JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 133/2002

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE K. HARRISON, J.A.

BETWEEN	**CLARENCE G. ROYES**	**PLAINTIFF/APPELLANT**
A N D	**CARLTON C. CAMPBELL**	**DEFENDANT/1ST RESPONDENT**
A N D	**YVONNE A. CAMPBELL**	**RESPONDENT/2ND RESPONDENT**

Hilary Phillips Q.C., Nesta Claire Smith and Marsha Smith instructed by **Ernest Smith** & Company for the appellant

Carol Davis for the 1st Respondent

October 12, 13, 14, 15, 19, 20, 26, 27, 2004 and November 3, 2005

FORTE, P:

I have read in draft the judgment of my brother Smith J.A. and I agree. The issues have been comprehensively dealt with and the resolutions are in keeping with my own opinion. Consequently, I have nothing to add.

SMITH, J.A.

This is an appeal from an Order made on December 13, 2002 by Harris, J. dismissing the appellant's claim against the respondents for a declaration that he has a beneficial interest in property situate at 15

Lindsay Crescent, Kingston 10 in the parish of Saint Andrew, and registered at Volume 628 Folio 75 of the Register Book of Titles. By the said order Harris, J. also gave judgment for the first respondent on his counterclaim for an account of rent, an order of possession and mesne profits.

Background

The appellant, Mr. Clarence Royes, and the first respondent, Mr. Carlton Campbell were friends of long standing. They were classmates at the St. Andrew Technical School in the early part of the 1960s. In the 1970s they worked together at the Jamaica Industrial Development Corporation. They were not only close friends but during the 1970s, and 1980s their relationship was like that of brothers. The appellant, in the late 70s, guaranteed a student loan for the first respondent and assisted with his accommodation in Miami, when he was a student pilot. Their friendship ended in or about 1989 when differences over their respective interests in the property at Lindsay Crescent arose.

15 Lindsay Crescent

In November of 1981, 15 Lindsay Crescent ("the property") was purchased from Kathleen Barton and registered in the names of the first and second respondents, who were then husband and wife. At the time the appellant was a businessman and an engineer. The first respondent was a businessman and a pilot and the second respondent a real estate agent. There is a conflict of evidence as to the circumstances of the

purchase of the property. According to the appellant, there was an oral agreement between himself and the respondents to purchase the property jointly with the appellant paying one half of the deposit and the respondents together paying the other half.

The first respondent denies the existence of any such agreement. He claims that the property was purchased by the second respondent and himself without any contribution by the appellant.

As said before, the property is registered in the names of the respondents alone. Thus, the legal estate is in the respondents and prima facie the legal estate carries with it the whole beneficial interest. For the appellant to succeed in his claim to a share in the beneficial interest he must show, on a balance of probability, that the registered owners, the respondents, hold the legal estate as trustees for themselves and the appellant. Lord Diplock in **Gissing v. Gissing** [1970] 3 WLR 255 at 267 expressed the legal principle in this way:

> "Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based upon the proposition that the person in whom the legal estate is vested, holds it as trustee on trust to give effect to the beneficial interest of the claimant as cestui que trust."

In the absence of an express trust, the appellant can only succeed in his claim to a beneficial interest in the property if he can establish, on the balance of probability, the existence of a resulting, implied or constructive

trust. He may do so by showing that in all the circumstances it would be inequitable for the legal owners to claim sole beneficial interest. To establish such a trust the appellant must show that there was a common intention that he and the respondents should have beneficial interests in the property, and that he acted to his detriment on the basis of that common intention in the belief that by so acting he would acquire a beneficial interest.

The main issue, therefore, before this Court is whether or not the learned trial judge fell into error in concluding that the appellant had failed to establish his entitlement to a share in the beneficial estate.

The Appellant's Case

The appellant's evidence is to the following effect: Sometime in the 1980s, the first respondent told him that the second respondent, his wife, had a friend who owned property at 15 Lindsay Crescent which she was selling for $60,000.00. The first respondent invited the appellant to join him and his wife in the purchase of the property. The proposal was that the appellant would own 50% of the property and the respondents 50%. The deposit was $15,000.00 The first respondent informed the appellant that he had a friend, at the Royal Bank Trust Company, who could arrange a mortgage for $45,000.00. The appellant agreed to the proposal. In furtherance of this oral agreement he withdrew the sum of $7,500.00 from his account at the Royal Bank. He handed this sum of money, which

represented one-half of the deposit, to the second respondent. This transaction took place at the Royal Bank building on Knutsford Boulevard, which is next door to the Trust Company. The second respondent left for the Trust Company to transact the business.

The intention of the parties was to develop the property by constructing eight (8) studio apartments for sale. To this end a company, Lindsay Court Limited, was incorporated. The appellant and his wife and the respondents signed the Memorandum of Association (Exhibit 1) and the Articles of Association (Exhibit 2). The Certificate of Incorporation was exhibited. A letter (Exhibit 4) addressed to the Registrar of Companies and signed by the first respondent, in which he purports to state the reason for incorporating the company, was relied on by the appellant. I will return to this letter later. The appellant was the managing director of the Company.

In furtherance of this oral agreement the appellant prepared plans for the proposed development of the property (Exhibit 5). He requested and obtained a preliminary budget report for the proposed development from Goldson, Barrett Johnson, Quantity Surveyors, (Exhibit 6). The appellant suggested to the first respondent that they convert the old house on the property into three flats with a view to generating income to assist in the financing of the proposed development. This was agreed. The appellant, at that time, was in the construction business and was a

partner in, and the general manager of Clover Construction Company. He borrowed $13,000.00 from Clover Construction. This amount was disbursed by way of material delivered to the appellant. These materials included blocks, steel and cement. The appellant used these in the conversion of the old house into three self-contained flats. He testified that he got no assistance from the respondents in this endeavour.

In early 1982, the appellant opened an account at the Harbour View branch of the Royal Bank Jamaica Limited ("the Bank") in the name of Lindsay Court Limited ("the Company"). The signatories to the account were the appellant and any one of the directors. Cheques drawn on the account would require the appellant's signature and the signature of one of the other directors.

The parties agreed to borrow $15,000.00 from the Bank in order to furnish the flats. The money was borrowed in the name of the Company. In this regard a promissory note dated October 27, 1982 was signed by the first respondent and the appellant as directors of the Company (Exhibit 7). [This loan with interest was repaid on October 25, 1985 (Exhibit 7(a)].

The loan of $15,000.00 was converted to US dollars and used by the first respondent to purchase three stoves and three refrigerators in Miami for the partial furnishing of the flats. It was agreed that the money collected from the rental of the flats would be used to service the

mortgage and loan payments. Pursuant to this arrangement the appellant instructed the Bank, by letter dated January 18, 1983 (Exhibit 8), to make monthly payments to the Royal Bank Trust by debiting the account of the Company.

The appellant gave evidence of many rental and lease agreements between the Company and various tenants over the years.

At the time of the purchase of the property the respondents had migrated to Miami. The first respondent was working with Air Jamaica. Whenever he was in Jamaica he stayed at the appellant's premises at 35 Stillwell Road. The appellant observed correspondence addressed to the respondents from the Trust Company which made no mention of the appellant. As soon as the first respondent was available the appellant asked him to explain the absence of his name from the document. The first respondent, he said, told him that the property was being purchased from a friend of the second respondent at a reduced price and that, if another name had been included on the agreement, the vendor would have asked for more money. The appellant was not happy with the explanation and contacted his attorney, Mr. K.D. Knight.

During the period 1984 to 1985 the appellant phased out his employment with Clover Construction. He started to work on his own as a building contractor. He converted the garage into an office. He

exhibited a Bill of Quantities in respect of the work done in the modification of the garage (Exhibit 12).

The appellant testified that in November 1983, on his initiative, the parties agreed to sell to one Mr. Biersay a part of the property. The purpose for this sale was to raise funds for the proposed development.

The issue of the appellant's name being added to the title was discussed in 1986. At that time the respondents were divorced and the second respondent had transferred her interest in the property to the first respondent pursuant to a "divorce decree." The parties, according to the appellant, agreed to delay transferring the property into his and the first respondent's names, as they were of the view that it would have complicated the agreement for sale involving Mr. Biersay. This agreement, he said, had already been signed by the respondents and Mr. Biersay (Exhibit 13).

The appellant claimed that he did minor and extensive repairs and maintenance of the property over the years 1982 to 2001. He exhibited detailed Bills of Quantities to substantiate his claim in respect of the work he carried out on the property. After five to six years the appellant discontinued rental of the apartments as it was uneconomical to do so.

In 1992 the appellant and the first respondent again discussed the issue of the appellant's name being added to the title. According to the appellant he reminded the first respondent of his promise to have the

appellant's name added to the title. The first respondent, he said, explained that he had instructed one Caroline Goulbourne to effect the transfer but that this was to no avail. The first respondent was leaving for Saudi Arabia and was expected to be back in Jamaica in three weeks time. He did not return in three weeks. The appellant wrote to remind him of their discussions and proposed that the first respondent sell him his share- see letter dated September 17, 1992 (Exhibit 30). The respondent by letter dated October 17, 1992 (Exhibit 32) scoffed at the appellant's letter and asserted his claim to sole ownership of the property.

The First Respondent's case

The evidence of the first respondent, as summarized in the judgment of the court below, is as follows: The first respondent made an offer to Mrs. Kathleen Barton to purchase the property for $60,000.00. The first deposit of $6,000.00 was paid to the vendor in Miami. A second deposit of $9,000.00 was paid to Mr. K.D. Knight. The Agreement for Sale, signed on the 5th November 1981 by the vendor and the respondents, was tendered in evidence as Exhibit 49. He denied that he had any special arrangement with the vendor with respect to the purchase price. He denied that he received any money from the appellant, or, from the second respondent on the appellant's behalf. He and the second respondent were the exclusive purchasers of the property.

Prior to the purchase of the property he had no discussions with the appellant about its purchase. The object of the purchase, he stated, was to have his family, who was then resident in Miami, return to Jamaica. The second respondent, he said, was reluctant to move into the house immediately and in an effort to avoid vandalism he decided to form Lindsay Courts Limited. Subsequently, he conferred with the appellant who informed him that the house on the property was in need of repairs. The appellant suggested that it could be converted into three flats with minimum input and estimated the cost to be $15,000.00. This sum was borrowed by the Company to carry out the remodeling exercise. It was agreed that the appellant would be the manager for the flats and would occupy the garage as an office in exchange for the first respondent's occupation of a room in the appellant's house at Stillwell Road.

He recalled that prior to the signing of the Agreement of Sale, whenever he was in Jamaica, he stayed at his cousin's home at 1 Acadia Circle, Kingston 8.

After the agreement he continued so to do until 1984 when he left Air Jamaica. He started to stay at the appellant's house in late 1984. The appellant, he said, informed him that the flats were rented for $1,000.00 to $1,200.00 per unit per month.

He claimed that on each occasion when he requested an account of income and disbursements of the rental the appellant gave excuses.

The appellant never discussed the matter of repairs with him. The only repairs he knew of were those done consequent on the damage caused by hurricane Gilbert in 1988. In any event, he said, a claim was made in respect of the damage done by the hurricane and the proceeds of the claim were utilized by the appellant.

He denied that the appellant had any discussion with him concerning the omission of his name from the document. He made no promise to have the appellant's name placed on the title.

The Judgment of the Court Below

The learned trial judge after an analysis of the relevant law and the evidence, held (page 21 of judgment):

> "The plaintiff (now appellant) has not established that he had made any contributions towards the purchase of the property. Additionally, there were no events occurring at the time of, or even subsequent to the purchase of the property, from which it can be concluded that he suffered any deprivation in the belief that he would have acquired an interest therein. There is nothing to show the existence of an agreement between the plaintiff and defendants to warrant the establishment of a trust in his favour which would grant to him an entitlement to an interest in the property. His claim must of necessity fail."

The learned judge accordingly gave judgment for the respondents, ordered the appellant to deliver up the property to the respondents and to pay to him the sum $4,499,122.00 as mesne profits with interest thereon.

Grounds of Appeal

Four grounds of appeal were filed on behalf of the appellant. These were:

"(1) The evidence on the whole supports the appellant's case that the judgment of the learned trial judge is unreasonable in light of the evidence and is wrong in law.

(2) The learned trial judge erred in finding that there was no agreement between the plaintiff and the defendants to purchase the property at 15 Lindsay Crescent jointly.

(3) The learned trial judge erred in finding that it was highly ludicrous that the appellant discontinued rental of the flats for approximately 5 – 6 years as it was uneconomical to do so as there was evidence to substantiate the same and there was no challenge to this evidence by the respondent.

(4) The learned judge erred in awarding mesne profits to the respondent on the basis that the appellant was a tenant-at-will subsequent to the Notice to Quit in April 1995. The appellant's occupation of 15 Lindsay Crescent was never in pursuance of any tenancy agreement, but pursuant to his joint ownership of the premises."

Grounds 1 and 2 obviously overlap and may conveniently be dealt with together.

Submissions on Grounds 1 and 2

The submissions of Miss Phillips Q.C, for the appellant, may be summarized as follows:

(i) The evidence, on the whole, supports the appellant's case that there was an agreement between the parties. Although there is no written agreement the conduct of the parties is sufficiently clear and cogent to show what the agreement was. The law of trust therefore provides the avenue to protect the true character of the transaction so as not to defeat the beneficial interest of the party to the transaction.

(ii) The courts will always lean to uphold a constructive trust or proprietary estoppel when to do otherwise would be unconscionable – See **Yaxley v. Gotts & Anor.** [2000] 1 All ER 711.

(iii) The learned judge has entirely ignored the contribution of the appellant in the development of the property which originally housed an old building. It now has three (3) flats, refurbished garage and is surrounded by solid concrete wall. The value has increased substantially.

(iv) In all the circumstances it was unconscionable for the first respondent to claim that the appellant was a tenant whose tenancy could be determined by Notice to Quit giving one (1)

month's notice and thereafter to call the appellant a trespasser.

(v) The learned trial judge has not taken into account the numerous items of correspondence and documentary evidence placed before the Court which specifically point to the fact that an agreement existed between the parties to purchase and develop the property. The learned judge, having not canvassed the evidence in detail, her reasons are therefore flawed and the matter is therefore at large for the appellate Court – See **Union Bank of Jamaica Limited v. Yap** (2002) 60 W.I.R. 342.

(vi) Where, as in the instant case, the issues are essentially ones of fact and the decision of the trial judge would have depended on both her assessment and, interpretation of the oral evidence and all material placed before the court, the appellate court will not interfere unless the trial court had come to a conclusion that was plainly wrong – See **Watt v. Thomas** [1947] A.C. 484; **Industrial Chemical Company (Jamaica) Limited v. Ellis** (1986) 35 WIR 303 and **Union Bank of Jamaica Ltd. v. Dalton Yap** (supra).

(vii) The conclusion of the learned trial judge was plainly wrong in that, among other things:

a) The learned trial judge failed to consider the effect of all the evidence in the case particularly that which was consistent only with an agreement existing between the parties to purchase and develop the property.

b) The learned trial judge failed to consider the inconsistencies and unreasonableness in the first respondent's evidence as to how the sale of land proceeded.

c) The learned trial judge erred in concluding that no benefit should accrue to the appellant on the basis of mortgage payments made to the bank by Lindsay Courts Limited, the payments not having been made by the appellant personally bearing in mind evidence of the manner in which the operation of Lindsay Courts Limited was conducted.

d) The learned trial judge erred in concluding that the appellant would have gone through all the effort such as preparing plans for the proposed construction of apartments, obtaining quantity surveyors report and securing conditional building approval from the KSAC without the knowledge, consent and approval of the respondent and just on the basis solely of being manager

of the property and not on the basis of having a beneficial interest in the same.

Miss Davis, for the first respondent, submitted that the learned judge applied the correct legal principles to the issue of a constructive trust. She contended that the main issue for determination was whether or not there was an agreement between the parties that the appellant would have a one-half share in the property. This is a question of fact. Having seen and heard the witnesses, the trial judge concluded that there was no agreement as alleged by the appellant. This was an issue that had to be determined largely by an assessment of the oral evidence of the parties, though there were some documents that the trial judge was required to consider. In the absence of any statement of account the appellant, she argued, cannot establish that there was any deficit between the amounts collected for rental and the expenses incurred in the management of the property. The findings of the trial judge should be disturbed only if they were "plainly wrong" and in the instant case this is not so.

Further, she submitted, where there was a situation such that the decision could go either way, then the decision of the trial judge was of "paramount importance." She agrees that where a case turns on the construction of a document, the appellate court may interfere with the decision of the trial judge since the latter holds no particular advantage in such a situation. Counsel for the respondent then proceeded to analyse

the oral and documentary evidence, and submitted that the trial judge was right in concluding that there was no agreement between the parties that the appellant would own half of the beneficial interest in the property. If the appellant had truly agreed to purchase the property jointly with the respondent, he would have ensured that a caveat was lodged to protect his interest. It could be inferred from the absence of the caveat that there was no such agreement.

Both counsel agree that the critical issue before the trial judge was whether or not there was an agreement as alleged by the appellant. Before addressing this issue, I will comment briefly on the role of the appellate court.

The Appellate Approach

Rule 1.16(1) of the Court of Appeal Rules states that an appeal shall be by way of rehearing. But this does not mean "a rehearing in the fullest sense of the word" because, for example, the Court has never exercised its discretion afresh unless and until it had held that the judge had exercised his discretion wrongly. Also, the Court does not hear the oral evidence again. Thus, although expressed to be by way of rehearing, it is very much an appeal by way of review of the decision of the trial judge – see dicta of Clarke, L.J. in **Assicurazioni Generali SpA v. Arab Insurance Group** [2003] 1 W.L.R. 577 at 579 para. 11 and **Lascelles Chin v Audrey**

Chin Privy Council Appeal No. 61 of 1999 delivered 12th February, 2001 at para. 14.

It is now an established principle that in cases in which the Court is asked to reverse a judge's findings of fact, which depend upon his view of the credibility of the witnesses, the Court will only do so if satisfied that the judge was "plainly wrong."

In **Watt v. Thomas** (supra) at 487-8 Lord Thankerton stated the principle thus:

> "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."

Lord MacMillan emphasised the point that the printed record was only part of the evidence. What was lacking, he said, was "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." Lord MacMillan said that when a decision either way may seem equally open, "then the decision of the trial judge, who has enjoyed advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed." He went on to say at page 491:

> "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 completely wrong."

In **Green v Green** [2003] U.K. PC 39 their Lordships said that "the appellate court must bear in mind the observation of Lord Fraser of Tullybelton in **Chow Yee Wah v. Choo Ah Pat** (1978) 2 MJL 41, 42." In that case Lord Fraser observed that "when Lord Thankerton referred in **Watt v Thomas** to "the printed evidence"... he was referring to a transcript of the verbatim shorthand record of the evidence, and that it was obvious that the disadvantage under which an appellate court labours in weighing evidence is even greater where all it has before it is the judge's notes of evidence and has to rely on such an incomplete record."

Indeed, a long line of cases speak to the paramountcy of the decision of the trial judge where the credibility of the witnesses is challenged on appeal. However, the position is more complex where the judge reaches his/her conclusion on primary fact as a result partly of the view he/she formed of the oral evidence and partly from an analysis of documentary evidence (as is the situation in the instant case). There are also the cases where the judge makes findings of primary fact based almost entirely on documentary evidence.

Some findings of primary fact will be the result of direct evidence, whereas others will depend upon inference from direct evidence of such facts – see the **Arab Insurance Group** case (supra) at paragraph 14. At paragraph 15 ibidem Clarke, L.J. stated what in his view the approach of the Court should be in such circumstances:

> "In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater the advantage the more reluctant the appellate court should be to interfere."

Sir Christopher Staughton concurred with the opinion expressed by Clarke, L.J. Ward L.J. did not disagree, however, he "would pose the test for deciding whether a finding of fact was against the evidence to be whether that finding by the trial judge exceeded the generous ambit

within which reasonable disagreement about the conclusion to be drawn from the evidence is possible."

Clarke, L.J. went on to say (para. 16):

> "Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way."

In my judgment, the approach suggested by Clarke, L.J. is correct in principle. Clearly, the approach of the Court should depend upon the nature of the issues or the findings under attack. The authorities seem to establish the following principles:

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

2. In **Chin v Chin** (supra) para. 14 their Lordships advised that an appellate court, in exercising its function of review, can "within well recognized parameters, correct factual findings made below. But, where the necessary factual findings have not been made below and the material on which to make these findings is absent, an appellate court ought not, except perhaps with the consent of the parties, itself embark on the fact finding exercise. It should remit the case for a re-hearing below."
3. In an appeal where the issues involve findings of primary facts based mainly on documentary evidence the trial judge will have little if any advantage over the appellate court. Accordingly, the Court of Appeal, which has the power to draw any inference of fact it considers to be justified, may more readily interfere with the findings of the trial judge – See Rule 1.,16(4).
4. Where the issues on appeal involve findings of primary facts based partly on the view the trial judge formed of the oral evidence and partly on an analysis of documents, the approach of the appellate court will depend upon the extent to which the trial judge has an advantage over the appellate court. The greater the advantage of the trial judge the more reluctant the appellate court should be to interfere.

5. Where the trial judge's acceptance of the evidence of A over the contrasted evidence of B is due to inferences from other conclusions reached by the judge rather than from an unfavourable view of B's veracity, an appellate court may examine the grounds of these other conclusions and the inferences drawn from them. If the appellate court is convinced that these inferences are erroneous and that the rejection of B's evidence was due to an error, it may interfere with the trial judge's decision – See Viscount Simon's speech in **Watt v Thomas** (supra).

I now turn to address the critical issue in the light of the foregoing.

Was there an agreement between the appellant and the respondents?

The appellant claims that he and the respondents decided to purchase the property as joint owners . The appellant said that, pursuant to the agreement, he gave the second respondent $7,500.00 which represented one-half of the deposit. The balance of $45,000.00 was obtained through a mortgage.

The first respondent denied that there was an agreement that he, the appellant, and the second respondent should jointly purchase the property. However, the first respondent conceded that there was an oral agreement between them for the appellant to operate his construction business from the garage when he left Clover Construction (page 107 of Record). Thus the parties have testified to two different agreements. The

learned trial judge found that there was no agreement between the parties to "warrant the establishment of a trust" in the appellant's favour. It is the contention of Miss Phillips, Q.C. that the conclusion was plainly wrong. This Court must examine the oral evidence and documentary evidence with a view to ascertaining whether the trial judge, in making such a finding of fact, was plainly wrong.

I will embark on this exercise by analysing the evidence under the various subheads dealt with by counsel for both parties.

Payment of $7,500.00 as part of deposit

There is no direct evidence, documentary or otherwise, to support the mere assertion of the appellant that in early 1982 he gave the second respondent $7,500.00 as his part of the deposit. The learned trial judge in rejecting the oral evidence of the appellant said (page 184):

> "One would have expected, that he, being an engineer and company manager, would have acted with prudence and secured a receipt in exchange for any cash, which he may have given the 2nd defendant, notwithstanding the close relationship between the 1st defendant and himself."

The learned judge was of the view that the appellant should have adduced other evidence to support such "a fundamental aspect of his claim". She expressed the view that the unavailability of the passbook did not "preclude him from tendering evidence to substantiate his allegation that he had withdrawn the funds from the bank." She held that his failure

to substantiate the allegation "leads to the irresistible conclusion that he had not done so".

Miss Phillips, Q.C. complained that the learned trial judge failed to address her mind to an exhibit, adduced by the respondent, which is in conflict with the respondent's evidence. The first respondent's evidence in this regard is that the second deposit of $9,000.00 was paid to his attorney-at-law, Mr. K.D. Knight. His evidence was "that was done by myself. It was handed over by Yvonne Campbell. I was on my way to the airport. We stopped at his office. I left her there. It was paid in my presence. It was paid in cash".

In a letter dated 23rd July 1982 to Mr. K.D. Knight, Miss Gloria Thompson, the vendor's attorney, said in part (Exhibit 58):

> "Thank you for your cheque of One Thousand Five Hundred and Twenty-five Dollars and Thirty-One cents (J$1,525.31) in respect of Purchasers' half costs. This also confirms the arrangement that we have spoken about on the telephone about the payment of the Nine Thousand Dollars (J$9,000) payable to Mrs. Barton being handed over to Mrs. Campbell."

It is the contention of the appellant that the above excerpt from Exhibit 58 shows that the second deposit was not paid by Mr. Knight to the vendor's attorney but that there was an arrangement for the payment between the second respondent and the vendor.

As far as can be seen, it is fair to say that the learned trial judge took no account of this part of exhibit 58. Both the appellant and the first

respondent are at one that the money was handed to the second respondent, Mrs. Yvonne Campbell. Where they differ is that the appellant claims that he gave the second respondent $7,500.00 whereas the first respondent is saying he gave her the entire $9,000.00 and was present when she delivered it to Mr. Knight. The second respondent did not give evidence. The letter from the vendor's attorney-at-law seems to suggest that the second deposit was not paid to the vendor's attorney-at-law by Mr. Knight but that there was an 'arrangement' for payment between the 2nd respondent and the vendor. This evidence, in my view, should be taken into account. It was the duty of the trial judge to analyse and consider all the relevant evidence before deciding whether to reject or accept the mere assertion of the appellant that he paid half the deposit.

The Proposed Development of Lindsay Crescent

Does the proposal to develop the property point to the appellant's alleged agreement? The contention of the appellant is that it was the intention of the parties to buy the property and to form the company to develop it. The first respondent denies this. He says that the purpose for the purchase of 15 Lindsay Crescent was for it to be his family's home as soon as the second respondent decided to return to Jamaica. He further claims that the company was established to protect his interest in 15

Lindsay Crescent. However in a letter dated 24th March, 1982 to the Registrar, the first respondent stated:

> "This letter is written in an attempt to explain the selection of Lindsay Courts Ltd. as the name of our Company. The initial plan is to develop properties situated at Lindsay Crescent in Kingston. The name selected is relevant to the planned purpose of the Directors in the formation of this Company and its registration thereof ..." Ex. 4

The respondent, under cross-examination, said that this letter was dictated by a member of the Registrar's office when he was asked to explain why he chose the name "Lindsay Courts Ltd":

The learned trial judge in her analysis of this aspect of the evidence said (p. 188):

> "Even if it was intended to utilize Lindsay Courts in the development of Lindsay Crescent, the object of the Memorandum of Association do not restrict it to the carrying out of construction on 15 Lindsay Crescent.
>
> It follows therefore, that any proposal or intention of the plaintiff and the defendants to develop Lindsay Crescent does not point to an agreement that the plaintiff should acquire an interest in the property.
>
> Additionally it was the company which was designated to erect apartments. The parties are not the only ones holding interests in the Company; that is the directorship and shareholding of the Company do not comprise the plaintiff and the defendants exclusively. The plaintiff's wife is also a director and shareholder. There is no evidence that she was involved in the purchase of the property. Any proposal or

> intention of the parties to build apartments would not point to an agreement by the plaintiff and the defendants that the plaintiff should acquire a share of the property."

Exhibit 4 clearly, in my mind, shows that contrary to the evidence of the first respondent, the Company was not incorporated to protect the property from vandalism but rather to develop the property. The documentary evidence shows that the agreement to purchase the property was signed on November 5, 1981; the Memorandum and Articles of Association in respect of the Company were signed on December 27, 1981 and the Company was incorporated on March 4, 1982. It is fair to say that the documentary evidence supports the conclusion that, as the company was formed almost comtemporaneously with the purchase of the property, it was formed for the purpose of developing it. I agree with Miss Phillips Q.C. that the documentary evidence does not support the first respondent's contention that the property was purchased for himself and his wife to occupy. The documentary evidence accords with the appellant's case that the property was purchased for the purpose of development and that the company was formed to develop the property. It seems to me that the learned judge did not reject the appellant's contention in this regard. However, the learned judge concluded that any such proposal or intention of the parties to develop the property would not point to an agreement that the appellant should have a beneficial interest in the property.

It is my view that the roles that the company and the appellant played in the development of the property are very important in determining whether or not the proposal or intention of the parties to develop the property points to such an agreement between the appellant and the respondents. I now turn to the question whether there was a common intention that both parties should have a beneficial interest in the property and, if so, did the appellant act to his detriment in pursuance of that common intention?

The Common Intention and Detriment

The authorities show that a distinction is to be made between conduct from which the common intention can be inferred on the one hand and conduct which shows that a party acted to his detriment in reliance on the common intention on the other - **Grant v. Edwards** [1986] 72 All ER 426.

We have seen that it is incumbent on the appellant to establish on the balance of probabilities, that there was a common intention that they should both have a beneficial interest and also that he had acted to his detriment on the basis of the common intention and in the belief that by doing so he would acquire a beneficial interest – **Grant v. Edwards** (supra).

The common intention may be proved by direct evidence or inferred from the actions of the parties. Such intention may be inferred

from indirect contributions to the purchase price, such as mortgage payments. Generally, the common intention can be inferred from expenditure which is referrable to the acquisition of the property. If an expenditure is shown to be referrable to the acquisition of the property, it will perform the twofold function of establishing the common intention and showing that the party had acted on it. Further and importantly, such an expenditure may provide corroboration of direct evidence of intention.

Applying these principles to the instant case the first question for the trial judge should have been whether any of the acts done, or any transaction carried out by the appellant in respect of the development of the property, was referrable to the acquisition of the property.

Was the trial judge plainly wrong when she held that there was nothing from which the existence of an agreement as alleged by the appellant could be inferred? Was she plainly wrong when she concluded that the appellant suffered no detriment in reliance on any such agreement?

The appellant, apart from claiming that he paid $7,500.00 to the second respondent as his contribution to the purchase of the property, gave evidence as to his involvement in the operation of the Company in the development of the property. It is the contention of counsel for the appellant that the conduct of the appellant in the management of the

development of the property points, on a balance of probabilities, to the agreement as claimed by the appellant. Among the factors which the appellant contends are referrable to a common intention that the appellant should have a beneficial interest in the property are the following:

1. The appellant prepared or had plans prepared for the proposed development of the property into eight (8) studio apartments – Exhibit 5. He engaged quantity surveyors to prepare a preliminary budget report - Exhibit 6. These were done at the appellant's expense. (The first respondent denied knowledge of these activities).
2. The appellant acquired a loan of $13,000.00 in material from Clover Construction for the conversion of the old house into three (3) flats. He converted the old house into three flats with his team of workers without any assistance from the respondents. The first respondent seemed uncertain as to whether or not he paid the appellant for this. He said: "The work from the modification of the house was to be done by the plaintiff. I relied on the plaintiff for the cost to do modification on the house. I believe I paid him." – See page 129 of the Record.

3. In 1982 the appellant co-signed a promissory note as a director of Lindsay Courts Ltd. to repay to Royal Bank Jamaica Ltd. the sum of $19,947.60 (Exhibit 7). He personally guaranteed the loan – see page 35 of the Record.

4. He gave instructions for the establishment of a standing order at the bank to pay arrears on the mortgage and to ensure that future mortgage payments were made on time – see letter dated January 18, 1983 (Exhibit 8).

5. He, at times, made lodgments of his own income to the Company's account to assist in the mortgage payment when payments for rents were not made on time or at all – p. 65 of the Record.

6. He negotiated the sale of a portion of the property to Mr. Kenneth Biersay. The appellant testified that he and the first respondent discussed the purpose of the sale of land to Mr. Biersay. The purpose was to obtain funds for the financing of the planned development of the property (p.41 of the Record). In furtherance of the agreement with Mr. Biersay, the appellant obtained the services of Mr. Kenneth Grant, a surveyor, to prepare subdivision plan and he secured a conditional subdivision approval from the KSAC (see Exhibits 14 & 15).

7. He left Clover Construction, in which he was a partner and general manager, to operate his own construction business at 15 Lindsay Crescent – p. 38. He converted the garage into an office which he occupied. This was done at his own expense.

8. He retained the services of attorney-at-law, Mr. K.D. Knight, to deal with the presale of the proposed eight studio apartments – Exhibit 16.

9. He carried out substantial repairs and maintenance of the property over the years.

10. He paid the land taxes for 15 Lindsay Crescent up to 1992 – Exhibit 36.

It seems to me that of equal importance is the role of the company in the development and management of the property. Lease Agreements between Lindsay Courts Limited, referred to as the Landlord, and two tenants, Arlene Francis and Paul Clarke, were received in evidence as exhibits 10 and 11 respectively. It is of great significance that these agreements were between the tenants and the company. The appellant signed for the company. We know that the company was not the legal owner. We also know that the monies collected from the renting of the flats were lodged to the company's account. This, to my mind, points to an agreement or understanding between the legal owners and

the company, or those who own the company, that the legal owners hold the property in trust for the company. The only shareholders of the company were the appellant, the first respondent and their wives. This arrangement for the development of the property clearly supports the appellant's contention that there was an oral agreement for the joint ownership of the property.

One of the complaints of the appellant is that the learned trial judge made a finding against the appellant based on a misunderstanding of the evidence. After concluding that the appellant had failed to adduce tangible evidence to support his claim that he had paid $7,500.00 as part of the deposit, the learned judge proceeded to address the evidence of the appellant that during the initial discussions the first respondent informed him that he would obtain a mortgage. She then observed that the appellant made no mention of any arrangement as to how and by whom the mortgage would have been repaid (p. 14 of judgment). On the basis of that finding the learned judge said:

> "Clearly, if the plaintiff had been a participant in a discussion to purchase the property as he alleges, it is inferred that on the balance of probabilities, the question of the payment of mortgage instalments, which would be highly relevant, would have formed part of any initial discussions between the parties."

However, the uncontradicted evidence of the appellant is that the mortgage payments were to be made from the renting of the flats. The

appellant testified that "we decided that renting out the flat we would use the money to pay back mortgage ..." In examination in chief the first respondent was ad idem when he said:

> "Payments should be made from receipt of rental. Payments were to be made to mortgage payments and other expenses arising from operation of apartments."

There is no other evidence as to how and by whom these payments would be made. Therefore, on the learned trial judge's own reasoning the arrangement that the mortgage payments should be made from the renting of the flats must have formed part of the initial discussions between the parties. This would certainly not be consistent with the first respondent's claim as to the purpose for the purchase of the property. The undisputed evidence as to the arrangement for the repayment of the mortgage loan tends, in my judgment, to support the appellant's case that the property was purchased for the purpose of development and that the company was formed to develop the property.

The clear evidence of the appellant indicates that, before the completion of the conversion of the old building into three flats, arrears in mortgage payments occurred – see Exhibit 8. The appellant made arrangements with the bank for the arrears to be cleared and for future payments to be made timeously through the company's account. According to the appellant, his own funds were also deposited into the company's account from time to time. This clearly, in my mind, supports

the appellant's contention that the common intention was that the property should be jointly owned.

The learned trial judge was also of the view that the appellant would suffer no detriment in respect of any payments made by the company and not by him personally.

The appellant's evidence is that apart from rental, he made lodgments of moneys received from his construction business to the company's bank account. Bank statements in respect of some of the lodgments made to the company's account over the period January 1983 to December 1991 were put in evidence as Exhibit 29. These statements reflect lodgments of various amounts – at least two in the region of $180,000.00 and many over $100,000.00. The appellant referred to lodgments of $40,000.00, $50,000.00, $129,708.58 and $169,792.99 as representing income from specific projects at Carimed and United Bedding Industries in Old Harbour. It is important to remember that the undisputed evidence is that the mortgage payments were made from the company account. It is also important to bear in mind the appellant's claim that he expended his own money on repairs and maintenance of the property.

The first respondent's evidence is that up to 1988 he was co-signing cheques on account of Lindsay Courts Ltd. He had at first denied this, but changed his testimony when certain documents were shown to him.

He said he discovered in 1993 that his name was removed from the account. He did not insist that his name be replaced on the account.

Under cross-examination he said:

> " I totally disagree that in 1984 moneys were paid to me from Lindsay Court account."

He admitted, presumably when further questioned:

> "I believe in 1984 cheques were issued to me from Lindsay Court account. I signed cheques in 1984 made payable to myself."

The first respondent, when shown the bank statement in respect of the company's account (exhibit 29), said that he had no idea where the deposits to Lindsay Court's account came from. He said he made deposits to Lindsay Court's account but he could not be specific. Some of the deposits, he said, were rentals.

It does not appear that the learned judge had taken into consideration exhibit 29 and the evidence which relates thereto when considering whether or not the appellant had acted to his detriment.

At page 15 of the judgment (page 186 of the record) the learned judge said:

> "It is my view that the plaintiff had been renting premises continuously since he began to do so. Payments to the bank were made from the rents collected. These payments having been made by the company and not by the plaintiff personally no benefit would accrue to him."

This conclusion, it seems, was reached without taking into account the important documentary evidence (exhibit 29) and the undisputed evidence that all the deposits to the company's account - rental and otherwise – were made by the appellant. In my judgment, the learned judge erred in holding that no benefit should accrue to the appellant in light of his unchallenged evidence as to his role in respect of the proposed development and management of the property as a director of the company and as a shareholder.

The undisputed evidence clearly shows that the appellant was solely responsible for the operation of the company and had made substantial contributions to the development of the property. The appellant through his own efforts, and partly at his own expense has improved the value of the property. In the circumstances it would be inequitable for the first respondent, who had acquiesced in such an arrangement, to deny the appellant any share in the ownership of the property and to claim sole beneficial ownership along with the second respondent.

I will now consider the conversion of the old house into flats. Is this act referrable to the parties' alleged agreement? We have seen that it was the intention of the parties that the mortgage payments should be made from the renting of the three flats. According to the appellant he used his own income to assist in the repayment of the mortgage. It is not

in dispute that it was the appellant and his workers who converted the old house into the three (3) flats. Thus, the acts of the appellant in converting the old house into flats were clearly referrable to the acquisition of the property.

The next question for the trial judge must be whether these acts link the appellant to the acquisition of the property. The judge held that they did not because they were the acts of the company and not those of the appellant himself. But the company does not own the property. The clear evidence is that the company was established to develop the property, not to own it. The development of the property was a joint venture between the appellant and the respondents. The appellant, the first respondent and their wives signed the Articles and Memorandum as directors of the company. The inescapable inference is that, as shareholders, they would have an interest in the income derived from the development of the property. It was that income which was used to repay the mortgage and this, in my view, is evidence which clearly links the appellant to the acquisition of the property. It is evidence from which the common intention, as alleged by the appellant, may be inferred. However mere common intention by itself is not enough. There must be evidence to show that the appellant acted to his detriment in the reasonable belief that by so acting he was acquiring a beneficial interest. It seems to me that the appellant's expenditure of money and time in the

conversion of the old house into flats, for the purpose of meeting the mortgage payments, performed the two fold purpose of establishing the common intention and showing that he acted on it.

Of the many other acts on which the appellant relies it will suffice if I mentioned only a few. It is the appellant's evidence that he co-signed with the 1st respondent a promissory note in 1982 as a director of the company to repay a loan of $19,947.60 inclusive of interest (Exhibit 7). He personally guaranteed the repayment of the loan.

Although the parties differ as to the reason for acquiring the loan they are at one that the loan was obtained for the development of the property and in particular, for the conversion of the old house. The question is, would the appellant have co-signed the promissory note and guaranteed the repayment of the loan if he thought he had no beneficial interest in the property? On a balance of probabilities, I think not. I agree with counsel for the appellant that this conduct constitutes evidence of detriment and relates to joint proprietorship of the property.

What is said above in relation to the promissory note may also be said in respect of the appellant's acquiring of a loan of $13,000.00 in material from Clover Construction to assist in the conversion of the old house.

Further, as another instance of detriment, the appellant testified that pursuant to the agreement he left Clover Construction and set up his

own construction business at 15 Lindsay Crescent in an old garage. He converted the garage into an office.

The renovation began in 1985 and was completed in 1987. The respondents, he said, had made no input. The appellant submitted Bills of Quantities prepared by him which show an expenditure of $124,265.70 for the modification of the garage into office area (exhibit 12).

The first respondent said that there was a verbal agreement between the appellant and himself for the appellant to use the garage as his office and for him, in turn, to occupy a room at the appellant's residence at 35 Stilwell Road. It would be a kind of set off – there would be no exchange of funds. He further said that the loan of $15,000.00 was to be used to convert the garage into habitable space and the old house into three flats. However, the witness seemed to be saying, in the same breath, that the appellant was permitted to occupy the garage as a quid pro quo for acting on his behalf "on the rest of the property" (p. 126). The appellant agreed that there was an arrangement whereby the first respondent would occupy a room at his Stilwell residence whenever he was in Jamaica, but stated that the arrangement was made because the first respondent, whom he treated as a brother, had rented out his Worthington Towers apartment. This arrangement he said was made in 1980 – 1981. The learned trial judge made no finding of fact on this issue. The preponderance of evidence, in my view, is in favour of the appellant.

The question then is, would the appellant have converted the garage into a modern office for the operation of his business at such great expense if he thought he had no beneficial interest in the property? On the balance of probability, I think not.

It is also the appellant's evidence that, in keeping with the arrangement between himself and the first respondent, he prepared plans for the proposed construction of the apartments. He obtained quantity surveyors' reports and conditional building approval. He exhibited documents to substantiate his claim including plans for 8 studio apartments and 4 one bedroom apartments (exhibit 5), a preliminary budget report dated June 1982 – (exhibit 6) and a letter dated 19th June 1983 with enclosures from the K.S.A.C. (exhibit 14). The first respondent said he knew nothing about the plans, the surveyors' report or building approval. He stated that the appellant did,not discuss these matters with him. According to him, if the appellant prepared plans and got preliminary proposals for development, in considering the evidence of the appellant in this regard, stated (p. 187):

> "The principal objects of the company Lindsay Courts Ltd., recited in its Memorandum of Association enables it to do among other things the following:
>
> > 'To construct and maintain and alter any structures building works and plant necessary or convenient for the purposes of the company.'

> The plaintiff has misapprehended the scope of the foregoing clause of the company's Memorandum of Association. It does not confer on him any right personally. Any act done or any transaction carried out by him in respect of any proposed development of the property, are deemed to be those of the company and not his."

Whether the appellant's acts were attributable to the company or to himself is not, in my view the issue. The question is - as a director of the company, would the appellant have done all these things without assistance from and without the knowledge of the respondent, if he did not believe that he had a beneficial interest in the property? I should think not.

For the above reasons, I have come to the conclusion that the learned judge erred in finding that there was no agreement between the appellant and the respondents to purchase the property jointly.

Two other grounds were argued by counsel for the appellant.

Ground 3

The evidence of the appellant is that he rented the flats for a period of 5 to 6 years, that is 1983-89. Thereafter, he discontinued renting the flats because it was no longer economical to do so. The cost of maintaining the flats, he said, was high and to effect the necessary repairs would involve major expenditure.

The respondent gave evidence that he saw tenants on the premises in 1995. The appellant agreed that in 1995 Unicorp had rented

one of the flats. The valuation report of Allison, Pitter & Company dated 21st June, 1995 indicates that in 1995 the unit to the western side of the building was occupied as a residence, the central section as a woodwork shop, the eastern side as an office and storeroom, and the rear section as two offices, a reception area and a storeroom. The respondent gave no evidence in respect of the years 1989 to 1994. Thus all we have is the evidence of the appellant that the premises were not rented during that period. The learned judge rejected the reason the appellant gave for not renting the flats as "highly ludicrous". She found that the appellant had been renting the premises continuously since he began to do so. This finding of fact is not inconsistent with any other finding of fact or any documentary evidence. In my view, this Court cannot on the state of the oral evidence, conclude that the learned judge was plainly wrong.

Ground 4

The appellant was, on the 31st July 1995, served with a Notice to Quit. I will approach this ground by considering the contrasting claims of the appellant and the first respondent.

As already stated, it is the appellant's claim that he entered into an agreement with the respondents to purchase the property jointly. It was also agreed that he should be the managing director of the company which was set up to develop the property. He converted the garage on the property into an office and relocated his construction business.

According to his version, on no account could he be considered a tenant at will or a licensee. He claims to be a joint owner. Accordingly, the issuance of a Notice to Quit would be completely inappropriate.

On the first respondent's case, the appellant was the managing director of the company. His occupancy of the property was pursuant to an arrangement whereby the first respondent would, as a "set off," occupy a room at the appellant's Stilwell Road residence. The first respondent also claims that the appellant was permitted to occupy the garage in consideration of the appellant "acting on his behalf on the rest of the property." The first respondent has not given evidence that this agreement with the appellant was terminated. The first respondent would not be entitled to recover possession without first bringing to an end this special arrangement with the appellant. In such a case, the appellant would probably be entitled to compensation if the circumstances warrant it.

I cannot accept the submission of counsel for the respondent that the Notice to Quit was sufficient to end the relationship between the appellant and the first respondent. Thus, even on the first respondent's case, the appellant was certainly not a tenant at will or a licensee. I do not agree with counsel that the appellant's continuing occupancy after he was served with the Notice to Quit was unlawful.

It is my view, therefore, that the learned trial judge erred in holding that:

> "Occupation of the property by the plaintiff since 31st July 1995, is unlawful. He has been since that date a tenant-at-will. Having deprived the defendant of the use and enjoyment of his property he ought therefore to vacate."

The award for mesne profits cannot stand.

Conclusion

1. This case involved an assessment of a number of different factors which have to be weighed against each other. The issues involved findings of fact based on oral and documentary evidence.
2. The learned judge failed to analyse and consider the effect of important documentary evidence. Thus the reasons given by the judge for her conclusions on important aspects of the case are not satisfactory.
3. The judge was plainly wrong in concluding that any proposal or intention of the appellant and the respondents to develop Lindsay Crescent, through a company owned jointly by the appellant, the first respondent and their wives, could not point to an agreement that the appellant should acquire an interest in the property.
4. On a balance of probabilities, the oral and documentary evidence show that there was such an agreement as alleged by the appellant.

5. The learned judge was wrong in concluding that no benefit should accrue to the appellant on the basis that mortgage payments were made by Lindsay Courts Ltd. and not by the appellant personally.
6. The trial judge erred in holding that the appellant did not act to his detriment in the belief that by so acting he would acquire a beneficial interest.
7. The appellant was not a tenant-at-will. The trial judge erred in awarding mesne profits to the first respondent since the appellant's right to occupy had not been terminated.

Accordingly, I would allow the appeal and set aside paragraphs 1, 2 and 3 of the order made below. I would give judgment for the appellant on the claim and counterclaim and make the following declarations/order:

1) That the appellant is entitled to one-half of the beneficial interest in ALL THAT parcel of land situate at 15 Lindsay Crescent part of Dunrobin Estate and registered at volume 628 Folio 75 of the Register Book of Titles.

2) Costs of this appeal and costs below to be paid by the first respondent to the appellant.

3) Liberty to apply.

K. HARRISON, J.A.:

I agree.

FORTE, P:

ORDER:

Appeal allowed. Paragraphs 1, 2 and 3 of the order made below set aside. Judgment entered for the appellant on claim and counterclaim. It is further ordered:

(1) That the appellant is entitled to one-half of the beneficial interest in ALL THAT parcel of land situate at 15 Lindsay Crescent part of Dunrobin Estate and registered at volume 628 Folio 75 of the Register Book of Titles.

(2) Costs of this appeal and costs below to be paid by the first respondent to the appellant.

(3) Liberty to apply.