JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 119/97

BEFORE: THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE PANTON, J.A. (Ag.)

BETWEEN	GEORGE DUNKLEY	APPELLANT
AND	SEYMOUR CAMPBELL	
AND	HAZEL CAMPBELL	RESPONDENTS

Dennis Morrison, Q.C. and Carlton Williams, instructed by Williams, McKoy and Palmer, for the appellant

B. St. Michael Hylton, Q.C., instructed by Myers, Fletcher & Gordon, for the respondents

July 22, 23 and November 3, 1999

WALKER, J.A.:

This appeal is directed at a judgment of McCalla, J. (Ag.) (as she then was) whereby the learned trial judge ordered that:

> "The contract made in August 1983 be rescinded and a return of the deposit of TEN THOUSAND DOLLARS ($10,000.00) to the Defendant with interest thereon at the rate of 10% per annum from 1st January, 1984, to today and an award made to the Defendant of half the costs that would have been agreed or taxed on the

> successful prosecution of his Counter-claim. The Defendant must deliver up possession of premises within 6 months of the date of the refund of the deposit."

At the trial, a document purporting to be a copy of a contract for the sale of land entered into between the parties hereto was admitted in evidence as exhibit 1. The validity of this contract is disputed, and it is agreed by counsel appearing on both sides that the central issue on this appeal is whether the document, exhibit 1, evidences a sufficient memorandum of an agreement between the parties for purposes of the Statute of Frauds for the sale to the appellant of the relevant parcel of land of which the respondents, who are husband and wife, were proprietors as joint tenants. More specifically, the question to be determined on this appeal is whether the principal finding of the learned trial judge that the disputed agreement for sale was not, in fact, signed by the first respondent is sustainable on the evidence that was adduced before the court.

The Relevant Evidence

The appellant's case was supported by three witnesses as to the identity of the signatories to the disputed agreement for sale. Firstly, the appellant, himself, testified that he signed the original of exhibit 1 on August 6, 1983. This he did in the office of his attorney, Mr. Diggs-White. Also signing the document at this time were, he said, the appellant's brother, Delroy Dunkley, the second respondent and a gentleman whom she introduced to the appellant as her husband. After the document was signed, the appellant paid a deposit of $10,000 which is not

disputed. Thereafter, the appellant said, he was put in possession of the subject property by both respondents. The balance of the purchase price of $14,800 was payable on completion of the transaction. When asked to identify the first respondent in court, the appellant could only say that the first respondent (who was then present in the court room) resembled the same man who had signed the agreement for sale in the attorney's office. Secondly, Leslie Diggs-White, attorney-at-law, gave evidence that he prepared the relevant agreement for sale which was duly executed by the parties on the date and at the place as testified to by the appellant. He did not know either of the respondents before. It was the second respondent who introduced the male person who accompanied her by saying, "this is my husband." Mr. Diggs-White denied that at any time he handed to the second respondent a sealed envelope in which was enclosed the original agreement for sale with instructions that she should take the document to England there to be signed by the first respondent. Some three to four years later, the witness said, he saw Mrs. Campbell again. On this occasion Mrs. Campbell came to his office "almost in tears" stating that she had sold her property too cheaply, that her husband, was "about taking her head off" for so doing, and that she would "do anything in the world" to reverse the sale since she had another buyer who was willing to pay more for the property. Mr. Diggs-White said he told Mrs. Campbell that she had already entered into a binding contract for the sale of the property and he could do nothing to help her. When asked to identify the first respondent in

court the judge's notes of evidence disclose the following interchange between counsel and Mr. Diggs-White:

> "Q: Before July, 1983 did you know Mr. Seymour Campbell?
>
> Ans: No.
>
> Q: Do you know him today?
>
> Ans: I see a gentleman that looks like him. I don't see him so don't know if I recognise him, saw man who looks like man who came that day.
>
> Q: Do you know Seymour Campbell?
>
> Ans: Can't be one hundred percent sure I can't know him after fourteen (14) years. Person seen with Mrs. H. Campbell I would be prepared to say looks like man and if I can't I would say so. Don't know if I could identify unless I see the person. Hypothetical, can't answer. Not sure I could identify person I saw with Mrs. Hazel Campbell.
>
> Q: Look around courtroom and see if you see person.
>
> Ans: Man in blue in courtroom. Can never forget look on his face when he quarrelling with Mrs. Campbell. That man in blue, same sort of man (points to Seymour Campbell sitting in court)."

Subsequently, the learned trial judge recorded the proceedings as follows:

> "Suggesting you did not see Seymour Campbell in July or August 1983.
>
> Ans: I saw gentleman purporting to be Mr. Seymour Campbell. Two times to inspect - one time to sign and time went for drink.

> Suggesting you knew Mr. Seymour Campbell was not there.
>
> Ans: Nothing like that. The gentleman came and said he is Mr. Seymour Campbell. Lady said this is my husband. I didn't know them before."

At another stage of the cross-examination of this witness, the judge's record reads:

> "Suggesting Mrs. Campbell never introduced gentleman as husband.
>
> Suggesting Mr. Seymour Campbell did not sign any document in your presence in July or August 1993.
>
> Ans: Gentleman who was introduced to me as Mr. Seymour Campbell signed document in my office."

Also giving evidence on behalf of the appellant was Doreen Campbell who said that she knew both respondents. In 1983 she became a tenant of premises owned by the respondents at Palmer's Cross in Clarendon. Her husband was a cousin of the first respondent. In about mid-July, 1983, she saw the first respondent in Jamaica. At that time both respondents came into her shop along with the appellant. She observed the trio inspecting the shop and conversing with each other. After inspecting the premises, the respondents introduced the appellant as the new prospective owner of those premises. Subsequently, on the eve of the respondents returning to England, both respondents, Mr. and Mrs. Diggs-White, and the appellant stopped at her bar to have a drink. On this occasion the

respondents reminded her that the appellant would be the new owner of the premises.

The respondents' case on this aspect of the matter consisted, firstly, of the evidence of the second respondent. Mrs. Campbell testified that she was married to the first respondent and had lived in England for 40 years. In or about August, 1983, she visited Jamaica to attend the funeral of her father. While in Jamaica at this time she commenced negotiations with the appellant for the sale to him of a parcel of land. Pursuant to these negotiations, the appellant took her to an attorney, Mr. Diggs-White, who "write out a paper in his hand" in a bar where they all met. This Mr. Diggs-White did after taking from her particulars relating to her husband who was at that time in England. Subsequently, she visited Mr. Diggs-White's office where she signed a blank paper which the attorney gave to her with instructions to have the document signed by her husband before a lawyer in England. When shown exhibit 1 and asked whether she saw her signature on that document, the witness is recorded as having answered:

> "I am a little bit suspicious about this. I don't think this is my handwriting."

Later on when it was suggested to the witness that she did, in fact, sign exhibit 1, she replied, "Not at all." Still later on in the course of cross-examination when asked again about the signature which purported to be hers, the witness is recorded as saying:

> "It's a bit swaggy and can't say if it's my signature."

Mrs. Campbell denied that she went to Mr. Diggs-White's office with a gentleman whom she introduced as her husband. In his testimony, the first respondent, Seymour Campbell, gave evidence that he was the husband of the second respondent and that both himself and his wife resided in England. He confirmed that Mrs. Campbell came to Jamaica in 1983 to attend the funeral of her father. He did not visit Jamaica in that year. Upon Mrs. Campbell's return to England she handed him the original of exhibit 1, the copy document then shown to him in court. He did not sign the original of that document, nor did he give Mrs. Campbell permission to sell any land. The witness said that he recognised his wife's signature on exhibit 1 "definitely" and added that his wife had told him that she had signed "a blank paper." The witness testified that he gave specimens of his signature to his lawyers in England. Having been identified by Mr. Campbell, these specimen signatures were admitted in evidence as exhibit 2. Then the witness said that he came to Jamaica on January 21, 1996, and afterwards went to see his attorney, Mr. Codlin, to whom he gave another set of specimen signatures. This latter set of specimen signatures was duly identified by the witness and admitted in evidence as exhibit 3.

Mr. Campbell was questioned as to whether he was the holder of a valid passport in 1983. At first he said he was not, but later on admitted that he was, indeed, the holder of a valid British passport at that time. The witness said that for

a period of ten years between 1975 and 1985 he had been without a Jamaican passport.

Carl Major, Senior Superintendent of Police, gave evidence on behalf of the respondents. Senior Superintendent Major, having established his expertise in the field of handwriting, and having testified as to his examination of exhibits 1, 2 and 3, opined that the signature "Seymour Campbell" appearing on exhibit 1 was of a different authorship to the signatures of the same name appearing on exhibits 2 and 3. In other words, said the witness, his examination of these three exhibits led him to a conclusion that the signature on exhibit 1, on the one hand, and the signatures made on exhibits 2 and 3, on the other hand, were written by different individuals.

The Relevant Findings of Fact

As to the execution of the document, exhibit 1, the learned trial judge recorded her findings as follows:

> "In order to pronounce on the validity of the signed agreement the circumstances surrounding its execution must be carefully examined. In this regard the Court has to consider the evidence as to whether Mr. Campbell was in Jamaica in 1983 and whether he signed the purported agreement. The court must also determine the circumstances in which his signature appears to be affixed to Exhibit 1. He first claimed that in 1983 he possessed a valid passport but subsequently testified to the contrary.
>
> I find it difficult to believe that Mr. Campbell was genuinely in error as to his possession in 1983 of a valid passport.

I accept the evidence of Mrs. Doreen Campbell that she saw Mr. Campbell in Jamaica in 1981 and again in 1983. I accept her evidence that she is not mistaken as he it was who invited her to accept a tenancy at his shop but as to Mr. Campbell's attendance on the premises in 1983 as she testified, I make no finding adverse to him as this was not put to him with specific reference to her.

The next question to be determined is whether the Plaintiffs executed the agreement for sale at the office of Mr. Diggs-White. If, as the Plaintiffs contend, a sealed brown envelope was opened by Mr. Campbell in the presence of his wife and it contained an agreement for sale it is hardly conceivable that Mrs. Campbell had in fact signed a blank piece of paper in the attorney's office.

If, as the Defendant and Mr. Diggs-White have testified, the document was executed there by both Plaintiffs, Mr. Diggs-White would certainly not have addressed Exhibit 7 to Mrs. Campbell only. I am fortified in this view by the pleadings at paragraph 1 of the Defence to wit:

> '...the 2nd Plaintiff representing that she was acting on behalf of the first Plaintiff and herself agreed to sell...'

And paragraph 2 to wit:

> '...that the agreement was prepared in accordance with instructions jointly given to Mr. Diggs-White by the Second Plaintiff and the Defendant.'

This supports the view that the First Plaintiff was not present. For these reasons I reject the testimony of Mr. Diggs-White as also that of the defendant as untruthful."

The Relevant Law

The guiding principle to be followed by an appellate court in reviewing the findings of a trial judge on questions of fact is to be found by reference to the decision of the House of Lords in ***Watt or Thomas v. Thomas*** (1947) A.C. 484. That principle was clearly stated by Lord Macmillan (at pages 490-491) in the following terms:

> "The appellate court has before it only the printed record of the evidence. Were that the whole evidence it might be said that the appellate judges were entitled and qualified to reach their own conclusion upon the case. But it is only part of the evidence. What is lacking is evidence of the demeanour of the witnesses, their candour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial. This assistance the trial judge possesses in reaching his conclusion but it is not available to the appellate court. So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong. But I need not pursue this topic which has been so fully expounded in many cases in this House and to-day again by my noble and learned friends who have preceded me. It is sufficient for me to say that, agreeing with Lord Thankerton in all that he has said, I do r ıd in the opinion of Lord

> Mackay, which embodies the views of the Second Division of the Court of Session or in the criticism to which the judgment of the Lord Ordinary was subjected at your Lordships' bar any adequate justification for reversing the decision which the Lord Ordinary reached. If the case on the printed evidence leaves the facts in balance, as it may be fairly said to do, then the rule enunciated in this House applies and brings the balance down on the side of the trial judge."

Again (at page 487) Lord Thankerton stated the principle in this way:

> "I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;
>
> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

The point to be made here is that in every case it is the trial judge who would have seen and heard all the witnesses and who would have been in a position to observe the demeanour of the witnesses in a way that an appellate court

is not able to do and who, ultimately, would have been in the best position to assess the credibility of those witnesses.

The principle enunciated in ***Watt's*** case (supra) has been often cited with approval and followed by this court, see for example ***Powell v. Hibbert*** (1963) 6 W.I.R. 43; ***Young v. Stone and Webster Engineering Ltd.*** (1964) 9 J.L.R. 44. In the instant case, the learned trial judge found that the first respondent did not, himself, sign the original of the document, exhibit 1. In so finding, she rejected the evidence of the appellant and his witness, Mr. Diggs-White, and accepted the evidence of both respondents and their witness, Senior Superintendent Major. She made this finding, notwithstanding the fact that she accepted the evidence of the appellant's witness, Doreen Campbell, as to the presence of the first respondent in Jamaica in 1983 while rejecting the evidence of both respondents on that issue. At first glance, such a finding might appear to be inherently contradictory and, therefore, unreasonable. However, we do not think that this is so. It was always open to the judge to conclude, as she obviously did, that none of the witnesses on either side had been entirely honest with the court in giving evidence. She found that the first respondent was untruthful in denying that he was in Jamaica in 1983, but truthful when he swore that he was not present in Mr. Diggs-White's office and did not sign the disputed agreement for sale. This was a distinct possibility and a finding of fact that was open to the court. Quite significantly, and as it appears from the record, the appellant was unable to positively identify the first

respondent in court, as was the case with his witness, Mr. Diggs-White. Where the latter is concerned, counsel for the appellant submitted that the trial judge fell into error in comparing his evidence to the appellant's pleadings and not to the other evidence in the case as she should have done. We found no merit in this submission. In our view, while it is undoubtedly true to say that the judge did relate Mr. Diggs-White's testimony to the substance of the appellant's pleadings, she certainly did not do so to the exclusion of the rest of the evidence in the case. Hence her thoughts expressed in the words "I am fortified in this view". To our way of thinking, the judge was here saying no more than that, having related Mr. Diggs-White's evidence to the other evidence in the case, the tenor and substance of the appellant's pleadings, with which the evidence adduced on behalf of the appellant did not accord, when taken into account strengthened her in the conclusion to which she had come. In our view, it was entirely proper for the judge to have assessed the credibility of the witness in this way. In the final analysis, we think that the findings of the learned trial judge are eminently sustainable on the evidence that was adduced before her. Accordingly, we consider that we ought not to differ from her conclusions, and we do not do so.

In the result, therefore, we would dismiss this appeal and affirm the judgment of the court below. Costs to the respondents to be taxed if not agreed.