NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 78/2002

BEFORE: **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE COOKE, J. A.

BETWEEN	**RUPERT MORTIMER BENT**	**APPELLANT**
AND	**EUNICE RAMLOCHANSINGH BENT**	**RESPONDENT**

Hilary Phillips, Q.C., and Kipcho West for the Appellant instructed by Grant, Stewart, Phillips & Co.,

Pamela Benka-Coker, Q.C., and Debra E. McDonald for the Respondent instructed by Debra E. McDonald

July 6, 7, 8, 9, 12 & November 4, 2004

FORTE, P.

Having read in draft the judgments of Smith and Cooke, JJA I agree with their reasoning and conclusion and consequently there is nothing I could usefully add.

SMITH, J.A.:

I have had the advantage of reading the draft judgment of Cooke J.A. I agree with his analysis and conclusion. However, I wish to say a word in respect of Ground 5. This ground reads:

> "The learned trial judge erred in law in failing to disclose the bases or reasons for his decision in the judgment delivered."

The primary task of the trial judge was to determine the beneficial interests of the parties in land situate at 25 Stilwell Road, Kingston 8 and registered in the names of both parties. The appellant claims to be entitled to one half share in the said property. On the other hand the respondent claims to be the sole owner of the beneficial interest in the property. The respondent bases her claim on an alleged oral agreement between the parties whereby the appellant agreed to give up his half interest in Stilwell Road in exchange for the respondent giving up her one half interest in property situate at 1343 Squire Drive, Ontario, Canada. According to the respondent, pursuant to this agreement she transferred her interest in Squire Drive to the appellant. The appellant denies the existence of such an agreement.

The critical issue therefore is whether or not there was such an agreement. The credibility of the parties was a major issue. The parties between them filed over twelve affidavits. Both were extensively cross-examined on their affidavits. The learned trial judge said:

> "A resolution of the dispute before the court will largely depend on the findings that the court makes with regard to the terms of the agreement. It is necessary that the court examines the surrounding circumstances and the conduct of the parties in relation to the agreement before the matter can be resolved".

After "carefully considering all the evidence adduced along with the authorities cited" the judge accepted that there was an oral agreement as the respondent claimed. He gave no reason for so doing.

The question then is – When may the failure of a trial judge to give reasons for a conclusion essential to his decision, of itself, constitute a good ground of appeal.

The question was addressed in ***Flannery and Another v Halifax Estates Agencies Ltd.*** [2000] 1 All ER 373, a decision of the English Court of Appeal. I agree with the considerations canvassed in that judgment. The following is gleaned from the headnote. At trial the case centred entirely on a dispute between rival expert witnesses concerning the cause of cracks in the superstructure of a flat. Without providing any reasons for his decision, the judge stated that he preferred the evidence of the defendant's expert witness, and accordingly dismissed the claim. On appeal the plaintiff accepted that it had been open to the judge to conclude that the property had not suffered from structural movement, but they relied on his failure to provide any reasons for reaching such a conclusion.

The English Court of Appeal held:

> "Where a failure by a judge to give reasons made it impossible to tell whether he had gone wrong on the law or the facts, that failure could itself constitute a self-standing ground of appeal since the losing side would otherwise be deprived of its chance of appeal. The duty to give reasons was a function of due process and, therefore, of justice. Its rationale was, first, that parties should not be left in doubt as to the reasons why they had won or lost, particularly since without reasons, the losing party would not know whether the court had misdirected itself and thus whether he might have any cause for appeal. Second a requirement to give reasons concentrated the mind, and the resulting decision was therefore more likely to be soundly based on the evidence. The extent of that duty depended upon the subject matter of the case. Thus in a straightforward factual dispute, which depended upon which witness was telling the truth, it would probably be enough for the judge to indicate that he believed the evidence of one witness over that of another. However, where the dispute was more in the nature of an intellectual exchange, with reason and analysis exchanged on either side, the judge had to enter into the issues canvassed before him and explain why he preferred one case over the other. That was particularly likely to apply in litigation involving disputed expert evidence, and it should usually be possible for the judge to be explicit in giving reasons in cases which involved such conflicts of expert evidence. In all cases, however, transparency should be the watchword. In the instant case the judge had been under a duty to give reasons and had not done so. Without such reasons, his judgment was not transparent and it was impossible to tell whether the judge had adequate or inadequate reasons for his conclusion. Accordingly, the appeal would be allowed and a new trial ordered."

In the instant case the appellant contends in grounds 1 and 3 that it was not open to the judge on the evidence to conclude that an agreement existed between the parties to the effect that the appellant would be the sole legal and

beneficial owner of the property situate at Squire Drive and that the respondent would be the sole legal and beneficial owner of the property at Stilwell Road. In ground 2 the appellant complains that the learned judge failed to analyse the documentary evidence and to assess and analyse the inconsistencies in the oral evidence.

It seems that ground 5 is pleaded in the alternative in the event of the Court finding against the appellant in grounds 1,2 & 3. Thus only if the Court ruled against the contentions of the appellant in grounds 1,2,& 3 would ground 5 be of importance.

The main thrust of the appellant's argument in ground 5 is that the judge ought to have given reasons for his conclusion that there was an agreement as alleged by the respondent. It is important to note that the Court held in ***Flannery*** that the duty to give reasons was a function of due process and, therefore, of justice. The failure to give reasons may itself constitute an independent ground of appeal. Thus even if the appellant had conceded that it was open to the learned trial judge on the evidence to conclude that there was such an agreement as alleged by the respondent, the appellant was still entitled to rely on this ground.

As I have stated before the critical issue is whether or not there was such an agreement as alleged by the respondent. An examination of the affidavit evidence, the documents and the viva voce evidence shows that the case involved a straightforward factual dispute, which depended upon which party

was speaking the truth. The dispute was certainly "not in the nature of an intellectual exchange with reasons and analysis exchanged on either side" such as was likely to apply in litigation involving disputed expert evidence. In a case involving conflicts of expert evidence the judge would be expected to enter into the issues canvassed before him and explain why he preferred one case over the other.

In the instant case which involves a straightforward factual dispute it is probably enough though certainly not desirable for the judge to indicate that, having "carefully considered all the evidence adduced along with the authorities cited" he accepted the respondent's evidence.

Accordingly, in my judgment ground 5 fails. For the above reason and of course those given by Cooke JA, I would dismiss this appeal.

I may add that in ***Samuel Scott v Gladpole Simpson*** SCCA No. 3 of 2001 delivered July 30, 2004 this Court endorsed the observations made **per curiam** in the ***Flannery*** case that where the Notice of Appeal indicates that a "no reasons" point is being taken, the respondent should invite the judge to give reasons.

COOKE, J.A.

The parties were married in 1965. They were divorced in 1998. I shall, nonetheless, refer to the appellant as "the husband" and the respondent as "the wife". During the subsistence of the marriage it is not disputed that there was the joint acquisition of five different matrimonial homes – two in Canada and three in Jamaica, the last of these being the property at 25 Stilwell Road in Saint Andrew in Jamaica. This is the property which is the subject of the present litigation. This property was purchased in 1981. The husband and wife resided with their two children there until 1988 when the husband, who was not only an engineer and accomplished guitarist, secured employment as an airplane pilot in Canada – and to that country he went in September 1988. At this time it could be said the marriage was not one of conjugal harmony.

In May 1989, property at 1343 Squire Drive, Manotick, Ontario, Canada had been acquired. This property was registered in the names of both the husband and the wife. The mortgage document relative to the financing of the acquisition was signed by both parties. There was, further, a joint account in Canada in the names of the parties from which payments were made towards the purchase of this well appointed home. By a Transfer/Deed of Land dated the 26th October 1991 the wife transferred her interest in this property to the husband "for natural love and affection" and the payment of two dollars. In December 1997 the husband by an originating summons under the Married Women's Property Act sought a declaration that each party was entitled to one

half interest in the Stilwell Road property and an order that that property be sold and the proceeds distributed equally. The wife counter-claimed. Her stance was that there was an oral agreement between herself and her husband that she would sign the Transfer pertinent to the Squire Drive property on condition that the latter would relinquish his interest in the Stilwell Road property. The husband said that there was no such agreement – that the wife well knew that she had not contributed to the purchase of Squire Drive. The transfer by the wife of her one half share in this property was a recognition on her part of her non-contribution. Was there this agreement? This was the critical issue in the court below, as it now is in this court.

After a hearing which took some ten days at various times between November 2000, and February and July 2001, the learned trial judge delivered his decision on May 17, 2002. The wife succeeded. It was declared that she was the sole owner of the beneficial interest in Stilwell Road. The husband has now appealed. The grounds of appeal are set out hereunder.

> (1) The learned Judge erred in fact in finding that an agreement existed between the Applicant and Respondent to the effect that the Applicant would be the sole legal and beneficial owner of the property situated at 1343 Squire Drive Manotick, Ontario, Canada and that the Respondent would be the sole legal and beneficial owner of the property at 25 Stilwell Road, Kingston 8, in the parish of St. Andrew, there being insufficient evidence to come to such a conclusion.
>
> (2) The learned Judge erred in law in that he erroneously relied on his finding that an

> agreement was reached between the Applicant and the Respondent without analyzing the documentary evidence before the Court and further failed to assess and analyse the evident inconsistencies in the oral evidence and documentary evidence.
>
> (3) The learned Judge erred in accepting the Respondent's evidence in this regard especially since her evidence had been considerably discredited generally.
>
> (4) ...
>
> (5) The learned Judge erred in law in failing to disclose the bases or reasons for his decision in the judgment delivered.

Ground 4 was not pursued.

In his judgment, all the learned trial judge had to say in respect of his decision was:

> "Both sides agree that there was an agreement with regards to 1343 Squire Drive. The terms of the agreement are highly contested.
>
> A resolution of the dispute before the Court will largely depend on the findings that the Court make (sic) with regard to the terms of the agreement. It is necessary that the Court examine the surrounding circumstances and the conduct of the parties in relation to the agreement before the matter can be resolved.
>
> The parties married in 1965, they lived in Jamaica. Sometime in 1967 they decided to emigrate to Canada.
>
> Both parties are very ambitious and hardworking persons. The husband is an engineer, a jazz and classical guitarist, he is also a highly qualified commercial pilot. The wife was employed as a Public Relations Representative in Canada, she also worked

> for the Jamaica Tourist Board. Later she established her own Consultancy Business in 1981.
>
> The evidence shows that both parties contributed to the financial well being of the marriage and the family.
>
> In his affidavit of 11th June, 1998, the husband admits that he and his wife were the joint legal owners of the dwelling house at Squire Drive, Manotick, Ontario, Canada. He denies that he had any discussions with his wife whereby he had agreed that she should have stilwell (sic) Road and that Squire Drive should be his. It is his contention that his wife did not contribute to the acquisition of the property at Squire Drive and therefore she had no claim on it. He had purchased the land and constructed the house from his own funds as he had originally intended that the family should move to Canada. When it became apparent to him that his wife would not be joining him in Canada, he requested her to sign over her half share in the property to him. There was never any condition for doing so.
>
> The affidavit evidence and the oral evidence presented in this case are quite substantial. I have carefully considered all the evidence adduced along with the authorities cited.
>
> I accept that there was an oral agreement whereby the respondent would transfer her one-half share of the property in Squire Drive in Canada to the applicant and that the property at Stilwell Road would become the respondent's property solely."

This judgment is unhelpful. There is no indication that there was any examination of the surrounding circumstances and the conduct of the parties in relation to the agreement as the appellant rightly complains. There was no analysis of what the appellant aptly describes as "a plethora of documentary evidence". There was a regrettable absence of the reasons which led to the

conclusion. Merely to say that there has been a careful consideration of "all the evidence adduced along with the authorities cited" is insufficient. There has to be some demonstration that this has been done. And there was none. This is unfair to the litigants and moreso because of the undue length of time between the end of the protracted hearing and the delivery of the decision.

In light of the grounds of appeal and the foregoing comments, the question arises as to what should be the approach of this court. Guidance is to be found in the advice of Their Lordships' Board in ***Union Bank of Jamaica Limited v. Dalton Yap*** Privy Council Appeal No. 17 of 2001 in paragraph 4 which is as follows:

> "The issues in the case were essentially ones of fact and the decision of the trial judge depended on his assessment and interpretation of the evidence that he heard. It follows, of course, that the appeal to the Court of Appeal also turned on issues of fact, as does the appeal to the Board. The approach which an appellate court must apply when dealing with an appeal on fact from a judge who has seen and heard the witnesses giving evidence is not in doubt. Their Lordships refer for convenience to the decisions of the House of Lords in ***Thomas v. Thomas*** [1947] AC 484 and of the Board in ***Industrial Chemical Co (Jamaica) Ltd v. Ellis*** [1986] 35 WIR 303. One situation where, exceptionally, an appeal court may be entitled to differ from the judge of first instance on such questions of fact is described by Lord Thankerton ([1947] AC 484, 488) in these terms:
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> > '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.'

> As Lord Shaw of Dunfermline observed in the earlier case of ***Clarke v. Edinburgh and District Tramways Co*** 1919 SC (HL) 35, 37, the appeal court cannot interfere unless it can come to the clear conclusion that the first instance judge was 'plainly wrong'."

In this case the learned first instance judge has given no reasons. It is now for this court to determine if there is a clear conclusion that the judge below was "plainly wrong". This necessitates a review of the evidence in so far as it is relevant to the sole issue of fact to be determined bearing in mind the attack of the appellant against the decision below.

The documentary evidence

Stilwell Road

The main burden of Ground 2 of this appeal is that there was a failure to assess and analyse the documentary evidence. It was submitted that a proper analysis and assessment would indicate the falsity of the wife's contention and compel a different conclusion. In respect of Stilwell Road, the written submission concisely expressed the appellant's viewpoint thus:

> "13. The plethora of documentary evidence exhibited by the Appellant substantially refutes the claims of the Appellant in respect of this alleged agreement claimed by the Respondent.
>
> 14. The documentary evidence shows a continuous and sustained pattern of contribution to and maintenance of the preservation of Stilwell Road by the Appellant, in particular the remittances of foreign exchange and the payment of the mortgage and the repairs effected to the property, all of which, we submit, is inconsistent with an agreement between the Appellant and the Respondent for the Appellant to

part with his clear registered, legal and beneficial interest in 25 Stilwell Road."

The only documentary evidence which is relevant is that pertaining to the period subsequent to the 26th October 1991 which is the date of the transfer by the wife of her share in Squire Drive. I will deal firstly with the "remittances of foreign exchange." Listed below are the relevant remittances which the husband made while he was working in Geneva, Switzerland, and on which he relies.

Date	**Amount**	**Recipient Account**	**Location Account**
19.11.91	Can. $10,000.00	Husband & Wife	Canada
29.11.91	Sw. Fr. 9,500.00	Husband & Wife	Canada
06.02.92	US$ 1,100.00	Husband	Jamaica
06.02.92	Can. $ 3,500.00	Husband & Wife	Canada
05.03.92	Can. $ 3,500.00	Husband & Wife	Canada
05.03.92	US$ 3,000.00	Husband	Jamaica
08.05.92	US$ 4,000.00	Husband	Jamaica
01.09.92	US$ 10,000.00	Husband	Jamaica

There is no documentary evidence that the wife ever utilized any of these accounts. The joint account of the husband and wife was in Canada and she lived in Jamaica. The husband claimed that she had ready access to his foreign account in Jamaica. This the wife denied. The parties operated a joint account under the name of Bent Enterprises. This account was used for Stilwell Road household transactions. It is to be noted that none of the remittances were sent to this account. It cannot be said that documentary evidence of these remittances assisted the cause of the husband. This evidence is not probative of whether or not there was the disputed agreement. They are not inconsistent with the disputed agreement.

The husband returned to Jamaica in 1993 and from about April 1993 resided at Stilwell Road. The period between the date of the wife's transfer of her share in Squire Drive (26/10/91) and April 1993 is of significance. It is so because there is no documentary evidence (of which type the husband so heavily relies) to show that the husband made any contribution to "the maintenance of the preservation of Stilwell Road" during this period.

The husband exhibited documentary evidence to show that he made the mortgage payments after he returned to Jamaica through to 1995. This, he asserts, demonstrates that there could not have been the disputed agreement. The wife countered that the payment of the mortgage was part of his responsibility as a contribution to his living expenses at Stilwell Road. She said that she and her husband agreed to share the living expenses of the household which were calculated at J$55,000.00 per month. The payment of the mortgage (the monthly amount of which was not documented but surely was not of any magnitude judging from the documentary evidence of payment by the husband) in addition to $25,000.00 monthly was his responsibility. The husband exhibited documentary evidence of his payment of J$25,000.00 monthly to the Bent Enterprises account. Under cross-examination he said that the figure of J$55,000.00 per month was incorrect. The figure was J$40,000.00. Of this he would contribute J$15,000, the wife J$15,000.00 and the two now grown children J$5,000.00 each. The husband further said that his contribution of J$15,000.00 was not inclusive of mortgage payments. In view of this evidence,

it is somewhat curious that the husband did make payments of J$25,000.00 to the household account of Bent Enterprises. In any event, the documentary evidence as regards the husband's contribution while he was residing at Stilwell Road is in no way conclusive of the issue of whether or not there was the disputed agreement. It was for the tribunal to determine whether or not to accept the wife or the husband as to the significance of the husband making the mortgage payments.

The husband also exhibited "some of the cheques I was able to locate showing my payments for house repairs and improvements". This documentary evidence was tendered to show that he would not have undertaken this expenditure had there been the alleged agreement. A perusal of these cheques reveals a *hodge podge* of expenditure. It is impossible to discern a path to which these cheques beckon. They certainly did not indicate any significant repairs to Stilwell Road. Even if they had so done, this would not have been of telling effect. This was the residence of the husband's children.

I am of the view that the great weight which the appellant would accord to the documentary evidence in respect of Stilwell Road does not stand up to the test of close scrutiny.

Squire Drive

An area of contention between the parties is as to whether or not the wife contributed financially to the purchase of Squire Drive. It is agreed that the wife participated in the selection of the lot and in the architectural design of the

house which was built. The husband said in cross-examination "we were both involved in acquiring the property". It is somewhat surprising that the husband, who has put so much faith in documentary evidence, has not exhibited accounts to show the total cost of acquisition of Squire Drive and the payment record. Be that as it may, the husband said in an affidavit dated 11th June 1998 that it was the proceeds of the sale of his company Vidcom which realized some $70,000.00 (Canadian) which was used to purchase Squire Drive. This was to answer the assertion by the wife that she had contributed US$24,000.00 which came from an insurance payment consequent on damage caused to Stilwell Road by Hurricane Gilbert. In a subsequent affidavit dated 2nd November 1998 the husband deponed as follows:

> "4. That with regard to paragraph 30 of my second affidavit I further state that in 1989 Vidcom was sold to Richard Clarke for Jamaican Three Hundred and Forty Thousand Dollars (JA$340,000.00) which I converted to United States Dollars and then purchased Canadian Dollars. That I exhibit hereto marked **'RB1'** for identity my bank statement dated 18th April, 1989 showing inter alia, two (2) salary lodgments in the amount of Two Thousand Fifty Seven Dollars and Seventy Cents ($2,057.70) and Two Thousand Two Hundred and Fifty-Five Dollars and Twenty-eight Cents ($2,255.28) as well as lodgment in the amount of Forty Thousand One Hundred and Fifty Three Dollars and Forty-five Cents ($40,153.45) which amount was derived from converting to Canadian currency part of the proceeds of the sale of Vidcom.
>
> 5. That in May 1989 I made a final payment towards the Ottawa property in the amount of

Canadian Fifty Seven Thousand Dollars ($57,000.00) which amount I was able to pay from converting further proceeds from the sale of Vidcom first to United States Currency and then to Canadian. That I exhibit hereto marked **"RB2"** for identity a copy of the cheque I paid in the amount of Canadian Fifty Seven Thousand Dollars ($57,000.00) as well as the bank draft and my bank statement dated May 16, 1989 showing lodgments by me of Canadian Seven Thousand Seven Hundred and Ninety-four Dollars and Ninety-one Cents (CA$7,794.91) and Canadian Forty One Thousand Eight Hundred and Fifty Dollars and Ninety-five Cents (CA$41,850.95) as well as the withdrawal from my account of the amount of Canadian Fifty Seven Thousand Dollars (CA$57,000.00) mentioned above.

6. That I further state that the insurance proceeds we received as a result of the damage to the Stilwell Road property, was jointly owned by the Respondent and myself. The funds were paid out, in our joint names. That I reiterate that none of the insurance funds were used to assist in the purchase of the Ottawa property. That the Respondent sent to me approximately Canadian Ten Thousand Dollars (CA$10,000.00) from the insurance proceeds so that I could purchase furniture for the Ottawa property as I told her that I did not have the money to buy furniture."

Before adverting to **"RB 1"** and **"RB 2",** it is clear that the husband did not receive J$340,000.00 from the sale of Vidcom. He by his own admission in cross-examination received some J$185,000.00 in hand. In respect of **"RB 1"** the amount of J$40,153.45 is stated in the bank statement of 18th April 1989 to be $4,153.45. **"RB 2"** is only probative of the fact that $57,000.00 was drawn from the account. It should be stated that there was no documentary evidence

to show that the wife had given to the husband US$24,000.00. The husband also tendered documentary evidence to show that he paid the initial deposit of $20,000.00 as well as the mortgage document in respect of the loan of $206,000.00. These two bank statements **("RB 1"** and **"RB 2")** do not demonstrate that the wife did not provide any funding. There is no evidence as to the amount of Canadian dollars obtained when J$185,000.00 was converted to that currency. The evidence reveals that the husband received payment in two installments. It is not possible to correlate the conversion of the proceeds of the sale of Vidcom with any lodgments in either of the two statements. The wife also said that she sold their jointly owned motorcar which provided US$10,000.00. The husband does not deny receiving funds from the sale of that car but claimed that the car was solely his, although he conceded that the wife had spent some J$8,000.00 on the car to put it in a saleable condition. The documentary evidence in respect of the acquisition of Squire Drive does not in any way tend to disprove that the wife did not provide the husband with funds for the purchase of Squire Drive.

The Agreement

The husband said that his purchase of Squire Drive and the placing of the wife's name on the title was an inducement for the latter to join him in Canada. "However when it was evident that the Respondent (wife) did not intend to join me in Canada with the children, I requested her to sign over the half interest in the Canadian property to me which she agreed to do and did. There was never

any condition for doing same" (Affidavit dated 11th June 1998). In this same affidavit the husband said "there was no request from my lawyers in Canada but a demand that the Respondent relinquish all interest in the Ottawa property as she has made no contribution to its purchase". This assertion was in answer to the wife saying in her affidavit of 24th April 1998 that she had received "a request from the husband's lawyers to sign over her share of Squire Drive to the husband." There is no documentary evidence of this communication from the lawyers from either party. The stance of the husband is that the wife only did what she knew she had to do. Both parties agree that discussion pertaining to Squire Drive did take place towards the end of 1990. In the cross-examination of the husband he said at page 379 of the record:

> "When I told her that I wanted her name off the title she was not very happy. I reminded her of conversation we had previously and [that] she should have no objection as she did not contribute to acquisition of the property."

This was on the 29th November 2000. At page 387, the husband, still under cross-examination on the 30th November 2000 said:

> "The discussion was that despite her stated intention to come after two (2) years she had not done so and therefore I was asking her to agree to come off the title. She obviously did not like it. That was the end of the discussion. She said she can't stop me for this was my property but she was angry over it."

These two excerpted passages from the record indicate that the wife was certainly not enthused about giving up her share of Squire Drive on the basis contended by the husband.

The wife's position was that she had contributed to the acquisition of Squire Drive. She was an integral part in the establishment of Squire Drive from its genesis. She provided (and the husband agrees) furniture and some household appliances for the home. She decided that she would not join her husband at Squire Drive. The husband, she said, had a live-in female lover at Squire Drive. The marriage was at an end. There were at this time two joint homes. The solution to her, in respect of these two properties, was that the husband should have Squire Drive and she would have Stilwell Road. By this time the wife was a part owner of a well-established company in Jamaica – Communications Consultants Limited, which she and two other partners had incorporated in 1981. When asked why she did not effect a transfer of the husband's share of Stilwell Road to herself she said at page 414 of the record:

> "I investigated the cost of transfer and it was too expensive for me at the time. I decided to investigate setting up a trust which would involve the children."

It is to be observed that since the 26th October 1991, the wife did not initiate any process to have the husband's share transferred to her. The court was faced with conflicting assertions. It was for the court to determine on a balance of probabilities which account to prefer – there was no documentation as to the disputed agreement. In the end the issue of credibility was paramount. The trial judge saw and heard the husband and wife as each was cross-examined. He was suitably placed to assess the credibility of each party as regards the impression which each conveyed as to their truthfulness.

The appellant combed the record in an effort to demonstrate that because of the inconsistencies in the evidence of the wife her credibility had been so tarnished that she should not be believed. It was for the trial court to determine (a) if there were inconsistencies; (b) the relevance of these inconsistencies; and (c) ultimately the materiality of these inconsistencies. This materiality would be gauged according to the extent to which such inconsistency affected the credibility of the witness as regards the issue(s) to be determined. In this case the issue was as to whether or not there was the alleged agreement. The inconsistencies relied on by the appellant pertained to (i) whether or not the husband generally contributed to the financial maintenance of the marriage; (ii) the wife's role in managing the affairs of Vidcom; and (iii) whether or not the wife used the husband's credit cards which would have enabled her access to his foreign exchange account. The appellant would also, incorrectly, seek to rely on documentary evidence to establish inconsistencies. In the circumstances of this case, with the focus being on the disputed issue of the alleged agreement, the trial court could not be faulted for concluding that, taking into consideration the proffered evidence showing inconsistencies, the wife's credibility as to the alleged agreement was not destroyed. The trial court could well come to the conclusion that these inconsistencies (if they are so categorized) are not material – or sufficiently material to lead to a conviction that the wife was an unreliable witness.

In conclusion, I would say that the learned judge failed "to disclose the bases or reasons for his decision in the judgment delivered" (Ground 5). However, this court being "at large" and having examined the record, I cannot say that I can come to the "clear conclusion that the first instance judge was "plainly wrong". I would therefore dismiss this appeal. There will be no order as to costs.