mr Thompson]. This question remained unanswered. [Mr Morgan] was associated with Duke Brown and this [sic] unchallenged. It is evident then, that [Mr Morgan] ought to have had discussions with [Mr Thompson] about the club, its processes, who Duke Brown was and how the wire transfer would work in order for Exhibit B1 to be evidence of a channel for the receipt of repayments. There was no evidence of any such discussions. It is therefore open on the facts to infer that the parties had no such conversation during their meeting on December 6, 2007 or at any time prior, for had this information been given to [Mr Thompson] by [Mr Morgan], it ought to have been pleaded and put in evidence at trial.
>
> [24] In any event, it would seem to be more logical for [Mr Morgan] to amend his account particulars to reflect any change to his account into which his interest payments were to be deposited. I am unable to discern how [Mr Thompson] could have laboured under an expectation that he could cause a change to [Mr Morgan's] account information by use of a club membership form whether fully completed or incomplete. There was no evidence of how this would be done by the club and it was not put to Duke Brown that Exhibit B1 could have led to a change to [Mr Morgan's] account which has been suggested. The evidence of the completion of a membership form by [Mr Thompson] to ensure repayments from [Mr Morgan's] account with the club and which is not contained in [Mr Thompson's] witness statement, nor put to Duke Brown is evidence which I reject."

[58] The matter of the manager's cheque being made payable to Mr Brown was also considered by the judge and at paragraph [27] she said:-

> "On December 6, 2007, [Mr Thompson] handed to [Mr Morgan] a manager's cheque made payable to Duke Brown and not to [Mr Morgan]. Why was the cheque handed over by [Mr Thompson] made payable to Duke Brown if he was making a loan to [Mr Morgan]? If this was a loan to [Mr Morgan] then for what purpose was the cheque made payable to Duke Brown. This cheque coupled with the membership form are in tandem with the system the club operated as described by Duke Brown and Christopher Townsend."

[59] The judge went on to consider the undisputed evidence that Mr Morgan had given the certificates of registration and fitness for his motor vehicle to Mr Thompson. She queried and found to be unexplained, how Mr Thompson intended to recover the debt by holding on to these documents. She found that, in the circumstances, Mr Thompson was not in a position to cause any purported transfer of Mr Morgan's vehicle. She accepted Mr Morgan's evidence that the handing over of these documents was "because [Mr Thompson] was only holding the certificates of registration and fitness until his money was placed with the club" (paragraph [28]).

[60] The judge also addressed the fact that Mr Thompson had given Mr Morgan his driver's licence and his explanation for having done so. Her reasoning on this matter was as follows:-

> "[29] [Mr Thompson's] drivers licence and Exhibit B1 were said to have been tendered as proof of his identity to the club in light of anti-money laundering laws and to '*justify who he was as it was [Mr Morgan's] account*.' [Mr Thompson's] evidence was that he had completed a membership application form, but that he had not joined the club as he had not filled out the contribution amount and his signature had not been placed on the line for club members nor had it been witnessed. These are inconsistent positions. If the form was incomplete and his signature had not been

> witnessed, how could it verify his identity? If that information was required for dealing with the club, it most certainly would not satisfy the provisions of anti-money laundering laws for his membership form to omit salient personal details. While this explanation may or may not have satisfied the club it could not and does not satisfy the court."

[61] The judge recognised the fact that only a single page of the club member application form, which she described as a multi-page document, was exhibited as signed by Mr Thompson. She, however, found that from the evidence of Mr Brown, it was clear that a completed form and payment had to be made in order to obtain membership. She noted that Mr Brown had given evidence that a completed membership form had been returned to him by Mr Morgan on behalf of Mr Thompson. She concluded that it was "open on the evidence to find that [Mr Thompson] had completed all the six pages of the membership form, though he had not executed the signature line of the membership form" (paragraph [32]).

[62] The judge found that an inference could be drawn that Mr Morgan would have had to return both the club member agreement form and the manager's cheque to Mr Brown on 6 December 2007 and accepted this as evidence showing that Mr Thompson intended to join the club.

[63] The judge, under the heading 'documentary evidence' referred to what she identified as an extract from the text Phipson on Evidence, 12th edition, as follows:-

> "Documents which are or have been, in the possession of a party will be admissible against him as original evidence to show his knowledge of their contents, his connection with, or complicity in, the transactions to which they relate and are receivable against him as admissions to prove the

contents if he has in any way recognised adopted or acted upon them"

[64] At paragraph [37] she went on to state:-

> "The documents presented are items of real evidence, the demeanour of the parties and their witnesses all are relevant to credit and it is for the court to determine the weight to be attached to their evidence."

[65] Against this backdrop, she went on to conclude:-

> "[38] On a review of the documentary evidence it would appear that Exhibit B1 lends credence to [Mr Morgan's] position that [Mr Thompson] joined the club and that he signed the document for that purpose. It is clear evidence of an intention to join the club along with a cheque made payable to a sales representative of that club. Both actions of signing the membership form and presenting the cheque for payment to Duke Brown were done on the same day and at the same time as part of the same transaction. I accept the evidence of [Mr Morgan] and Duke Brown that a completed form was turned in for membership. Despite Exhibit B1 on its face being an incomplete club membership form, it is more consistent with membership in LA's Private Club as opposed to a form purportedly containing instructions to the club to amend or alter the interest payments from [Mr Morgan's] club account to [Mr Thompson's] bank account.
>
> If [sic] accept the evidence of Duke Brown as to payouts to [Mr Thompson] and the evidence of Christopher Townsend that [Mr Thompson] was a member of the club who had discussed with him his financial woes. [sic] On a balance of probabilities on the totality of the evidence [Mr Thompson] was a member of the club.
>
> [39] All the receipts tendered in evidence issued by [Mr Morgan] say '*as a loan*.' There was no evidence that Mr Townsend was making a loan to [Mr Morgan]. In the absence of any evidence to the contrary, these receipts show funds receipted as loans by the club to the persons paying into it. I find that the receipt Exhibit A1 does not

show that [Mr Thompson] made a loan to [Mr Morgan] in his personal capacity but shows a payment to the club receipted as a loan. In those circumstances, it is difficult to see how the words '*as a loan*' meant that a loan was made to [Mr Morgan] in light of the viva voce evidence of Mr Townsend which I accept in its entirety and the documentary evidence presented in the trial which speaks for itself."

The grounds of appeal

[66] The grounds of appeal as set out by the appellant were as follows:-

"1. The learned trial judge erred in failing to give any or any sufficient weight to the receipt issued by the Respondent on December 6, 2007 [Exhibit A-1] acknowledging the monies he received was a loan.

2. The learned trial judge erred in failing to give any or any sufficient weight to the Respondent's act of handing over his original Motor Vehicle Registration Certificate and Certificate of Fitness [Exhibits A-3 & 4] to the Appellant as a security.

3. The learned trial judge erred in recording [*at paragraph 23 of the judgment*] that the Appellant gave evidence that he completed Exhibit B-1 as instructions to the LA's Private Club, where he gave no such evidence.

4. The learned trial judge erred in concluding that because there was no evidence of discussions between the parties, the correct interpretation to be applied was that the Appellant was making an investment in the LA's Private Club, and not looking to be repaid by the Respondent from that source as was his evidence at trial.

5. The learned trial judge erred in disregarding [*at paragraph 26 of the judgment*] the commercial reality that any borrower is at liberty to nominate a payee, provided that the lender is agreeable to such a request, as evidenced by the manager's cheque for

Two Million Jamaican Dollars made out to the Respondent's nominee, Duke Brown, the counter-receipt of which was acknowledged by the Respondent and the Court.

6. The learned trial judge erred in finding [*at paragraph 38 of the judgment*] that Exhibit B-1 was clear evidence of the Appellant's intention to seek membership in LA's Private Club where the only completed section of that document, produced by the Respondent disclosed the Appellant's Bank's name, account number and himself as holder. The form carries a clearly identifiable signature block for club member which was unfilled, and instead there is an 'X' to its right where the Appellant's evidence was that he placed his signature which he acknowledged as his own.

7. The learned trial judge erred [*at paragraph 30 of the judgment*] in incorrectly placing the burden for accounting for '*the other five pages'* of the Respondent's Exhibit B-1, on the Appellant.

8. The learned trial judge erred in equating Exhibit- B-1 to the fully completed membership form completed by Christopher Townsend [*Exhibit B 3*] which comprised a six-page attachment containing the rules, regulations and compliance requirements of LA's Private Club which Mr Townsend acknow1edged on each page before signing at the end and duly witnessed.

9. The learned trial judge erred [*at paragraph 32 of the judgment*] in finding that the Appellant had fully completed the LA's Club Member Agreement Form where no such evidence was before the Court."

Preliminary point

[67] Before the court commenced the hearing of the appeal, counsel Mr Bishop, on behalf for Mr Morgan, sought to make submissions on a point *in limine*. He complained about the manner in which Mr Thompson had sought to comply with rule 1.10 of the

Court of Appeal Rules ("CAR"), which provides that an appellant must give details of the decision which is being appealed and identify so far as is practicable any findings of fact and law which he seeks to challenge. Mr Bishop submitted that "so far as practicable" was not inserted in the rule for appellants to take a casual or nonchalant approach to the identification of findings of law or fact. He contended that the findings identified by the appellant were imprecise and as such should not be facilitated by this court.

[68] Mr Bishop enumerated the complaints as follows:-

> "a. The appellant failed to properly identify the findings of fact and law in the reason [sic] for judgment;
>
> b. The 'findings of fact' as set out by the appellant under the heading "findings of fact" are not the conclusions on the issue arrived at by the learned trial Judge;
>
> c. Similarly, the 'findings of law' as set out by the appellant are not the findings of law determined on the issues by the learned trial judge.
>
> d. The findings of fact or law MUST be the trial Judge's findings as shown in the reasons for judgment and NOT the findings of the appellant.
>
> e. If the appellant did not challenge the finding in fact and/or law of the learned trial Judge there can be NO grounds of appeal as the grounds of appeal MUST relate or be connected to a CHALLENGE of the learned Judge's findings in fact or law.
>
> f. The appellant should ONLY be allowed to argue the grounds where it is shown that there is a CHALLENGE to the Judge's conclusion on an issue in fact or law."

[69] Mr Bishop went on to point to each of the issues identified by Mr Thompson as findings of fact and submitted that certain words used by Mr Thompson as being in the findings did not in fact appear in the judgment, that is, "foreign exchange club",

"Twenty-Eight Thousand United States Dollars", and "the date December 7, 2007". He pointed to the findings of law identified and submitted that they were not in fact findings of law and, in any event, were never made by the judge.

[70] Mr Bishop, in commenting on all nine grounds of appeal, submitted that grounds 1, 4, 7, and 8 had absolutely no connection to any of the findings of fact or of law. He submitted that in ground 2 there was no mention of the findings in fact and/or law made by the judge. He submitted that in ground 3 Mr Thompson had misquoted what was written by the judge. Mr Bishop further submitted that in ground 9 Mr Thompson failed to challenge the actual findings in fact and/or law that were made by the judge and, therefore, could not argue this ground without first challenging the judge's findings.

[71] In conclusion Mr Bishop submitted that Mr Thompson should not be allowed to argue grounds 1, 2, 3, 4, 7, 8 and 9. He stated that he took "no issue with grounds 5 and 6".

[72] In the response, counsel Mr Dunkley, on behalf of Mr Thompson, explained that what had been done was to make general statements of the findings made by the judge and there was no effort to slavishly follow her actual words. He conceded that the manner in which the findings and grounds of appeals were set out might well have been counsel's formulation and not precisely that of the judge. Mr Dunkley proceeded to consider every finding and each ground of appeal to demonstrate that they all related in some way to specific paragraphs of the judgment. Ultimately, he submitted

that Mr Thompson should not be prevented from pursuing any of the grounds of appeal since they were all related to the judgment.

[73] We were satisfied that Mr Dunkley demonstrated that the contents of Mr Thompson's notice of appeal sufficiently complied with the requirements of rule 1.10 of the CAR. The findings of facts and law as well as the grounds of appeal were based on the judgment. The point *in limine* therefore did not succeed.

The appeal

[74] It is necessary to note that in advancing the appeal on behalf of Mr Thompson, Mr Samuels contended that this is a simple case with few facts in contention and that differences arose almost entirely on the respective explanations from the parties. It is urged that this court should consider the documentary evidence in particular and see how each "square with the respective case". He contended that the judge erred in her consideration of this evidence and as such this was one basis on which this court can disturb the decision of the judge which was based largely on findings of facts. Reference was made to **Carlton Williams v Veda Miller** [2016] JMCA Civ 58 in support of this submission.

[75] Mr Samuels chose to identify certain documents and develop his submissions in relation to each, in keeping with the grounds of appeal, in the following way:

i. The receipt Mr Morgan handed to Mr Thompson dated 6 December 2007. (ground 1)

ii. The certificates of registration and fitness for the vehicle belonging to Mr Morgan. (ground 2)

iii. The club member agreement forms dated 6 December 2007 and 10 January 2008. (grounds 3, 6, 7, 8 and 9)

[76] The remaining grounds of appeal, grounds 4 and 5, were not so directly related to the documentary evidence, as identified by Mr Samuels, and therefore must be considered separately.

[77] I will, therefore, first succinctly rehearse all the submissions made on behalf of both parties, in keeping with this approach by Mr Samuels, before embarking on the discussion and disposal of the issues, under similar headings.

The receipt dated 6 December 2007 – ground 1

The submissions for the appellant

[78] In the skeleton arguments, which were largely consistent with the submissions made below, by way of general comment, it is submitted that this was primarily a case which should have turned on the documentary evidence, the majority of which emanated from Mr Morgan and consequently ought to have been construed negatively against him. It is contended that Mr Thompson "was not privy to those documents prior to the proceedings and so any benefit derived by him therefrom would be a consequence of the weakness" of the case presented by Mr Morgan. It is also submitted that the judge would have heard the oral evidence and had an opportunity to assess the documentary evidence and those documents exhibited in the case presented by Mr

Morgan were not helpful to him and did not support his contention that Mr Thompson intended to join the club.

[79] In relation to the receipt of 6 December 2007 Mr Samuels invited the court to take note of the receipt dated 10 January 2008 issued to Mr Townsend, which he pointed out was prepared five weeks after. He pointed to the fact that the receipt made out to Mr Townsend is for a Jamaican dollar amount with the United States dollar equivalent also included. The receipt also clearly states that it was being signed by Mr Morgan on behalf of Mr Brown. In comparison, the one made out to Mr Thompson does not have a Jamaican dollar amount or the conversion rate and fails to clearly state that it was signed by Mr Morgan on behalf of Mr Brown. Mr Samuels submitted that this difference is significant.

[80] Mr Samuels contended that the evidence from Mr Townsend was used by Mr Morgan to explain the procedure of the club, with the purpose primarily of establishing the course of dealings with the club. The word 'loan' was common to both receipts but apart from that the receipts bore no other resemblance. Mr Samuels therefore opined that the evidence from Mr Townsend failed to support the case for Mr Morgan. He submitted that the receipt issued to Mr Townsend in fact undermined Mr Morgan's contention that the receipt issued to Mr Thompson was for the United States dollar equivalent of JA$2,000,000.00 as the receipt issued to Mr Townsend is clearly written for Jamaican dollars with the US dollar equivalent captured at the bottom left of the receipt. He also urged that, in any event, it cannot be used to explain why Mr Morgan

did not repay, what was on the face of the receipt issued to him, clearly a loan made to him.

[81] Ultimately Mr Samuels submitted the receipt given to Mr Thompson on its face, when given its plain meaning, was an acknowledgment by Mr Morgan that the monies he received was a loan and the judge erred in failing to give any sufficient weight to this fact.

The submissions for the respondent

[82] Mr Bishop at the outset of his submissions, made on behalf of Mr Morgan, observed that the judge seemed to have taken a very close look at the exhibits and conducted an extensive analysis of them all and was correct in her conclusion that they did not assist Mr Thompson and were more consistent with the case for Mr Morgan. He submitted that the judge had to decide the case on her assessment of the truthfulness and credibility of the witnesses. Her findings of facts ought not to be disturbed unless this court is satisfied that she was plainly wrong. In the course of his opening submissions, Mr Bishop referred to **Armagas Limited v Mundogas SA** [1985] 1 Lloyd's Rep 1, 1984 WL 281; **Onassis v Vergottis** [1968] 2 Lloyd's Rep 403, **Everett Rodney v R** [2003] JMCA Crim 1; **Sonia Stanigar-Reid v Robert Lloyd Yee** et al [2016] JMSC Civ 185; **Watt v Thomas** [1947] AC 484, **Industrial Chemical Company (Jamaica) Limited v Ellis** (1986) 23 JLR 35 and **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7.

[83] In relation to the complaint made about the receipt issued to Mr Thompson by Mr Morgan, the court was urged to consider the clear and uncontroverted evidence of Mr Brown that he did write the receipt and gave an explanation as to the circumstances under which it was written. Mr Bishop pointed to the fact that Mr Brown identified his handwriting on the receipt as well as Mr Morgan's signature. He also invited the court to recognise the significance of the fact that the receipts issued to Mr Thompson and Mr Townsend were written by two different persons.

[84] It was also submitted that the case could not turn on the documentary evidence alone as particularly the receipt, on which the entire case for Mr Thompson rests, would not paint the true picture without the oral evidence explaining it.

[85] Mr Bishop submitted that when the evidence of Mr Thompson is contrasted with the largely consistent evidence of Mr Morgan, Mr Townsend and Mr Brown, the judge was correct in not giving any weight to the receipt in establishing that the monies were in fact a loan. He contends that their evidence in totality support Mr Morgan's assertion that the transaction was not about a loan to him. Counsel further contended that, in any event, the inertia of Mr Thompson in demanding repayment of the monies is consistent with the fact that he did not lend Mr Morgan any money but made an investment in the club.

The certificates of registration and fitness for the motor vehicle owned by Mr Morgan –ground 2

Submissions for the appellant

[86] Mr Samuels contended that the explanation given by Mr Morgan as to why he gave Mr Thompson the certificates of registration and fitness for his motor vehicle does not accord with common sense. It is submitted that this court should find that the balance of probabilities favours Mr Thompson's account that Mr Morgan's car papers were given as security for the cash and the manager's cheque which was loaned to him. Mr Samuels contended that the allegation that Mr Thompson expressed the need to hold on to the certificates until satisfied that the monies had been delivered to Mr Brown is not believable. This was so given that Mr Thompson was not at risk when he handed the cheque payable to Mr Brown to Mr Morgan and would not have known who would have got the cash, in any event.

[87] Ultimately, Mr Samuels submitted that the judge accepted the unlikely explanation given by Mr Morgan and was plainly wrong to have done so.

Submissions for the respondent

[88] Mr Bishop countered that the judge conducted a careful analysis of the conflicting evidence given about the handing over of these certificates. He submitted that she correctly recognised the fact that there was no accompanying handing over of the title for the vehicle and no lien was registered on the vehicle, hence the usage of these two documents as security for a loan was really of no value. He invited the court to note that the certificate of fitness for the vehicle would have expired two months

thereafter. He contended that the judge was also correct in considering the fact that no valuation was done to ascertain the value of the vehicle. In concluding, he submitted that the fact that the judge preferred the explanation given by Mr Morgan was therefore not demonstrably unreasonable.

The club member agreement forms dated 6 December 2007 and 10 January 2008 - grounds 3, 6, 7, 8 and 9

Submissions for the appellant

[89] Mr Samuels submitted that it was unreasonable for the judge to have found that Mr Thompson had completed the club membership application form as instructions to the club when there was no evidence from him to that effect. The evidence was that he had given the information to Mr Morgan so that the monies could be repaid from Mr Morgan's account with the club to Mr Thompson's bank account directly. This, Mr Samuels contended, was a reasonable explanation.

[90] Mr Samuels submitted further that there was no evidence presented that Mr Thompson had filled out anything other than the single page document that had been introduced into evidence by Mr Morgan. Counsel contended that the judge was therefore plainly wrong to equate that page with the six-page document Mr Townsend said he had filled out or to have required an explanation as to the absence of the remaining five pages from Mr Thompson.

[91] Further, Mr Samuels pointed to the evidence of Mr Brown that an incomplete application form could not create membership and would not permit payment. He also pointed to the evidence given by Mr Brown that he had never seen a membership form,

which had been filled out by Mr Thompson. This, Mr Samuels contended, meant that Mr Thompson's evidence about giving the information about his bank account to Mr Morgan and signing the page in the manner he did, clearly support his assertion that he had no intention to and did not become a member of the club. Thus Mr Samuels submitted that the judge erred in not accepting Mr Thompson's explanation about the exhibited page which he did not dispute signing.

[92] Mr Samuels also complained that the judge erred in finding that Mr Thompson had in fact fully completed the club member agreement form since no evidence had in fact been given to that effect.

Submissions for the respondent

[93] Mr Bishop invited the court to find as significant, the fact that Mr Thompson in his claim form, particulars of claim and witness statement failed to make any mention whatsoever of the club member agreement form.

[94] Mr Bishop submitted that any casual reading of the paragraph referring to the issue of Mr Thompson giving instructions to the club reveals that Mr Thompson is patently wrong. Counsel noted that it was Mr Thompson's assertion that he provided the particulars he wrote on the form to facilitate the wire transfer of funds from Mr Morgan's account with the club to his account. This counsel contended amounted to saying that the particulars were provided by Mr Thompson to the club to instruct and guide them to pay into his account monies, due to him, from Mr Morgan's account.

[95] Mr Bishop submitted that the judge did not in fact place any burden on Mr Thompson to explain the missing pages but that she thought it fit that he could have given an explanation. Counsel also submitted that the judge heard the *viva voce* evidence from Mr Brown which was accepted, along with other evidence, to determine that Mr Thompson completed the requisite application form and joined the club. He noted that Mr Brown said that he gave Mr Morgan a membership form for Mr Thompson to complete and Mr Morgan in his evidence agreed that he had collected the form from Mr Brown and gave it to Mr Thompson. Further Mr Morgan testified that he had collected the signed form along with a copy of his driver's licence from Mr Thompson. Mr Bishop submitted that the judge had ample evidence that allowed her to arrive at the conclusion that Mr Thompson had completed a membership form to join the club. He urged that any error the judge may have made in relation to the form ought not to affect her ultimate findings.

Ground 4 - The judge erred in concluding that because there was no evidence of discussions between the parties, the correct interpretation to be applied was that Mr Thompson was making an investment in the club, and not looking to be repaid by Mr Morgan from that source.

[96] There is no substantial submission advanced by Mr Thompson in relation to this ground.

Submissions for the respondent

[97] It should be noted that this is one of the grounds that Mr Bishop had challenged in his submissions *in limine* as having absolutely no connection to any findings of fact or findings of law. However, in response, it was submitted that it was open to the judge in

assessing the evidence, especially the unchallenged evidence of Mr Townsend and Mr Brown, that Mr Thompson was a member of the club. Further, it was submitted that the judge, having had the opportunity to observe the demeanour of Mr Thompson and examine the documents admitted into evidence, was correct in holding that the manager's cheque for JA$2,000,000.00 was delivered to Mr Morgan for Mr Thompson to join the club. Mr Bishop noted that Mr Thompson did not give any account in his evidence-in-chief about how he came to sign the club member agreement form or give a copy of his driver's licence. He submitted that the judge did not err in drawing the inferences she did and ultimately arriving at the conclusion that Mr Thompson was making an investment in and became a member of the club.

Ground 5 - The judge erred in disregarding that the commercial reality that any borrower is at liberty to nominate a payee provided that the lender is agreeable to such a request, as evidenced by the manager's cheque for $2,000,000.00 made out to Mr Brown.

Submissions for the appellant

[98] Mr Samuels complained that the judge was influenced by the thought that it was illogical for the manager's cheque to be made payable to Mr Brown. He submitted that she misdirected her mind when she used "the illogical test" rather than "the belief test". The fact that a borrower is able to nominate any payee was not addressed by the judge and, as such, Mr Samuels contended she was wrong to have considered as illogical Mr Thompson's compliance with the request by Mr Morgan to have the cheque made payable to Mr Brown in the circumstances as described by Mr Thompson.

For the respondent

[99] In response, Mr Bishop accepted that it is to be recognised that it is a basic principle of commercial law and that it is trite law that a borrower is at liberty to nominate a payee. He submitted that the judge in effect rejected the evidence from Mr Thompson as to the reason Mr Morgan had nominated Mr Brown as payee and this rejection was not of a principle of law and does not mean a misunderstanding or lack of appreciation of the principle by the judge. Counsel noted that, in any event, this issue was not raised in evidence or in submissions so there was no need for the judge to directly respond to it as an issue to be resolved.

[100] Mr Bishop invited this court to consider the fact that Mr Thompson made no enquiries about Duke Brown before purchasing the manager's cheque in his name. This Mr Bishop contended is especially significant since the relationship between Mr Thompson and Mr Morgan was not so close as to justify Mr Thompson handing over such a large sum of money, having done no due diligence about the mortgage he was assisting Mr Morgan to pay. Mr Bishop also invited the court to note that the judge accepted Mr Townsend's evidence in its entirety which meant that she accepted the explanation given by Mr Townsend of the modus operandi of the club where the Jamaican dollar equivalent of the United States dollar amount to be invested was paid to Mr Brown.

[101] It was submitted in conclusion on this ground that the judge, in rejecting Mr Thompson as a witness of truth, would have borne in mind the fact that she did not believe him on the point that Mr Morgan nominated the club as nominee to pay back

sums allegedly borrowed by Mr Morgan. Mr Bishop submitted that the judge, taking all the evidence into consideration, was correct in reaching the conclusion arrived at on this issue.

The approach of this court

[102] It was properly recognised by counsel that the grounds of appeal and the submissions in this appeal gave rise to issues of fact. It is therefore useful to bear in mind the approach that this court must take on an appeal from the findings of facts of a trial judge sitting alone.

[103] The usual starting point for this consideration is the oft-cited passage from the judgement of Lord Thankerton in **Watt (or Thomas) v Thomas** [1947] AC 484 at pages 487-488:

> "(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 material.
>
> (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 then become at large for the appellate court."

[104] In a more recent decision from Privy Council **Bahamasair Holdings Ltd v Messier Dowty Inc** [2018] UKPC 25 Lord Kerr, writing on behalf of the Board, in summarising the proper approach to the review by an appellate court to the findings of a trial judge, stated the following:

> "32. As was observed in *DB v Chief Constable of Police Service of Northern Ireland* [2017] UKSC 7, para 78 the United Kingdom Supreme Court on a number of occasions recently has had to address the issue of the proper approach to be taken by an appellate court to its review of findings made by a judge at first instance. And, as was said in that case perhaps the most useful distillation of the applicable principles is to be found in the judgment of Lord Reed in the case of *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477.
>
> 33. In para 1 of his judgment Lord Reed referred to what he described as 'what may be the most frequently cited of all judicial dicta in Scottish courts'-the speech of Lord Thankerton in *Thomas v Thomas* [1947] AC 484 which sets out the circumstances in which an appeal court should refrain from or consider itself enabled to depart from the trial judge's conclusions. Lord Reed's comprehensive and authoritative discussion ranged over the speech of Lord Shaw of Dunfermline in *Clarke v Edingurgh & District Tramways Co Ltd* (1919) SC (HL) 35, 36-37, where he said an appellate court should intervene only if satisfied that the judge was 'plainly wrong'; the judgment of Lord Greene MR in *Yuill v Yuill* [1945] P 15,19 and the speech of Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* [2003] UKHL 45; 2004 SC (HL) 1, para 17 where he stated that:
>
> > 'It can, of course, only be the rarest of occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion'."

[105] In **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21 the Board gave guidance as to what must be considered in determining

whether a judge at first instance is "plainly wrong". At paragraph 12 Lord Hodge, writing on behalf of the Board, had this to say:

> "...It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'. See, for example, Lord Macmillan in *Thomas v Thomas* at page 491 and Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: *Piggott Brothers & Co Ltd* [1992] ICR 85, Lord Donaldson at p 92. Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the finding of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: *Choo Kok Beng v Choo Kok Hoe* [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169."

[106] It is hardly surprising that there are several decisions from this court where the principles involved in assessing findings of fact have been re-visited and re-iterated in keeping with the guidance given. The fact that this matter also involved the assessment of documentary evidence in resolving the credibility of the parties causes the observations of Smith JA in one of the older decisions of this court to be of particular utility. In **Clarence Royes v Carlton Campbell and another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 133/2002, judgment delivered 3 November 2005, a matter in which this court disturbed findings of fact made by a first instance judge, Smith JA had this to say:

"...Clearly the approach of the court should depend upon the nature of the issues or findings of fact under attack. The authorities seem to establish the following principles:

1. The approach which an appellate court must adopt when dealing with an appeal where the issues involved findings based on the oral evidence of witnesses is not in doubt. The appeal court cannot interfere unless it can come to a clear conclusion that the first instance judge was "plainly wrong".- See **Watt v Thomas** (supra), **Industrial Chemical Company (Jamaica) Limited** (supra); **Clifton Carnegie v Ivy Foster** SCCA No 133/98 delivered December 20,1999 among others.

2. In **Chin v Chin** [Privy Council Appeal No 61/1999 delivered 12 February 2001] para 4 their Lordships advised that an appellate court, in exercising its function of review can 'within well recognised parameters, correct factual findings made below. But, where the necessary factual findings have not been made below and the material on which to make these findings is absent, an appellate court ought not, except perhaps with the consent of the parties embark on the fact finding exercise. It should remit the case for a re-hearing below.'

3. In an appeal where the issues involve findings of primary facts based mainly on documentary evidence the trial judge will have little if any advantage over the appellate court. Accordingly, the Court of Appeal, which has the power to draw any inference of fact it considers to be justified, may more readily interfere with the findings of the trial judge-See Rule 1.16(4)

4. Where the issues on appeal involve findings of primary facts based partly on the view the trial judge formed of the oral evidence and partly on an analysis of documents, the approach of the appellate court will depend upon the extent to which the trial judge has an advantage over the appellate court. The greater the advantage of the trial judge the more reluctant the appellate court should be to interfere.

5. Where the trial judge's acceptance of the evidence of A over the contrasted evidence of B is due to inferences from other conclusions reached by the judge rather than from n unfavourable view of B's veracity, an appellate court may

> examine the grounds of these other conclusions and inferences drawn from them. If the appellate court is convinced these inferences are erroneous and that the rejection of B's evidence was due to an error, it may interfere with the trial judge's decision- See Viscount Simon's speech in **Watt v Thomas** (supra)."

[107] It must be recognised that the appellant in the matter, Mr Campbell, was not satisfied with the decision of this court and appealed to the Privy Council, where some aspects of the appeal were allowed (**Carlton Campbell v Clarence Royes** [2007] UKPC 66). The Board, however, found no fault with the approach taken by this court, as expressed by Smith JA. Lord Neuberger, writing on behalf of the Board, had this to say:

> "18. When it comes to findings of primary fact or drawing instances [sic] from primary fact, it is well established that an appellate tribunal should be slow to interfere with the findings made of a first instance tribunal. In that connection the Court of Appeal correctly referred to observations of Lord Thankerton in *Watt v Thomas* [1947] AC 484 at 487-488 and of Clarke L J in *Assicurazioni General SpA V Arab Insurance Group (Practice Note)* [2003] 1 WLR 577, paras 11-16. These observations are well known and their effect was not in any way in dispute in this appeal...."

[108] Finally, in considering the approach to be taken by this court, this being a matter in which there was such divergence in the evidence, the observation of Lord Oliver of Aylmerton in **Industrial Chemical Co (Jamaica) Ltd v Ellis** (1986) 23 JLR 35 that "[t]he importance ...of the advantage enjoyed by the judge who heard and saw the witnesses at first hand ...can hardly be over-estimated..." must also be borne in mind.

Discussion and disposal

The receipt dated 6 December 2007- ground 1

[109] The first ground of appeal concerns the judge's treatment of the receipt issued to Mr Thompson. The differences between that receipt and the one issued to Mr Townsend are highlighted as being supportive of the fact that the one issued to Mr Thompson, which spoke only of a US$28,409.10 as a loan, must be taken on its face and, as such, is conclusive proof of Mr Thompson's case that it was a loan that he made to Mr Morgan.

[110] It cannot fairly be said that the judge did not appreciate the significance of the contents of the receipts. She acknowledged the differences between the receipt issued to Mr Townsend and the one issued to Mr Thompson and, at paragraph [35], stated:

> "The receipts issued to [Mr Thompson] and to Mr Townsend are distinct in that the receipt to the claimant, Exhibit A1, is written in both numerals US$28,409.10 and words Twenty Eight Thousand Four Hundred and Nine dollars and 10 cents and the words 'as a loan.' [sic] The receipt to Mr Townsend, Exhibit C4, contains no words, merely figures. Where there ought to be words appears "JA$1,924,080.00 beneath that are the words 'as a loan' and where there ought to be numerals $27486.85 USD then the words 'for Duke Brown'. Both receipts are inconsistent in respect of how they were completed. The reason that Exhibit C4 is not identical to Exhibit A1 is that different persons completed them as was given in evidence by [Mr Morgan] and Duke Brown. Exhibit A1 was written up by Duke Brown, signed by [Mr Morgan] and issued to [Mr Thompson]. Exhibit C4 was written up, signed by [Mr Morgan] and issued to Christopher Townsend."

[111] Ultimately the judge expressly accepted the evidence of Mr Townsend in its entirety. Mr Townsend had acknowledged, under cross-examination, that a receipt that

had been issued to him by Mr Morgan stated that it was for what it described as a loan and represented to the world that it was for a loan. His accepted evidence, however, was that he was issued the receipt "representing the amount invested in the club, which receipt reflects is a loan".

[112] The judge believed the evidence of Mr Brown that he had prepared the receipt issued to Mr Thompson. It certainly was open to her to do so especially since Mr Brown identified his handwriting on the receipt. She therefore was obliged to consider Mr Brown's explanation as to why and how he came to write up the receipt in the manner he had. This he said was done following discussions with Mr Thompson about the business and returns on investment and Mr Thompson's agreement to invest JA$2,000,000.00 in the club. Mr Brown explained that he then wrote the United States dollar equivalent on the receipt and asked Mr Morgan to sign and hand it over to Mr Thompson upon receiving the manger's cheque.

[113] It is, to my mind, also important to note that Mr Morgan had exhibited a receipt he said he had received from Mr Brown upon making an investment of US$15,000.00, which Mr Brown had acknowledged he had issued, stating the sum received from Mr Morgan had been a loan.

[114] The judge, therefore, could not be faulted for accepting that the words "as a loan" were written on receipts issued to members of this club. Hence the fact that those words were written on the receipt issued to Mr Thompson, did not conclusively support Mr Thompson's assertion that it was acknowledging a loan he had made to Mr Morgan.

The judge had conflicting explanations about the significance of the words "as a loan" and this was an important issue to be resolved in arriving at her decision.

[115] In my opinion, contrary to the complaint made, the judge gave the requisite weight to the receipt issued to Mr Thompson. She ultimately accepted the evidence of Mr Morgan, Mr Brown and Mr Townsend which she was entitled to do. She was satisfied that the receipt did "not show that [Mr Thompson] made a loan to [Mr Morgan] in his personal capacity but shows a payment to the club receipted as a loan" . It has not been demonstrated that she was plainly wrong for arriving at this conclusion. Ground 1 is therefore without merit and must fail.

The certificates of registration and fitness for the motor vehicle owned by Mr Morgan - ground 2

[116] The next documents that the court is asked to consider for their significance are the certificates of registration and fitness for Mr Morgan's vehicle and the purpose for which they were handed over to Mr Thompson. It is indisputable that the vehicle could have been used as security for the loan. To my mind the judge was correct to question the effectiveness of just handing over just those documents in achieving that purpose. She recognised that there had been no valuation on the vehicle to ensure it could cover the debt. More significantly she recognised that the vehicle could not have been sold using those documents alone in any event.

[117] I must however admit that, in my view, the alternate reason given by Mr Morgan for the handing over of the documents may well be fraught with the same issues. What

practically could Mr Thompson have done with them if Mr Morgan had failed to deliver the cheque to Mr Brown?

[118] Ultimately, however, I find that the judge correctly appreciated that it was for Mr Thompson to explain how he intended to recover his debt by holding the certificates. The evidence revealed that Mr Thompson had asserted that "at the time [he] gave [Mr Morgan] the money [he] was satisfied as to how [he] would be paid back, [he] could have sold his car if [Mr Morgan] didn't repay". When further cross-examined on the issue, Mr Thompson asserted that "[he] wasn't hold [sic] in the event of non-payment [he] was holding them as security for the loan and as per the agreement [he] would either dispose of or take the vehicle [himself]". Eventually, when asked how he would have been able to dispose of the vehicle without a lien, an agreement or any other documents, the following, as indicated before, was Mr Thompson's response:

> " This arrangement between us [sic] someone whom I knew, I expected an element of honour and I expected that [Mr Morgan] would have repaid the sum and me no [sic] disposing of the vehicle, I held the papers to ensure [Mr Morgan] could not dispose of vehicle without them, I still have the originals."

[119] I do not think that the judge can be faulted in concluding that Mr Thompson had failed to explain how he intended to recover his debt by holding the certificates of registration and fitness. It was against this background that she said it was open to her to accept the evidence of Mr Morgan. It has not been shown that she was plainly wrong to have done so. Ground 2 accordingly also fails.

The club member application forms- grounds 3, 6, 7, 8 and 9

[120] The next documents to be considered are the club members agreement forms which, as Mr Samuels correctly noted, were all exhibited through the case for Mr Morgan. Thus it was during the cross examination of Mr Thompson that he identified the one that had been signed by him. Thus again it became a matter of whether the judge believed Mr Thompson's explanation as to why his banking information and signature appeared on the document, albeit not in the correct place.

[121] In considering this issue I think the judge was correct to be concerned about how the document exhibited could have secured the objective Mr Thompson said he expected it to do. As such, she questioned how one page of a six-page membership form would secure the release of funds from Mr Morgan's account to that of Mr Thompson. She, quite properly, noted the fact that evidence of such an important issue was not contained in Mr Thompson's witness statement. She also, to my mind correctly, observed that it was never asked of Mr Brown if this could be done, he being the person in respect of whom, it had not been challenged, ought to have been most aware of the procedures of the club. I think that despite her manner of reasoning, which some might find unusual, the judge did, ultimately, come to a conclusion which on the evidence, she was entirely entitled to do. She did not find Mr Thompson's evidence on the issue credible.

[122] Flowing from the rejection of the evidence of Mr Thompson on this issue, the judge could have properly preferred the evidence of Mr Brown and Mr Morgan that Mr Thompson had signed the form intending to seek membership into the club. The judge

in her analysis of the evidence considered the evidence of Mr Brown that the single page he had been shown when recording his witness statement was part of a whole agreement which was completed and returned to him by Mr Morgan. He had also stated that "[t]o the best of [his] knowledge, information and belief this copy must have been made before the signature of a witness and the contribution/deposit amount was endorsed on the agreement, as [he] would have ensured that the original agreement was so endorsed before submission to the club". Under cross-examination when it was suggested to Mr Brown that he had "never seen any membership form filled out for" Mr Thompson he had responded: "[c]an't say I have seen it filled out".

[123] Mr Brown had also testified that no payments could have been made on an incomplete membership application form. The judge found that on Mr Brown's evidence a completed form and payment had to be made to the club in order to obtain membership. She considered and accepted the evidence of Mr Morgan of having delivered the form he had received from Mr Brown to Mr Thompson and of having subsequently collected and returned that same form to Mr Brown.

[124] It is significant that Mr Townsend had testified that Mr Thompson had told him that he was a member of the club and that both he and Mr Thompson had been together trying to recover their money. This was evidence the judge expressly accepted, in its entirety. On the totality of the evidence the judge was not plainly wrong to have found as she did that it was open for her to find that Mr Thompson had completed all six pages of the membership form, though he had not executed the signature line of the form.

[125] At this point I find it convenient to consider ground 9, which is the complaint that the judge erred in finding that Mr Thompson had fully completed the club membership application when there was no such evidence. As has been discussed in the preceding paragraphs, I think there was sufficient evidence from which the judge could have found that Mr Thompson had fully completed the club membership application form. There is accordingly no merit to this ground.

[126] In ground 3 the complaint is that the learned judge erred in recording that Mr Thompson gave evidence that he completed the document as instructions to the club where he gave no such evidence. When Mr Thompson was asked why he had signed his name in the manner he had and included his bank account details on the form he responded, "[he] did [it] because [Mr Morgan] would take this form to one of those now known as a ponzi scheme would wire money from his account with them to my account". Although this may not have been the giving of instructions in a strictly legalistic sense, it was clear that Mr Thompson was asserting that he had given the information, such that the repayments which he expected Mr Morgan to make from an account with the club could be transferred directly to his account.

[127] The section of the judgment from which the usage of the word 'instructions' is being complained about is as follows:

> "[Mr Thompson's] explanation was Exhibit B1 constituted instructions to the club and in this way he would receive repayment of the sums loaned"

[128] To my mind, this is not such an inaccurate representation of the evidence to justify saying that the judge fell into error or that any possible error is such that can have an impact on her eventual decision to justify interfering with it. There is therefore no merit to ground 3.

[129] In ground 6, it is submitted that the judge erred in finding that the single page exhibited, which was signed by Mr Thompson, was clear evidence of his intention to seek membership in the club. The entire context of the passage in which the judge made the comment is as follows:

> "On a review of the documentary evidence it would appear that the Exhibit B1 lends credence to [Mr Morgan's] position that [Mr Thompson] joined the club and that he signed the document for that purpose. It is clear evidence of an intention to join the club along with a cheque made payable to a sales representative of that club...I accept the evidence of [Mr Morgan] and Duke Brown that a completed form was turned in for membership. Despite Exhibit B1 on its face being an incomplete club membership, it is more consistent with membership in LA's Private club as opposed to a form purportedly containing instructions to the club to amend or alter the interest payments from [Mr Morgan's] club account to [Mr Thompson's] bank account."

[130] In her reasoning, the judge demonstrated why she rejected Mr Thompson's explanation as to why he had signed the document. It was open to her thereafter to accept Mr Morgan's explanation. Once she accepted that explanation, it seems to me that it was ultimately permissible for her to have arrived at the conclusion she did in the face of the evidence as a whole. As such, this seems to be a challenge which was more concerned with how she expressed herself and does not sufficiently undermine her conclusion to justify interfering with it. Ground 6 accordingly fails.

[131] Ground 7 is concerned with the fact that the judge said that "the absence of the other five pages was not explained by" Mr Thompson which, it is submitted, incorrectly places the burden of accounting for the missing five pages on Mr Thompson. This seems to be a justified complaint especially since the exhibit was introduced by Mr Morgan and, if any party had any burden of accounting for the other pages, it properly ought to have been Mr Morgan. In any event, Mr Morgan was also not specifically asked about any other pages, although he did give evidence that it was a full form with six or more pages he had given to Mr Thompson.

[132] Although there is some merit to this ground, the question is whether it significantly impacts on the ultimate conclusion of the judge. I am not satisfied that it does.

[133] Ground 8 is concerned with the judge erring in equating the single page of the club membership form with the six-page form completed by Mr Townsend. A careful reading of the judgment, however, does not fully support the premise of what has been identified as an error. The judge stated that the single page was the first page of a multi-page document and went on to state that she could "glean the effect" of the entire document from Mr Townsend, who explained that the document he exhibited was the entire membership form that he had completed. I am not satisfied that it can fairly be said that anywhere in the judgment does the judge equate the single page document signed by Mr Thompson with the six page one signed by Mr Townsend. I find no merit in ground 8.

Ground 4- The judge erred in concluding that because there was no evidence of discussions between the parties, the correct interpretation to be applied was that Mr Thompson was making an investment in the club, and not looking to be repaid by Mr Morgan from that source.

[134] In this ground it is being asserted that the judge fell into error in concluding that because there was no evidence of discussions between the parties, the correct interpretation to be applied was that Mr Thompson was making an investment in the club, and not looking to be repaid by Mr Morgan from that source, as was Mr Thompson's evidence. There is absolutely no basis for this challenge to the judge's findings. Nowhere in the judgment does the judge make any such reference to any absence of discussions between the parties being interpreted in this manner being complained about.

Ground 5- The judge erred in disregarding that the commercial reality that any borrower is at liberty to nominate a payee provided that the lender is agreeable to such a request, as evidenced by the manager's cheque for $2,000,000.00 made out to Mr Brown.

[135] This ground is concerned with what has been identified as the judge's error in disregarding the commercial reality that any borrower is at liberty to nominate any payee. This was never to my mind an issue for her consideration. The issue was whether she believed Mr Thompson's explanation that Mr Morgan had nominated Mr Brown to be the payee in circumstances where Mr Morgan was borrowing the monies to repay a debt. The fact is that the judge eventually heard from the payee Mr Brown himself and he gave an explanation which supported Mr Morgan's explanation that the money was being paid out to him pursuant to an arrangement made with Mr Thompson to facilitate Mr Thompson investing in and becoming a member of the club. In these

circumstances there was no commercial reality that she had to have regard for. She had to decide whom she believed. It has not been demonstrated that she had been plainly wrong for making findings of fact based on her preferring the evidence presented on behalf of Mr Morgan.

[136] Mr Samuels has taken issue with the fact that in the course of her reasoning on this issue the judge used the term "illogical" which, he contended, indicated that she used the wrong test in considering the matter. The usage of the term, to my mind, is by way of comment by the judge and is in keeping with her manner of commenting in her reasoning in this case. As inelegant or non-legal as the word may seem it cannot be said to invalidate the conclusion arrived at.

[137] I find there is no merit to this ground and accordingly it too must fail.

Conclusion

[138] This is yet another of those matters where the judge's decision is founded on findings of fact. These findings were determined on her assessment of the credibility of the witnesses. It has not been shown that the judge did not make proper use of the advantage she had in seeing and hearing the witnesses and was plainly wrong in her findings. There has not been any mistake identified in the judge's evaluation of the evidence that is sufficiently material to undermine her conclusion.

[139] Accordingly, with apologies for the delay in the delivery of this judgment, I would dismiss the appeal with costs to Mr Morgan to be agreed or taxed.

EDWARDS JA

[140] I too have read in draft the judgment of my sister P Williams JA and agree with her reasoning and conclusion.

PHILLIPS JA

ORDER

Appeal dismissed. Costs to the respondent to be agreed or taxed.