JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 133/98

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

BETWEEN	CLIFTON CARNAGIE	PLAINTIFF/APPELLANT
A N D	IVY MAY FOSTER	DEFENDANT/RESPONDENT

Norman Godfrey instructed by Brown, Godfrey & Morgan for the Appellant

Mrs. Ingrid Mangatal-Munroe instructed by Mrs. Paula Blake-Powell of Dunn, Cox, Orrett & Ashenheim for the Respondent

6th, 7th October & 20th December 1999

FORTE, P:

Having heard arguments in this appeal over a period of two days (6th - 7th October, 1999) we dismissed the appeal and promised to give our reasons in writing. We now fulfill that promise.

The appeal concerns the question as to which of the parties is now the beneficial owner of property situate in Ingleside, Mandeville in the parish of Manchester. The appellant and the respondent, both belonging to that fine class of Jamaicans who migrated to England, many years ago, and who having survived the cooler climates of that country over the years, reach a stage in life, when the urge for returning to their land of birth surfaces and brings them home

again. Mr. Carnagie and Miss Foster had known each other for many years, but eventually in the autumn of their lives had built up a relationship which the evidence reveals became intimate over a period of time. It is that relationship that caused both parties to become associated in the purchase of the property, the subject matter of this appeal.

However, as is usual in these cases, the account of its purchase differs on both sides, each claiming to have provided all the purchase money, and claiming to be the sole owner of the property. Agreed on both sides is that since her return to Jamaica in 1985, the respondent has occupied the house on the property and that the appellant having returned to Jamaica on the 20th July, 1986 lived in the house until September 1986 when it is disputed he was either asked to leave by the respondent or left voluntarily.

In his Statement of Claim, the appellant had asked the Court for the following order:

> "**17.** The PLAINTIFF claims against the DEFENDANT an order for the sale of the same dwelling premises situate at 10 Glenway, Ingleside, Mandeville, Manchester and registered at Volume 1167 Folio 546 of the Register Book of Titles, which premises is registered in joint names of the PLAINTIFF and DEFENDANT as Tenants in Common."

He also claimed a Declaration in paragraph 18 which reads as follows:

> "**18.** The PLAINTIFF also claims against the DEFENDANT a Declaration that:
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> a) The DEFENDANT is only entitled to 1/35th of the net proceeds of sale of the said dwelling premises.

> **b)** The DEFENDANT has exhausted her said entitlement by being in sole possession of the said dwelling premises since 1986, or in the alternative that the DEFENDANT accounts for all rents and or mesne profits accruing from the said dwelling premises from 1986 to the date of hearing of this action"

The entitlement to 1/35th share in the property, which the appellant conceded to the respondent, arose out of the appellant's own case in which he testified that the respondent loaned him the $10,000 which was used for the deposit for the purchase of the property and that he had never repaid it.

The two cases were diametrically opposed to each other. The appellant spoke of coming to Jamaica on holidays in 1985 and shortly before he was about to depart, he was introduced by Mr. Collins, a relative of the respondent to a real estate agent who showed him the property.

He liked the property, and consequently went to the Attorney who apparently acted for the vendors. The property was being sold for $345,000 and required a deposit of $10,000. As he had been spending a lot of money on his holiday, he was not able to find that sum, and as a result borrowed the $10,000 from the respondent. He signed a Sale Agreement and paid the deposit with the borrowed money. On his return to England, he sent two other payments of £8,000 and £5,000 to Mr. Collins to pay over to the Attorney. Subsequently, he sent through Collins, the sum of $217,000 as a final payment.

The respondent, on the other hand maintained that she had come to Jamaica in March 1985 for the purpose of buying a home to which she could return in February 1986. She stayed with her relative Mr. Collins, who helped

her to find a house. Having looked at two other houses, she finally saw the property in question shown to her by a real estate dealer. She went to the Attorney and paid the $10,000 deposit which was required. She admitted that the appellant was with her, and that he alone signed the Agreement. When she questioned him about it, he told her that what was important is not who signed the Agreement, but who paid the deposit.

On her return to England she later withdrew from her pass-book at the Abbey National Building Society £8,000 in June 1985 and £5,000 in July 1985. These amounts she gave to the appellant, to send to Jamaica to Mr. Collins, through the appellant's bank account to make further payments on the property. Subsequently the appellant informed her that the final payment would be $217,000. She arranged through her Bank in England to send that amount to the appellant's account at N.C.B. Mandeville so that Mr. Collins could arrange the final payment to the Attorney. However, she was informed by Mr. Collins, that a mistake had occurred, and that the Jamaican Bank was recording a receipt of $21,700 rather than $217,000. As a result she came to Jamaica, straightened it out with the Bank from which she received the $217,000.

She later discovered that the amount required for the final payment including costs etc., was $245,000. She then went to the Bank of Nova Scotia and got a cheque for $245,000 which she paid over to the Attorney. Eventually, the title was issued showing that the property was registered in both names as tenants in common. The fact that the title was in both names, did

not concern her too much, as the appellant had promised to repay half of the purchase price after he had sold his house in England. He has, however, never done so, and consequently she maintained that she was solely entitled to ownership of the property in keeping with her counterclaim in which she asked for such a declaration. It reads:

> "And the Defendant Counterclaims:
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> 1. For a Declaration that the Defendant is solely entitled to ownership of premises situated at 10 Glenway, Ingleside, Mandeville in the parish of Manchester, registered at Volume 1167 Folio 546 of the Register Book of Titles."

On the basis of the evidence, which is broadly outlined above, the learned judge found for the respondent and made the following order:

> "It is hereby adjudged that -
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> Judgment be entered for the Defendant against the Plaintiff on the Plaintiff's claim and the Defendant's Counterclaim, as follows:
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> I. It is declared that the Defendant is solely entitled to the property situated at 10 Glenway, Ingleside, Mandeville in the parish of Manchester registered at Volume 1167 Folio 546 of the Register Book of Titles.
>
> II. Costs to the Defendant on the claim and counterclaim to be agreed or taxed."

The appellant challenged this finding in five grounds of appeal all of which relate to the learned judge's findings of facts. In summary, the grounds complain firstly that there was not sufficient evidence to ground the learned judge's findings of fact, and that he did not take into consideration most of the evidence adduced as to the ownership of the property.

The latter allegation is unfounded. After a detailed examination of the evidence relied on by both sides the learned judge made it abundantly clear that he had given consideration to all the evidence when he stated:

> "I have given very careful consideration to all the evidence in this case. I have had regard to the demeanour of the witnesses. The very helpful written submissions by the Attorneys have been carefully perused."

Then he found:

> "I find that the Plaintiff has sought to exploit this (intimate) relationship for his own benefit. I found that all the purchase money for the property was provided by the Defendant alone, the Plaintiff's name was used in the transaction only as a matter of convenience.
>
> It is significant that when the Plaintiff was told to leave the property he did so without any sign of protest. Why would a man vacate his property in those circumstances."

The only inference that can be drawn from the words of the learned judge is that he accepted the respondent as a witness of truth and that the appellant was a witness not worthy of belief. The issue in this appeal therefore, is one of fact and that has been conceded by counsel for the appellant.

The resolution of the dispute rested solely on whose evidence the learned judge accepted. The complaint made before us that there was no sufficient evidence, to support the finding of the learned judge is without merit. The respondent, supported her contention that she had paid all the purchase money for the property, by documentary evidence which showed withdrawals she made from her Building Society account, which matched in amount and

time, the receipt by Collins of those sums, albeit sent to him by the appellant, to whom the respondent maintained that she had given the money for that purpose. I of course refer to the transmissions of £8000 and £5000 sent in June and July of 1985 respectively. On the other hand, the evidence of these payments by the appellant was easy of disbelief - he having received £26,000 as mortgage from his house in England from which these amounts he alleged were paid; yet he for no good reason sent the amount in two payments, which coincidentally matched in figures, the amounts withdrawn by the respondent from her Building Society account. In addition, the respondent's evidence of the final payment of £245,000 was also supported by the evidence of Collins, and documentary evidence showing the cheque stub of the cheque by which that amount had been paid to the vendor's attorney. That evidence alone, although there was other evidence denoting the suspicious conduct of the appellant, was sufficient to support the conclusion of the learned judge.

It is however appropriate to reiterate that an Appellate Court when asked to decide upon an appeal where the issues are confined to questions of fact, ought not to interfere with the findings of the learned judge, who had the opportunity to see and hear the witnesses, and thereby assess their demeanour and come to conclusions as to their credibility, unless it is satisfied that any advantage enjoyed by the trial judge by his having that opportunity would not be sufficient to explain or justify his conclusion.

This approach was clearly stated by Viscount Simon as long ago as 1947 in **WATT OR THOMAS V. THOMAS** [1947] A.C. 484 when at page 487 of the report he said:

> "I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: 1. 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; 11. 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; 111. 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."

In the instant case, it cannot be said that the learned judge's conclusion does not demonstrate a proper use of the advantage which he had of seeing and hearing the witnesses. On the contrary his conclusion is amply supported by the evidence, and as a result we found no reason to interfere with his judgment. We therefore dismissed the appeal, and affirmed the order of the Court below. Costs of the appeal were also awarded to the respondent, such costs to be taxed if not agreed.