[2016] JMCA Civ 58

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 119/2012

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN CARLTON WILLIAMS APPELLANT

AND VEDA MILLER RESPONDENT

Nigel Jones and Miss Kashima Moore instructed by Nigel Jones & Co for the appellant

Miss Jacqueline Cummings instructed by Archer Cummings & Co for the respondent

1, 2 June and 20 December 2016

MORRISON P

[1] I have read the judgment of Edwards JA (Ag), I agree with her reasoning and conclusion and have nothing further to add.

SINCLAIR-HAYNES JA

[2] I too have read the judgment of Edwards JA (Ag) and I agree with her reasoning and conclusion. I have nothing further to add.

EDWARDS JA (AG)

Introduction

[3] This is an appeal challenging the judgment of G Brown J who heard the matter at first instance. The learned judge after hearing evidence from the parties in the case, ruled in favour of the respondent who was the defendant in the court below. The appellant, who was the claimant in the court below, had sued the respondent on a purported contract for a loan, however, the learned judge found that there was no contract and gave judgment for the respondent.

[4] Both the appellant and the respondent are business people. At some time in the past there was a meeting of both their minds and hearts. According to the appellant, they nevertheless entered into an oral contract whereby he agreed to lend the respondent $3,000,000.00 and she agreed to repay it at an interest rate of 20% per annum.The purpose of the loan, he said, was to finance the respondent's purchase of materials for her garment manufacturing business known as Softees.

[5] As a term of the loan agreement, the respondent was to hand over her title to property registered at Volume 1095, Folio 195 of the Register Book of Titles, for the purpose of registering a mortgage on the property, as the security for the loan.

[6] The money was handed over in two tranches, $2,000,000.00 on 27 May 2004 and $1,000,000.00 on 1 July 2004. The appellant claimed that the respondent, in keeping with the agreement, handed over the certificate of title to her property and

made 10 payments on the loan, but thereafter refused to make any further payments or execute a mortgage deed.

[7] The respondent did not deny receiving the $3,000,000.00 but in her defence, she claimed the money was handed over as a gift, as she had been involved in an intimate relationship with the appellant and he agreed to assist her financially to purchase a restaurant and bar business called Fashion Café, which she did purchase with the money the appellant gave to her. She admitted to making payments to the appellant but claimed these were reimbursements for the purchase of liquor for Fashion Café. She therefore, relied in her defence, on the presumption of advancement. In the alternative, the respondent claimed they were in a joint venture agreement. She also filed a counterclaim seeking a declaration that the caveat lodged against her certificate of title by the appellant was unjustifiable and without reasonable cause and an order that it be removed.

[8] The appellant denied the parties were in a relationship, admitted to a "few and occasional sexual encounters" but insists that nevertheless there was an agreement which was intended to create legal relations at the time he gave the respondent the $3,000,000.00. The learned judge therefore had to determine whether, as claimed, there was a legally binding agreement between the appellant and the respondent for a loan at the time when the appellant handed over the monies to the respondent.

[9] At the close of the case, the learned judge, in a written judgment, found as a fact that the $3,000,000.00 was a gift, and, thereby, decided the case in favour of the

respondent. He also made an order for the Registrar of Titles to remove the caveat lodged by the appellant over the respondent's certificate of title. The appellant, being aggrieved by this decision, filed this appeal.

The evidence led before the learned trial judge

[10] The appellant's evidence was that he made a loan to the respondent to assist her in her garment manufacturing business known as Softees Limited. He said that the loan was part of a business plan to assist with getting Softees out of debt. He also testified that he felt the plan would work especially since the respondent had submitted the certificate of title to her property to him, to hold against the loan. He said he was satisfied this was done in good faith and that the business had a future. He said too, that his role, after giving her the loan, was to check the business sales, visit the office to see that everything was up and running, as well as to confirm orders from prospective and existing customers. The respondent's role, he said, was to spend the money and see to the day to day running of her company but he did not monitor the spending of the money because he had the certificate of title as security. He said that he took no part in the running of Softees except to assist with promoting the company.

[11] The appellant's further evidence was that the duration of the loan was two years at a rate of 20% per annum and the monthly payments were to be $50,000.00 per month. With regard to the certificate of title, he said after she submitted it to him, he immediately gave it to his lawyer and instructed them to prepare the mortgage. He was also instructed that a valuation would be necessary. He said that two sets of mortgage documents were prepared and sent to the respondent but she returned the first one,

stating it was damaged by hurricane and the second set she refused to sign. It was suggested to him that it was only after their relationship ended in 2005 that he personally took the documents to her to sign which he denied. He also denied giving her the money to purchase Fashion Café, he denied that he had her certificate of title only to note her husband's death, and he denied that the payments to him were reimbursement for liquor he had purchased for Fashion Café.

[12] The appellant also gave evidence that immediately after the respondent received the loan she began repaying it. He agreed that the respondent had made a payment of $265,000.00 on 28 May 2004 and a payment of $240,000.00 on 27 June 2004 but denied these were payments for liquor. He insisted they were repayments on the loan as reflected in his books. His books were, however, not produced at trial.

[13] He also gave evidence that he only knew that the respondent had purchased Fashion Café sometime after she failed to buy the materials for Softees as expected and he became curious. He said that having given an undertaking to Pings Fabrics in order to guarantee her a line of credit, he was later informed that she had not paid the bill. He had to pay the bill amounting to $500,000.00 in order to maintain his reputation. He said that as a result he accosted her and she told him she had acquired Fashion Café. He then became a minority shareholder in Fashion Café to the payment made on her behalf to Pings Fabrics.

[14] The evidence from the respondent was that her husband died (by her hands in self-defence) in January 2003 and by June 2003 she and the appellant began dating. By

the end of that year they were in an intimate relationship. It was also her evidence that after experiencing significant emotional and financial hardships in 2003 and 2004, as a result of her husband's death, the appellant began providing her with financial and emotional support and promised to assist her in getting back on her feet. To that end, she claimed that when she saw the business, Fashion Café, going on sale for $2,000,000.00 she shared her idea with the appellant who promised to give it some consideration. She claimed that two weeks later, the appellant promised to assist her, as he had spoken to a few friends about it and since the business was at a prime location.

[15] It was also the respondent's evidence that the appellant expressly stated that he did not want to be personally involved in the business so Fashion Café was bought in the names of her son and herself. This was evidenced by the fact that the sale agreement was signed by her and her son. She paid a deposit on the business of $1,500,000.00 on 28 May 2004 and the balance of $500,000.00 on 30 June 2004. According to her evidence she commenced business on 1 June 2004 and on 1 July 2004 she received another cheque for $1,000,000.00 from the appellant to purchase stock for the business. She claimed that it was only later that he changed his mind and started taking an interest in the business and became a shareholder. The respondent first claimed, in her witness statement, that it was in August 2004 that the appellant decided he wanted to be personally involved in the business. At the trial she corrected the date to July 2004. The business Fashion Café permanently closed in December 2004 and the relationship came to an end sometime in June 2005. When asked about the

payment to Pings Fabrics made on her behalf, she said that he was the one who instructed them to give her the goods and he would pay for them.

[16] The respondent also testified that she made ten payments to the appellant after she received the funds, all of which were reimbursements for liquor he bought on her behalf. She said that the appellant had told her that he had a friend who operated a liquor store and he would purchase all the liquor for the business from that friend and she should reimburse him from the $1,000,000.00 he gave to her. The first payment made by the respondent to the appellant was $265,506.00 made the same day she made the deposit on the business, that is, on 28 May 2004. The respondent made a second payment of $240,000.00 on 29 June 2004 and thereafter other payments of $40,000.00 (and one payment of $16,000.00) were made to the appellant monthly. Her explanation for these payments (which was accepted by the learned trial judge) was that they were made to the appellant as reimbursement for liquor he bought for the business and were not payments on the loan. The respondent claimed that as a result she wrote 10 cheques totalling $801,506.00. It was her evidence that when she received the second payment of $1,000,000.00 from the appellant they agreed that it was to purchase stock and that the reimbursement for the stock made to the appellant came from the $1,000,000.00, which she also used to pay the security deposit on the premises housing the business.

[17] The respondent denied that there was a contract for a loan. As to how the appellant came into possession of her certificate of title, her explanation was that she

gave the title to the appellant because he had offered to assist her by having her husband's death noted on it.

[18] All this evidence from the respondent the learned judge accepted as true, rejecting the evidence of the appellant that he was given the certificate of title to register a mortgage and that he caused his lawyers to draft and submit mortgage documents to the respondent, as per their oral agreement, and that she refused to sign it.

The findings by the trial judge

[19] The learned judge made a number of findings both of fact and law adverse to the appellant. All these were challenged by counsel for the appellant. The learned judge found the appellant's evidence to be inconsistent and his conduct to be 'quite odd'. He found also that the cheques paid to the appellant by the respondent were not in keeping with the stipulated amount of $50,000.00 per month for the repayment of the loan. The learned judge noted that there were no cheques which showed that the respondent had repaid any sum reflective of a 20% interest on the loan. The payments, he noted, were seven cheques for the sum of $40,000.00 and an eighth for $16,000.00 which, in his view, did not accord with the stated interest rate of 20%. The learned judge concluded that the fact that the appellant had made no claim for arrears of interest was a factor which weighed against him. As regards the first two payments, he found that the appellant had not given any explanation for those payments to contradict the respondent's claim that they were made to reimburse the appellant for the purchase of liquor for the business.

[20] With regard to the mortgage documents, the learned judge found that although the respondent had failed to sign the documents, the appellant continued to assist her by enabling her to get a credit card machine for the business from the National Commercial Bank, whilst failing to demand she execute the mortgage. The learned judge found that the appellant was not candid with the court and that his oral testimony was inconsistent with previous statements; a fact which the learned judge found cast serious doubts on his veracity and credibility.

[21] The learned judge however, found that the respondent's version was consistent and that it was supported by the appellant's previous statements. He found the respondent a credible and reliable witness. He accepted her statement that she gave the appellant her certificate of title to note her husband's death and not to register a mortgage. He ultimately found that:

> "... as a consequence of the claimant's dalliance with the defendant he willingly provided the money for the acquisition of the cafe to assist her..."

The grounds of appeal

[22] The appellant filed 19 grounds of appeal, all of which, in essence, complained that based on the evidence before the learned judge, his findings suggest that he misapprehended the claimant's case, applied the wrong principle of law and consequently arrived at the wrong conclusion.

Grounds 2, 3, 5, 7 and 16 - Was the learned judge plainly wrong to find that there was no agreement for a loan?

[23] The main issue to be determined based on all the grounds filed and the issue at the trial is whether there was an oral contract for a loan entered into by the appellant and the respondent. This issue formed the basis of grounds 2, 3, 5, 7 and 16. At the trial the only evidence as to the nature and terms of the contract came from the appellant, so that the credibility of the parties was a major issue and the learned judge determined the issue based on which of the parties he found more credible.

[24] Counsel for the appellant submitted that the learned judge was plainly wrong. Counsel submitted that there was sufficient evidence led before the learned judge on which he could have found that there was a contract for a loan. Counsel argued further, that the appellant had only to satisfy the court that the elements necessary for the existence of a contract were present, namely; that there was an agreement; that the parties intended to create a legal relationship and that there was evidence of consideration. Counsel cited **Garvey v Richards** [2011] JMCA Civ 16 in support of this submission.

[25] Counsel pointed to the evidence of the money being paid over to the respondent on terms that it was to be repaid over a period of two years, at an interest rate of 20% per annum. Counsel argued that the respondent immediately began repayment of the loan and made 10 payments to the appellant before she stopped paying. Counsel also noted that the certificate of title was also handed over by the respondent to the appellant as security for the loan.

[26] Counsel submitted that the findings made by the learned judge suggest that he misapprehended the appellant's case, did not apply the law correctly and consequently arrived at the wrong conclusion based on the evidence before him.

[27] Counsel for the respondent argued that the learned judge was correct to find that there was no contract. Counsel submitted that the burden was on the appellant to prove the existence of such a contract and he failed to discharge that burden. Counsel argued further, that the appellant had failed to prove any of the essential elements of a contract on a balance of probabilities, as he did not prove that there was: (a) an offer; (b) an acceptance; (c) any consideration; (d) any intention to create legal relations; and (e) any consensus ad idem. According to counsel, it was unclear what the offer was, if any, which was made and under what conditions. She asserted that not even the appellant knew the terms of the alleged contract and seemed to be "making it up as he goes along".

[28] Counsel noted that the appellant's evidence was inconsistent, in that there were three different periods alleged by the appellant when the loan was to be repaid, that is; two years as per his evidence in cross-examination, after selling the property as per his affidavit in support of his application to the Registrar of Titles to register the caveat or in June 2005 as per the demand letter written by his attorneys.

[29] Counsel also argued that the cheques for $2,000,000.00 and $1,000,000.00, respectively, only proved that payment was made but not the basis of such payment. She argued that there was no consideration for the payment as no interest was paid on

it. Counsel further argued that the evidence of intimacy between the parties gave rise to a "strong rebuttable presumption that parties in a social or domestic agreement do not intend to create legally binding relations". She cited the case of **Balfour v Balfour** [1918-19] All ER Rep 860, in support of this contention. Counsel also pointed to the coincidence of the $2,000,000.00 loan and the cost of Fashion Café being exactly $2,000,000.00. Finally, counsel also asserted that the learned judge was correct to decide the case on the basis of a claim for an equitable mortgage evidenced by part performance and that in so far as he found that there was no evidence of part performance to ground an agreement for a mortgage, the learned judge was correct.

Analysis

[30] The question to be determined is whether the judge was correct to find that there was no contract between the parties. In order to answer that question it is necessary to consider whether there were any relevant material which was not considered or having been considered was misinterpreted by the learned judge, from which it could have reasonably been concluded that there was an agreement between the appellant and the respondent whether expressed or implied. It is also necessary to consider whether, if there was such an agreement, there was an intention to create legal relations at the time it was made.

[31] How should a court approach the issue of considering whether there is a valid contract in existence? Firstly, if it is in writing, then it is normally not necessary to look beyond the four corners of the document to find the terms of the contract. In the absence of any written document, where the contract is alleged to be oral, the court

must look for the intention of the parties in the words said at the time the contract was alleged to have been made, the conduct of the parties to the contract and any evidence of the negotiations at the time of the contract. What the court cannot do is create a contract where none existed. However, as in this case, where one party is asserting that there was an oral contract, it is the duty of the court to thoroughly examine all the circumstances and determine whether or not the parties, by their words, conduct and negotiations, intended their actions to have legal consequences.

[32] Where the subject matter of the agreement is commercial rather than domestic, it is not necessary for the person asserting the agreement to prove that there was an intention to create legal relations and for the purpose of this principle, it is accepted that there can be commercial agreements between members of a family. There is a rebuttable presumption that the parties to a commercial agreement intended that agreement to have legal consequences and the onus is on the party asserting that there was no such intention for the agreement to have legal consequence, to prove it. See **Edwards v Skyways Ltd** [1964] 1 WLR 349 at 355-357 and Chitty on Contract twenty-fifth edition at paragraph 123.

[33] In **Garvey v Richards**, Harris JA, in discussing when an agreement will be considered to have legal effect, stated at paragraph [10] that;

> "It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into the contractual relationship and consideration. For a contract to be valid and enforceable all

> essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement, is in existence."

In that case it was an employment contract and this court concluded that not all the essential terms of the contract had been agreed by the parties and therefore there was no binding and enforceable contract.

[34] In **Balfour v Balfour** the parties were husband and wife who entered into a domestic agreement for the maintenance of the wife and after the parties separated, the wife sued for the monies she claimed was due to her under the agreement. The English Court of Appeal held that there was no contract in the legal sense, as the parties were in a domestic arrangement and did not intend to make a bargain which could be enforceable at law.

[35] In the instant case, on the evidence before the learned judge, at least on the appellant's case, all the terms of the contract were concluded. Whether or not it is accepted that they were in an intimate relationship, there is no dispute that both the appellant and the respondent were business persons. I however, do not accept the notion that, because they were in an intimate relationship, it ruled out any possibility that they could enter into an agreement which was intended to have legal consequences. The appellant's evidence was that it was a loan distributed in two tranches, on the consideration that it will be repaid at an interest rate of 20% per annum over two years. The money was paid over and accepted by the respondent and on the appellant's case the certificate of title was handed to him for a mortgage to be

endorsed on it, as security for the loan. The appellant was in possession of the said certificate of title up to the date of trial. There was evidence of monies being paid to the appellant on a periodic basis by the respondent, which the appellant asserted were repayments on the loan. Prima facie, therefore, all the elements of a contract seemed to have been present.

[36] It seems to me, that the learned judge, in concluding that the money was paid over due to the appellant's "dalliance" with the respondent, ignored the fact that both parties begun their acquaintance by way of commerce and initially begun a business relationship, the respondent first becoming a customer of the appellant's establishment "Clothe World". He also failed to consider that the subject matter of their agreement was commercial and not domestic.

[37] The appellant, in his witness statement, indicated how he came into contact with the respondent, he having sold his business and having been advised by a mutual friend that the respondent needed financial assistance with her business. He claimed that, believing that her business had great potential, he thought helping her financially was a good business opportunity. As a result, he met and had discussions with her and without making any commitment decided to visit her factory. This is what he said in his witness statement thereafter at paragraphs 7-18:

> "7. ... After the meeting I went to her factory off East Wood [sic] Park Road. I looked at her operations, machines, staffs, [sic] the types of goods she used, and took samples of materials. I worked out her production level based on the amount of machines she had. She showed me her customer

list. I asked to see her orders list also. She was very co-operative and showed me them.

8. I made a couple of calls to several department stores such as Sinclair's department store and Maxi's department store; they indicated to me that they would either buy from her or increase their orders if I was involved.

9. I worked out the average production on sales and there came to a figure that would cover production for about three months and help pay off her debts and settle the outstanding bills. I know I could source the material for better prices because of my contacts and years of selling materials. I knew I could source the material from the manufactures [sic] themselves.

10. I decided to lend her the money because I had done my research and I knew the business could grow and I would be repaid with interest. I saw it as a good investment opportunity.

11. She assured me that everything would be fine and reassured me that I would be repaid monthly. We agreed that as a form of security she would mortgage her property at Lot 435 Perseus Close, Smokey Vale, Saint Andrew registered at Volume 1095 Folio 435.

12. She gave me her Duplicate Certificate of Title for the said land. I still have it today. I then loan [sic] her the money.

13. We agreed that I would lend her the money and she would repay me at 20% per annum. The first cheque I gave her was a RBTT Cheque number 5012496 dated the 27th May 2004 for Two Million Dollars.

14. I had instructed my Attorney-at-law to prepare the mortgage documents for the Defendant to sign. I preferred a mortgage as against a contract for I was advised by my attorney that with the contract I would have to sue in order to recover my money but with a mortgage if I gave her notice and she failed to repay I could simple [sic] sell the land.

> 15. I loaned her a further One Million Dollars in July of 2004. I made out a First Caribbean International Bank Cheque Number 317 to her. I recall making out the cheque to Softee Ltd. and the Defendant told me to cross it out and make it out to her directly.
>
> 16. I loaned her the additional sum despite her not signing the mortgage deed because I was told by her that as a matter of urgency she needed the money as she needed to pay for some materials, and she was being evicted from the business place. Further, my [a]ttorney told me that the mortgage deed was not complete but will be completed shortly. She was repaying the loan and I had her Duplicate Certificate of Title so I loaned her the additional sums.
>
> 17. The Defendant immediately after I loaned her the first Two Million Dollars commenced repayment of the loan and continued until April 25, 2005 when I received my last payment. I kept a ledger of her payments to me."

[38] The respondent made no challenge to these specific assertions. Instead she asserted that she was in financial difficulties after the death of her husband and the appellant begun to assist her emotionally and financially so much so that when she came up with the idea of buying the restaurant and bar Fashion Café, he agreed to assist her in acquiring it.

[39] The matters relied on by the appellant to prove that there was an agreement intended to have legal consequences were:

1) the two cheques totalling $3,000,000.00 which he paid to the respondent;

2) the ten cheques paid to him by the respondent which he claimed were the repayment of the loan sum drawn on the Softee account;

3) a valuation prepared for the purposes of obtaining a mortgage;

4) the preparation of the mortgage instrument;

5) his possession of the respondent's certificate of title;

6) the letters of demand sent to the respondent by his attorneys-at-law; and

7) the lodging of the caveat.

[40] The respondent's evidence was that when the first tranche of the money was handed over to purchase this new business, the appellant was not interested in the business. The sales agreement for Fashion Café was signed by the respondent and her son. When that evidence is considered along with the appellant's evidence regarding the matters he relied on in support of his claim that there was an agreement for a loan, in my view, it wholly accords with the appellant's account that it was a loan. When the appellant's conduct in taking 25% of the shares in Fashion Café to secure the$500,000.00 expenditure on her behalf to Pings Fabric, is juxtaposed against his conduct in handing over $3,000,000,00 without taking any shares in the respondent's business venture, it cannot be said that it is wholly inconceivable that those monies were in fact paid over pursuant to an agreement for a loan which was intended to have legal consequences, if not repaid, and which was to be secured by a mortgage over her property. There was therefore, in my view, sufficient evidence to ground the rebuttable presumption that the money was handed over to the respondent pursuant to a loan agreement.

[41] Part of the respondent's defence to the claim was that there was a presumption of advancement in her favour based on the fact that she had been in a relationship with

the appellant. Counsel for the appellant argued that there could be no presumption of advancement in favour of the respondent as the parties were not married and were not in any relationship which would lead to a presumption of advancement as in the case of husband and wife or parent and child. Counsel cited the case of **Austin v Austin** 1978 HC 3, delivered 6 January, 1978, judgment of the High Court of Barbados, in support of her submission that a mistress could not benefit from the presumption of advancement. Counsel noted that in so far as the respondent relied on a presumption of advancement and in so far as the learned trial judge gave any credence to it, he was plainly wrong.

[42] Apart from the fact that the appellant is a married man and denied any such relationship, the highest the judge placed their relationship was in terms of a "dalliance" and no presumption of advancement applies to such a relationship. Counsel for the appellant is therefore quite correct in this regard. However, there is no evidence that the learned judge gave any credence to such a presumption in coming to his decision and counsel for the respondent in her oral submissions conceded that the presumption of advancement was not applicable to this case.

[43] In the face of the appellant's evidence as to the terms of an oral contract with the respondent, was the learned judge was clearly wrong to find that there was no agreement based on the fact that he found the appellant lacking in credibility? In finding that the appellant was not credible, that he was the respondent's partner and lover and that the money was given to her as a gift, the learned judge placed great weight on his findings that; (a) the appellant knew that the respondent would use the

money to buy Fashion Café rather than to buy materials for her clothing manufacturing business; (b) the appellant, knowing that the money was not used for the original plan, still went ahead and made a subsequent payment to the respondent; (c) the repayments were not consistent with a 20% per annum interest payment; (d) the documentary evidence was not consistent with a loan; and (e) the conduct of the parties.

[44] At paragraph 19 of his judgment the learned judge said:

> "I am of the opinion that Mr Williams was not candid with the court. His testimony consistently contradicted his previous statements and cast serious doubts on the veracity of his case and credibility..."

[45] The credibility of a witness is a matter entirely for the learned judge. It's a matter for him which of the witnesses' evidence he believed. He saw and heard them. There was no written agreement between the parties and the appellant depended in the court below, on an oral contract. The credibility of the parties was therefore a major issue for the learned judge. Before this court can interfere with findings of fact, it must be shown that the learned judge was plainly wrong, either because he applied a wrong principle of law, or took into account irrelevant material or failed to take into account relevant material or he so misunderstood the evidence on a particular point. See **Algie Moore v Mervis L Davis Rahman** (1993) 30 JLR 410, **AG and another v Paul Facey** RMCA No 25/2006 and **Davy v Davy** SCCA NO 19/2004.

[46] I will therefore, have to consider whether the issues affecting credibility which the learned judge resolved in favour of the respondent, were such, that this court

cannot say he was plainly wrong. These issues will be dealt with below based on the grounds as filed.

a) Grounds, 6, 13 and 19 - Was there evidence that the appellant knew that the respondent would use the money to buy Fashion Café?

[47] The learned judge found the appellant had given inconsistent evidence in relation to when he found out about the purchase of Fashion Café. He said at paragraph [6] on page 5 of the judgment that:

> "He did not resile from his position that he was unaware of the defendant's use of the loan for the acquisition of the cafe. In cross examination he emphasized this when he said that he became aware that the defendant had purchased the Fashion Cafe sometime after she should have bought raw material to satisfy the business according to the original plan and the large amount of material was not going in and I started getting curious. What was not clear was when it was that he knew that the defendant had used his money and purchased the cafe. In one instance he gave the impression that he found out sometime prior to the 27th July 2004, i.e. the date he executed the company documents to secure his five hundred thousand dollars. In the other instance it would have been after April 2005 when he said she had stopped paying him or made the last payment. These two statements were contradictory and inconsistent."

[48] At paragraph 19 of his witness statement the appellant said that sometime after giving the respondent the monies and giving his undertaking on her behalf to Pings Fabrics, he received a call from them during which he was informed that the respondent had not paid for the goods she ordered. He said he was surprised that the respondent did not pay Pings Fabrics as he had given her the money to do so. He had

to assure them that the money owed would shortly be paid over. He said it was when he accosted her about this failure to pay Pings Fabrics that he learned that she had acquired Fashion Café. It was his further evidence that when the respondent failed to pay despite promises to do so, he was the one who paid $500,000.00 to Pings Fabric in order to maintain his reputation with them.

[49] Later on at paragraph 20 of his witness statement he said that he became a shareholder of Fashion Café to secure his $500,000.00 advanced to Pings Fabrics on her behalf. Articles and Memorandum of Association for the company were executed on 27 July 2004 and the business was incorporated on 19 August 2004 as Cashville Fashion Café Limited. However, at paragraph 27 he went on to state that it was only later when the respondent stopped paying him that he discovered that she had used the money loaned to her to purchase Fashion Café. The learned judge found this statement at paragraph 27 to be inconsistent with his statement at paragraph 19.

[50] Counsel for the appellant pointed out that the statements were not inconsistent because there was a difference between knowledge of when the business was acquired and knowledge as to how the acquisition was funded. Counsel argued that in paragraph 19 of the witness statement the appellant was indicating when it was that he found out that the respondent had acquired the business but at paragraph 27 he was indicating when it was he found out where the funds for the acquisition came from. Counsel also pointed to paragraph 28 of the witness statement where the appellant said that when he pressed the respondent about the source of the funds to finance the purchase of the

business she initially told him that she had a friendly relation with the vendor and the landlord, which turned out to be not true. Counsel submitted that the appellant later became aware that the business was acquired in 2004 and became aware that it was his money which funded the purchase in 2005.

[51] Counsel further argued that when the appellant took shares to secure his $500,000.00 paid to Pings Fabrics on her behalf in 2004, it had nothing to do with his knowledge of how the business was paid for. Counsel argued that the 25% share is consistent with his securing the latter payment and not with securing $3,000,000.00. Counsel submitted that it was, therefore, clear that the appellant would have learnt about the source of funding for the acquisition of the business after July 2004.

[52] Although the learned judge found that the appellant was discredited by what he found was an inconsistency in his statement about when it was he found out the respondent had bought Fashion Café, I agree with counsel for the appellant that the learned trial judge was plainly wrong to do so. The appellant had said in his witness statement that it was "only later when the defendant stopped paying me that I discovered she had used the money I loaned her to purchase Fashion Café". He said that she had in fact concealed it from him and when he had enquired how she funded the purchase, she told him she was friendly with the vendor and the landlord, which he said turned out not to be true.

[53] In cross-examination at the trial, counsel for the respondent suggested to the appellant that in stating that it was when she stopped paying that he knew of the

acquisition, he was in fact referring to the date of the last payment in April 2005. Thereafter, there was an objection by the appellant's counsel who submitted that the words "last payment" and "stopped paying me" were to say two different things. Counsel for the respondent abandoned that line of questioning without requiring an answer or an explanation from the appellant as to what he meant. However, earlier in cross-examination he was asked when it was the respondent gave him the last cheque and his answer was that it was it was in 2005. In the absence of any clear indication on the evidence that in making the statements in paragraphs 19, 27 and 28 of his witness statement, the appellant was in fact contradicting himself, it was not open to the learned trial judge to treat it as an inconsistency in the appellant's evidence.

[54] The appellant's case was that he loaned the respondent the money for use in her garment manufacturing business as she had fallen on hard times. The respondent does not deny that she was in financial difficulties with Softees. The cheques that the respondent says were for reimbursement for the purchase of liquor for Fashion Café were all drawn on Softee's accounts except for one dated September 2004. The respondent had given no explanation for this but the learned trial judge accepted that the appellant was aware that the money he gave to the respondent would be used to buy Fashion Café. Counsel for the respondent submitted that Fashion Café, being a new business, would not yet have an account and that in any event the cheques totalling the $3,000,000.00 were made out to the respondent herself and not to Softees.

[55] Counsel for the appellant however, indicated that at least from September 2004 Fashion Café was operating its own account so that if the monies were reimbursement for liquor bought for Fashion Café those cheques would have been drawn on Fashion Café's accounts. Counsel argued that in those circumstances, there was no independent evidence that the appellant knew that Fashion Café had been purchased before July 2004 and that it had been acquired using the funds he loaned the respondent, before 2005.

[56] I take the view that what the learned judge considered to be an inconsistency was not sufficient for him to conclude on the point that the appellant did not give the respondent the money for her ailing business, Softees but to purchase a new business Fashion Café.

b) Grounds 5 and 10 - Was there an inconsistency in the reason given for the second payment of $1,000,000.00.

[57] The learned judge drew the inference that if the first disbursement had been a loan, having discovered that it was not used for the purpose for which it was intended, the appellant would not have disbursed a further $1,000,000.00 in loan to the respondent who he knew at that point had not used the first loan for the intended purpose.

[58] However, in this regard the learned judge was in error as there was no evidence led that when the second payment of $1,000,000.00 was made on 1 July 2016, the appellant knew that the respondent had purchased Fashion Café, neither was there any evidence from which he could have properly drawn that inference. In fact in paragraph

19 of his witness statement the import of what he states there is that it was sometime after he gave her the funds that he learnt that she had acquired Fashion Café.

[59] The learned judge also found that the appellant's evidence as to why he gave the respondent an additional $1,000,000.00 was inconsistent with his affidavit to the Registrar of Titles in support of his application to lodge a caveat against the respondent's certificate of title. In his evidence the appellant stated that he gave her the money as she had told him it was urgently needed to pay for more materials, and she was being evicted from the business place. To the Registrar of Titles he said she had advised him that she had committed herself to a business venture, and that there existed a shortfall of $1,000,000.00. For my part I see nothing inconsistent in these two reasons, as a commitment to a business venture could also be a commitment to purchase material for her existent business venture Softee which was in keeping with the appellant's case as to why he was lending her monies and helping her to source material for her business. The respondent's commitment to the purchase of Fashion Café was $2,000,000.00 and she says the $1,000,000.00 was for her to pay the appellant back for his purchase of liquor on her behalf. The appellant's account to the Registrar of Titles is therefore, in my view, more in keeping with his claim, and does not support the respondent's case.

[60] In any event, what was important for these purposes is, what the parties' had negotiated at the time the money was handed over. The respondent said it was a gift for stock purchases and the appellant says it was a loan for materials for Softee.

Counsel for the appellant argued that in discrediting the appellant, the learned judge failed to address the improbability and inconsistencies in the respondent's evidence. Counsel pointed to the evidence given by the respondent with respect to the reason for the $1,000,000.00. Counsel pointed out that it was highly improbable that the appellant would give the respondent $1,000,000.00 then use his connection to acquire the liquor, then have the respondent pay him back from the $1,000,000.00. She submitted that the learned trial judge was wrong to have accepted this evidence and to rely on it to discredit the appellant.

[61] Counsel also pointed out that the respondent's claim that the payments for reimbursement for the liquor bought were made out of the $1,000,000.00 could not be true because there were two cheques paid to the appellant prior to the $1,000,000.00 being disbursed. The $1,000,000.00 was on 1 July, 2004 yet there were two earlier payments made by the respondent to the appellant, one was 28 May, 2004 and one was 29 June, 2004, amounting to $505,600.00. It was also out of this $1,000,000.00 that the respondent claimed to have paid two months security deposit amounting to $154,000.00, on the premises, even though she began operations a full month before it was paid to her.

[62] Counsel asked this court to note that payments were made by the respondent to the appellant after December 2004 up to and including April 2005. Counsel pointed to the respondent’s evidence that Fashion Café closed in December 2004 due to the landlord refurbishing and remodelling the premises. Thereafter, the premises were

rented to someone else. Counsel for the appellant also submitted that the continued payments months after the restaurant closed, goes against the respondent's explanation that these were sums paid for liquor. Counsel submitted that in light of that evidence there was no valid explanation for the respondent buying stock up to April 2005 and therefore no reason for her to be writing cheques to the appellant. Counsel for the respondent argued on the other hand, that the fact that the business closed in December 2004 did not mean that the appellant had been reimbursed for all the liquor purchased up to that point.

[63] It seems to me that at the time the payment of over $505,506.00 was made there was no need for liquor as the business had not yet been opened. The respondent's explanation was that it was bought in preparation for the opening up of the business. That may well be, but it seems to me that that over half a million dollars worth of liquor was a great deal of liquor initially, for a restaurant and or bar, in comparison to the $40,000.00 worth of liquor which the respondent claims was later bought for the business by the appellant, on her behalf. There is no explanation for this diminution in purchases and no invoices for the purchases were produced by the respondent.

[64] Counsel for the appellant also pointed out that seven cheques were for $40,000.00 and one for $16,000.00. Counsel submitted that these consistent sums were evidence of the repayment of the loan and inconsistent with any payment for

replenishing stock. I have to agree with counsel. It seems to me unlikely that the exact same sums would be paid each time for stock.

[65] It is also important to note that the learned judge in accepting that the monies paid by the respondent were for liquor, failed to take account of the documentary evidence showing that when the business was purchased by the respondent, it was sold to her with a fully stocked bar as indicated by the schedule to the sales agreement. So having purchased a business with a fully stocked bar, it raises the question as to why it would then be necessary to purchase liquor in the sum of over half a million dollars before the business was even opened.

[66] The learned judge, in my view, was in error in discrediting the appellant on the grounds that his two statements were inconsistent whilst not appreciating the incongruities and the mathematical impossibility in the respondent's evidence regarding her use of the $1,000,000.00, before she had even received it.

c) Grounds 8 and 9-Were the repayments inconsistent with a 20% per annum interest payment?

[67] Counsel for the respondent noted that none of the cheques paid to the appellant was for $50,000.00. All the cheques he received would have been under-payments to which he made no demur. Counsel also pointed out that when the respondent paid the money over to the appellant on 28 May 2004, only one day's interest would have accrued on the loan. Counsel argued that the respondent's version was the more credible and the learned judge arrived at the correct conclusion. Counsel for the respondent maintained that the appellant by averring the receipt of 8 cheques did not

acknowledge the first two cheques as interest payment, so he could not now claim that it reduced the principal to make the monthly interest payments $40,000.00.

[68] Counsel for the appellant however, argued that the judge was wrong to find that the payments were not consistent with a 20% per annum interest payment. Counsel pointed out that the payment in May 2004 of $265,000.00 would have reduced the principal to $1,743,500.00 and therefore the interest payable in June would have been $28,908.33. The second payment made in June 2004 of $240,000.00 made prior to the disbursement of the $1,000,000.00 would have covered the interest plus further reducing the principal. Counsel submitted therefore, that after the disbursement of the $1,000,000.00, interest would become payable on $2,423,408.33 at a rate of 20% per annum, which would mean the interest payable monthly was $40,309.14; which was in line with the appellant's evidence. I must admit I can find no fault with counsel's mathematical application. Counsel for the respondent had no response to it, except to say that the appellant had not claimed the two first payments as payments on the loan, so he could not now rely on it to reduce the principal. However, it is of note that the appellant's evidence is that the respondent immediately began repaying so it cannot be said that he never acknowledged the first two payments.

[69] Counsel for the respondent also urged that the existence of the cheques was not evidence that money was disbursed for a loan and does not prove the existence of a contract. For my part, I have to begin with the undisputed fact that funds were paid over and received. The respondent said it was a gift. The appellant said it was a loan.

Surprisingly, there was a return of part of the "gift" almost immediately it was made. The appellant said that it was an immediate repayment on the loan. The respondent said it was to pay for liquor in preparation for the opening of the business.

[70] In accepting the respondent's account it does not seem to have occurred to the learned judge that the business cost $2,000,000.00 and that $2,000,000.00 was paid to the respondent by the appellant which she said was used to pay for the business. The respondent made a down payment of $1,500,000.00 on Fashion Café on 28 May, 2004 and paid the appellant $265,000.00 on the same day. On 30 June 2004, she made the outstanding payment of $500,000.00 balance on the business after making that first payment. Therefore, the balance of $500,000.00 would have been short $214,000.00, if she was dependent on the appellant's money to pay the balance. When she made the second payment of $240,000.00 to the appellant on 29 June, 2004, the respondent had not yet received the $1,000,000.00 from the appellant. The full costs of the business having already been paid, the question it raises is, where did that extra money come from before she received the second tranche? There was no explanation from the respondent in that regard.

[71] So, if the business cost $2,000,000.00 and it was paid for wholly by the money given to her by the appellant, where then did the respondent get the additional $505,600.00 to give the appellant to buy liquor? It could not have come from the $2,000,000.00 since it paid for the business. It could not have come from the $1,000,000.00 because she had not yet received it. The respondent claimed to have

been in dire financial straits which required her to be assisted financially by the appellant but she gave no explanation as to where the money came from to pay the balance on the purchase of the business. She sought to say that all the monies for liquor came from the additional $1,000,000.00 but this could not be true, as that payment was made on 1 July 2004 and the $505,600.00 was paid over in June 2004. The learned trial judge failed to give any regard to this but accepted that the payment of the $505,600.00 was out of the $1,000,000.00 to buy stock for Fashion Café. In that regard he was in error.

[72] The respondent's evidence is that she commenced operations June 1, 2004, the same day she signed the lease. The 28 May payment was three days before, so stock had to be purchased prior to the opening in preparation for the opening. However, her evidence was that the agreement was that the payment for the liquor would come from the $1,000,000.00. Based on the timing however, it is difficult to see how the learned trial judge resolved the incontrovertible fact that when these payments were made by her, she had not yet received the $1,000,000.00 from the appellant, in order to come to the conclusion that her evidence was more credible on this point.

d) Grounds 1, 4, 15 and 16 - Was the trial judge plainly wrong in his treatment of the documentary evidence?

[73] Counsel for the appellant complained that the judge failed to give due consideration to the content and effect of the letter to the respondent enclosing the mortgage instrument, revenue affidavits and application to note death, in the face of the respondent's assertion that they were in a relationship. Counsel pointed out that the

appellant's evidence was that their relationship continued until June 2005, however, the letter enclosing the mortgage was sent in November 2004 from the appellant's attorney, despite her claim that she did not receive it. Counsel asked this court to accept that the appellant would not have instructed his attorneys-at-law to do this, whilst the relationship was still subsisting, if there had been no agreement for a loan.

[74] Counsel for the appellant also complained that the learned judge misunderstood the appellant's case that he was relying on an oral contract supported by documentary evidence and instead treated with the case as if it were a claim for an equitable mortgage supported by part performance. Counsel noted that the appellant's claim was that it was a loan in which the certificate of title with mortgage endorsed on it was to have been the security for the loan.

[75] Counsel for the respondent, however, pointed out that the respondent had denied that the appellant had ever requested that she sign a mortgage document. Counsel noted that the learned trial judge gave due regard to the letter and the enclosed mortgage instrument in paragraphs 17 and 18 of his judgment but dismissed it in the light of all the evidence. Counsel also submitted that the learned judge did not misunderstand the appellant's case. Counsel argued that the learned judge in finding that no contract for a loan existed looked for other means by which a contract could legitimately be established in law.

[76] The learned judge did assess the import of the letter of 29 November 2004 and the appellant's assertion that the respondent refused to execute the mortgage,

although she received it. The learned judge then found at paragraph 11 of his judgment that "the issue of the mortgage and repayment of the money only came after they were separated". In so finding, as regards the mortgage, the learned judge was incorrect. The letter to the respondent was dated November 2004 before Fashion Café closed and before the relationship which the appellant claimed existed between them ended in June 2005. The learned judge seemed also to have accepted her denial that she had ever received that letter from the attorney.

[77] The learned judge was plainly wrong when at paragraph 14 of his judgment he purported to consider the case as one based on the doctrine of part performance and whether there was an equitable mortgage evidenced by acts of part performance. The appellant in this case, made no claim for an equitable mortgage supported by part performance and the learned judge had no jurisdiction to decide the case on a basis which was not claimed. The evidence of the mortgage document being sent to the respondent was merely to support the appellant's contention that at the time of the transaction there was an intention to create legal relations and that there was a loan which was to have been secured by a mortgage over the property. The learned judge therefore misunderstood the evidence and was in error when he purported to determine whether there was an equitable mortgage evidenced by acts of part performance.

[78] The learned judge said at paragraph 14 of the judgment:

> "The thrust of the claimant's [sic]was based on the doctrine of part performance as he was claiming an equitable

> mortgage and the duplicate certificate of title were [sic] deposited with him..."

However, a glance at the appellant's pleading shows that the question of the mortgage only arose as part of the terms of the loan contract, for a mortgage to be registered on the respondent's certificate of title, as security for the loan. The appellant is saying that the proof that that was a term of the contract, was the fact that the certificate of title was surrendered to him.

[79] In treating the appellant's case in the way he did, the learned judge also fell into error in the way in which he dealt with the letter of 29 November, 2004. In that regard, the learned judge referred to the case of **Steadman v Steadman** [1974] 5 WLR 56 where it was said that:

> "... It is well established that preparatory acts such as instructing a solicitor to prepare a lease or conveyance do not constitute sufficient part performance..."

This led him to reject the potential import of the letter as evidence of the parties' intention and led him to find that there was no independent evidence to support the agreement for a mortgage and that the appellant was only relying on conversations with the respondent, a fact which he found was detrimental to his claim.

[80] There were two demand letters tendered in evidence by the appellant. The first was dated 6 December, 2005 and the second 17 February, 2006.The learned trial judge found that the demand letters were not in accordance with the appellant's evidence at trial even though they must have been based on his instructions to the attorneys-at-

law. Therefore, the learned judge found that the demand letters stated the period of the loan was one year but the appellant's evidence in court was that it was for two years. He also found that in the appellant's affidavit to the Registrar of Titles, he said that the agreement was for her to sell the property at the end of 2004 and repay the debt in full. He also noted that the demand letters of 6 December 2005 and 17 February, 2006 indicated that the respondent had made no payments whilst his particulars of claim averred that eight payments were made.

[81] Counsel for the appellant argued that the learned judge was wrong to hold the inaccuracy in the letters against the appellant as they were written not by him but by an attorney-at-law. Counsel pointed out that even though the letter stated the loan was for one year, the evidence showed it was for two years and although it said no payments were made, the evidence was that principal payments were made immediately and interest payments were made also. Counsel pointed out that the demand letter was intended to notify the respondent that the appellant wanted back his money and trigger negotiations. However, there was no response from the respondent to this letter. The respondent admitted to getting this letter but no reason was given for her failure to respond. Although the learned judge considered that the letters were inconsistent with the evidence at trial, he made no assessment of the fact that the respondent having received the letter did not respond denying that there was a loan. He made no finding in this regard.

[82] Counsel for the respondent, at trial, attempted to cross-examine the appellant as to the letter dated 6 December 2005, the demand letter in which it stated that "I am further instructed that to date you have made no payments". The learned judge stopped the cross-examination by counsel, indicating that it was a matter for addresses. Counsel therefore, abandoned that line of questions. However, it seems quite likely that, had that cross-examination been allowed to continue, an explanation for the discrepancy between the appellant's evidence regarding the monthly payments and what was contained in the demand letter, may have emerged. Instead, having stopped the cross-examination on the issue, the learned judge then took that very discrepancy into account in the respondent's favour. In all the circumstances, this approach by the learned judge may have been unfair to the appellant.

[83] With regards to the cheques themselves, counsel for the appellant pointed out that payments continued even after the business was closed in December 2004. There was a cheque for $40,000.00 in January of 2005 and April, 2005 and two which were dishonoured in February of 2005. Counsel argued that this was consistent with the appellant's claim that these were interest payments. Counsel also asked this court to consider that there was no basis on which the learned judge could accept that these were payments for liquor, because the business had already closed down.

[84] Counsel also argued that the respondent's claim that the 10 cheques totalling $801,506.00 was reimbursement for liquor out of the $1,000,000.00 could not be true as the $1,000,000.00 was not yet received when the first two payments totalling

$505,506.00 was made to the appellant. Those cheques were dated in May and June of 2004 and the $1,000,000.00 was paid to the respondent on 1 July 2004. In addition to that, in looking at the sales agreement entered into by the respondent, the learned judge failed to consider that she acquired a fully stocked bar and kitchen with the business. There was therefore, no basis upon which he could find that the first two cheques were for liquor. As for the cheques for $40,000.00, the learned judge did not seem to find it curious that the payment for replacement liquor was consistently the same.

[85] On the question of the valuation of the premises, the learned judge found that the appellant was again inconsistent because although he claimed to have obtained the valuation, it was later revealed that the valuation had in fact been commissioned by the respondent. The learned judge found that this was supported by the appellant's affidavit to the Registrar of Titles where he said the valuation was shown to him by the respondent. However, it was suggested to the respondent that a valuation done in March 2004 was commissioned by the appellant's attorney which she denied. It was also put to her that it was done in order to facilitate the mortgage and she agreed that it was, but not with the appellant.

[86] The valuation report which was in evidence, however, indicated that the respondent "confirmed instructions for this appraisal to assess the open market value of the captioned property as a basis for negotiating mortgage financing." There is no evidence from the respondent that in year 2004 she was seeking financing from anyone

else other than the appellant. No reason was given by her for this valuation. The only explanation for the valuation before the learned trial judge was that from the appellant.

[87] The report was done 6 April, 2004 and it certified that the property provided the basis of adequate security for investment and recommended the advance of a mortgage loan. One month after this report was done the respondent received the funds from the appellant. It seemed also to have escaped the learned judge's notice that the market value of the property was $3,500,000.00 and the loan was $3,000,000.00 and he failed to consider whether this was a mere coincidence or supportive of the appellant's claim.

[88] The learned judge also found, at paragraph 22, that he accepted the respondent's evidence that she gave the valuation to the respondent to note death. The respondent at no time said she gave a valuation to the appellant to note the death of her husband on the certificate of title.

[89] The learned judge also considered the cardholder agreement to be significant. At paragraph 18 of his judgment he said:

> "... On the 22nd of September 2004 at the defendant's request the parties executed the NCB merchant agreement to enable her to get a credit card machine for the business. He was always willing to assist the defendant. He did all of this for the defendant's benefit yet during this period he did not insist or demand that she execute the mortgage that was very important to him..."

The evidence of the appellant was that the respondent had sent back the mortgage documents and refused to sign asking him to allow her to pay the debt instead. He said

that when she was to acquire the credit card machine for Fashion Café, two signatures were required by the bank and he saw no harm in signing. In any event, as he said, in September 2004 the respondent was still making payments to him and he still had her certificate of title and the 25% stake in Fashion Café.

e) Grounds 11, 12, 13, 14, 17 and 19- The conduct of the parties

[90] Counsel for the appellant argued that the learned judge erred in coming to the conclusion that the monies were paid over as a gift to the respondent as he did not consider the claim made by the appellant and did not properly consider the case put to him by the respondent because if he had he would have considered all these factors and come to a conclusion in favour of the appellant.

[91] Counsel also complained that the learned judge did not take account of, or at worst, misunderstood the evidence regarding the appellant's conduct in taking a share in Fashion Café. The appellant's evidence was that he became a shareholder to secure his advance of $500,000.00 to cover the bill at Pings Fabrics. Counsel argued that the proportionate share of the holdings in the company is supportive of the fact. Counsel pointed out that the shares were held in proportion of 75% to the respondent and 25% to the appellant. Counsel argued that this demonstrates that the appellant wanted no more than to secure his advance of the $500,000.00.

[92] On the other hand, counsel pointed to the fact that the appellant had furnished the full purchase price of the business bought by the respondent to the sum of $2,000,000.00 but wanted no part of the business at that time. When he did finally take

a share of the business it was only 25%, which counsel noted, was commensurate with the $500,000.00. Counsel submitted that the learned trial judge failed to consider the question of why the appellant would gift $3,000,000.00 but seek to secure a mere $500,000.00.Counsel also pointed to the fact that the business was bought in the name of the respondent and her son. The lease was in her name, the landlord's letter was addressed to her and the sale agreement was signed by her and her son. Up to July 27, 2004,the appellant was not in the picture.

[93] I take the view that the learned judge was indeed in error in the view he took of the appellant's conduct in this regard. There was ample evidence that the appellant intended his actions to have legal consequence. In considering that the appellant had given the respondent $3,000,000.00 to purchase Fashion Café, $2,000,000.00 of which was directly used for the purchase and with no initial interest in the business, the learned judge should have asked himself why then, having changed his mind and on incorporating the business, did he take such a small percentage of the share when he had put up the full purchase price of the business, plus all the funds to buy the stock and pay the rental on the premises?

[94] Also, the learned judge failed to ask himself why the appellant would give the respondent $1,000,000.00 to buy liquor, then turn around and accept payments from the respondent out of the said funds, as reimbursement for the purchase of the liquor for the respondent. Why not just buy the liquor then give the balance remaining to the respondent, if it was intended to be a gift? Additionally, the learned judge failed to take

account of the fact that, although the respondent was in financial difficulties with her existing business and the new business costs $2,000,000.00 which was wholly financed from the money given to her by the appellant, she was able to pay him back $265,000.00 of that money the day after receiving it and the same day she made a down payment of $1,500,000.00 on Fashion Café. She also paid the appellant a cheque of $240,000.00 on 29 June, 2004. The balance of $500,000.00 was paid on the 30 June 2004, before she received the remaining $1,000,000.00 from the appellant on 1 July 2004. There is no evidence of the source of those additional sums. Also, the learned judge failed to consider why she would be ordering material from Pings Fabric for the failing manufacturing business, when she was just about to start a new business.

[95] With respect to the certificate of title, the evidence was that the respondent's husband died in 2003. The appellant was given the title in 2004. The respondent made a lost title application in 2006 to the Registrar of Titles and noted the death of her husband on the new certificate of title thereafter, with the assistance of an attorney-at-law. The appellant's response to her claim that it was given to him to note the death of her husband on the certificate of title is that he is not an attorney. He claims it was handed to him to secure the loan.

[96] In her application for lost title the respondent swore a declaration that after the death of her husband the certificate of title was kept in an attache case and having had reason to use the title she discovered it was not in the attache case and it could not be found. She also claimed that she could not recall the last time she saw it and could not

consciously recall removing it from the attache case. She also swore that it was not pledged as security and that inquiries of relatives and friends showed no one knew anything of its whereabouts and no one had access to it but her. This was in direct contrast to her evidence at trial that she gave it to the appellant and he told her he had given it back to her but she was unable to locate it. Therefore, the learned trial judge's finding that the respondent's version was consistent cannot be sustained on the evidence.

[97] Counsel argued that the acts relied on by the respondent as evidence of joint venture do not establish that there was a joint venture agreement. Counsel for the appellant pointed out that the appellant's evidence was that at the time of the purchase, the appellant had expressly stated that he did not wish to be involved with the business. Counsel noted that the defence of a joint venture agreement was inconsistent with the defence that it was a gift. Counsel also pointed out that the respondent's counsel in the court below did not suggest the existence of a joint venture to the appellant and the respondent's evidence of how the business was acquired did not suggest that there was a joint venture agreement.

[98] The respondent relied on the fact that the appellant signed documents so that she could acquire a credit card machine as further evidence that they were in a joint venture. The appellant gave evidence that she had told him a second signature was required and he saw no harm in doing so. He indicated he took no part in the business other than to secure his shares until he was repaid in full.

[99] The respondent pleaded the existence of a joint venture as an alternative defence to the appellant's claim. However, I agree with counsel for the appellant that this was an inconsistent defence. The payment could not be both a gift and a joint venture; they are inconsistent with each other. A gift is something you give freely and walk away. A joint venture is a business partnership. There is no evidence that at the time the money was handed over there was any intention for there to be a business partnership. On the respondent's own evidence at the time the monies were paid to her the appellant wanted no part of the business. The appellant only became a shareholder in the business after the $3,000,000.00 was paid over and after he advanced the $500,000.00.

[100] The learned judge did not consider the inconsistency in the respondent's defence at all. If he had, he would have had to determine whether, if there was in fact an agreement, it was a joint venture as claimed by the respondent or an agreement for a loan as claimed by the appellant. In failing to assess the case in this way based on the defence of joint venture, he fell into error.

Ground 18-Was the learned judge wrong when he discharged the caveat

[101] Counsel for the appellant argued that in wrongfully finding that there was no contract the learned judge fell into further error in discharging the caveat over the property. Counsel argued that the learned trial judge made findings which were not supported by the evidence and consequently fell into error when he found favour with respondent's case. I fear I must agree.

Disposition

[102] I am mindful that this is a case which was entirely based on the judge's assessment of the credibility of the parties. This court is always slow to interfere with the verdict of a trial judge in such circumstances. However, I believe that this is one of the rare cases where the court ought to do so. I am guided by the approach of this court in the case of **Moore v Rahman** where Patterson JA (AG) noted:

> "Where there is an appeal from the trial judge's verdict based on his assessment of the credibility of witnesses that he has seen and heard, an appellate court "in order to reverse must not merely entertain doubts whether the decision below is right, but be convinced that it is wrong" (per Lord Kingsdown in *Bland v Ross, the Julia* (1980) 14 Moo P.C.C. 210 at p. 235) Lord Wright, in his opinion in *Powell v Streatham Manor Nursing Home* (supra) at page 67, quoted Lord Sumner's views as to "the proper questions which the Appellate Court should propound to itself in considering the conclusions of fact of the trial judge.
>
> i. Does it appear from the President's judgement [sic] that he made full judicial use of the opportunity given him by hearing the viva voce evidence?
>
> ii. Was there any evidence before him, affecting the relative credibility of the witnesses, which would make the exercise of his critical faculties in judging the demeanour of the witnesses a useful and necessary operation?
>
> iii. Is there any glaring improbability about the story accepted, sufficient in itself to constitute "a governing fact which in relation to others has created a wrong impression" or any specific misunderstanding or disregard of a material fact or any 'extreme or overwhelming pressure' that has had the same effect?"

[103] I find that I am entirely in agreement with counsel for the appellant when she submitted that the learned judge did not make a fair assessment of the case and made findings which were not supported by the evidence. Although the learned judge's decision was based on his assessment of the parties' credibility, in assessing the conflicts in the appellant's evidence, he failed to objectively assess the documentary evidence before him and as a consequence of his determination that the appellant's case was based on a claim for equitable mortgage supported by part performance, his findings in that regard were flawed. Certainly, if the learned judge had not misunderstood the purpose for which the letter of 29 November, 2004 was tendered into evidence and had given it correct regard, he may have concluded that it gave the lie to the respondent's assertion that it was only after the relationship broke up that the appellant began demanding his money back.

[104] The learned judge also ignored the glaring improbabilities in the respondent's evidence regarding the payments for liquor and, in my view, paid far more attention than warranted to the appellant's statements to the Registrar of Titles in his application for the caveat, whilst failing to give the same assessment to the respondent's statement to the Registrar of Titles in her lost title application.

[105] I would also venture to say that, looked at objectively, there was sufficient evidence pointing to a commercial agreement between the appellant and the respondent and the learned trial judge took the wrong approach in law when he failed to apply the presumption that such agreements are intended to have legal

consequences. The onus of rebutting that presumption was on the respondent. The learned judge was therefore wrong when he found that the monies were paid over as a result of a "dalliance" in a case where all the evidence was against such a finding. As a result the learned judge, in my view, erred when he found in favour of the respondent.

[106] I take the view that the principles in **Moore v Rahman** are applicable and this court would therefore be obliged to interfere with the trial judge's decision based on the circumstances. In the premises, I have come to the conclusion that the judgment in favour of the respondent on the claim and counterclaim made in the court below must be set aside. I would enter judgment for the appellant on the claim and counterclaim, with costs to the appellant to be agreed or taxed.

MORRISON P

ORDER

Appeal allowed. The judgment in favour of the respondent on the claim and counterclaim made in the court below is set aside. Judgment entered for the appellant on the claim and counterclaim. Costs to the appellant to be agreed or taxed.