SUPREME COURT LIBRARY
KINGSTON
JAMAICA

61
Filing Cabinet

IN THE REVENUE COURT OF JAMAICA

APPEAL NO. 5 OF 1998

BETWEEN MICHEAL LAKE APPELLANTS
DONNA VENTURA

A N D THE STAMP COMMISSIONER RESPONDENT

Miss Nicole Lambert for the Appellants

Miss Barbara Lee and Mr. Frank Williams for the Respondent
Heard on the 25th and 30th days of March, and the 16th day of July, 1999.

COURTENAY ORR J

INTRODUCTION

In their "supplementary Notice of Appeal" the appellants challenge the decision of the respondent, the Stamp Commissioner on the 9th day of June 1998. They state the decision as one whereby it was ordered that:

> "The Transfer of Land by Trustees dated August 21, 1997 in respect of Lot 55 Sherbourne Heights, St. Andrew registered at Volume 1122 Folio 728 ("the property") from Michael Rodwell Lake and Donna Ventura to Micheal Rodwell Lake and Caprice Marie Lake (nee Josephs) was not exempt from transfer tax."

In their prayer they seek an order:

> "That the objection be upheld and that the said Transfer of land by Trustees is exempt from transfer tax and stamp duty pursuant to Section 3 (2) of the Transfer Tax Act and the provisions of the Stamp Duty Act respectively."

The grounds of appeal are as follows:

> "1. The Appellant purchased the property pursuant to an Agreement for Sale dated March 10, 1987.
>
> 2. On the 10th day of March 1987 the Appellants executed a Declaration of Trust in respect of the property which stated that they held the property on trust for Michael Rodwell Lake and Caprice Marie Josephs as joint tenants.
>
> 3. Section 3 (2) of the Transfer Tax Act applies and consequently the Transfer of Land by Trustees is not subject to Transfer Tax.
>
> 4. The Transfer of Land by Trustees is not one arising from a sale, or for value, and therefore Stamp Duty is not payable."

In the Amended Statement of Case the Respondent joins issue with the Appellants regarding the date on which the Declaration of Trust was made and contends that the decision was validly made and should be confirmed. The respondent advances the following reasons for doing so:

> "(i) That in arriving at the said decision the Respondent at all material times acted in accordance with the provisions of the Transfer Tax Act and Stamp Duty Act.
>
> (ii) The Respondent did not err in law or in fact in arriving at the said decision.
>
> (iii) That even if, which is not admitted, the specific reasons given for the Respondent's decision were incorrect the decision that the transaction and/or documents were subject to tax is justifiable on the basis of other reasons on which the Respondent will seek leave to rely at the hearing of this matter.
>
> (iv) The Respondent was entitled, on the material available to her to come to the decision that the "Declaration of Trust was not executed on the date alleged by the Appellants, and does not substantiate the claim that a trust existed at the date of purchase of the property."

THE FACTUAL BACKGROUND

The following facts were agreed or proved:

1. By an Agreement for Sale dated March 10, 1987 the appellants purchased property known as Lot 99 Sherbourne Heights, in the parish of Saint Andrew, registered at volume 1122 Folio 728 of the Register Book of Titles.

2. In Transfer of Land no 460127 of lot 99 Sherbourne Heights, from Sherbourne Limited, the Transferor to the appellants, it is expressly stated that the Transferor "HEREBY TRANSFERS all its estate and interest in the said lot subject to the restrictive and other covenants set out in the First Schedule hereto to the Transferees in fee simple as Tenants in common in equal shares." (emphasis supplied)

3. The Agreement of Sale was duly stamped with Transfer tax and stamp duty in March 1987.

4. On or about the 24th day of February, 1997, the appellants, through their attorneys-at-Law presented to the respondent for stamping a document headed "Declaration of Trust", purporting to have been made on the 10th day of March, 1987, in which the appellants declared that they held the said land in trust for the beneficiaries, the said Michael Rodwell Lake and Suzanne Caprice Marie Josephs as joint tenants. The document was duly stamped.

5. Both the appellant Michael Rodwell Lake and his attorney Maurice Courtenay Robinson have given affidavits for use in this matter. In neither affidavit was the instrument of mortgage or the transfer no, 460127 exhibited, nor were they produced to the respondent at any time.

6. On or about the 25th day of August 1997, the appellants through their attorneys-at-Law, submitted to the respondent a document headed "Transfer of Land by Trustees", purporting to transfer the property from Michael Rodwell Lake and Donna Ventura to Michael Rodwell Lake and Suzanne Caprice Marie Lake. The stamped "Declaration of Trust" mentioned earlier was then presented in support of the appellants' contention that the purported transfer was not taxable.

7. The respondent informed the appellants by letter dated March 31, 1998, that the transfer was subject to transfer tax and Stamp duty.

8. By letter dated 21st April 1998, the appellants objected to this decision.

9. The respondent confirmed her decision by letter dated June 9, 1998.

10. By an instrument of mortgage dated 7th February 1991, the appellants obtained a mortgage of the property from Victoria Mutual Building Society in the sum of one million dollars $1,000,000.00) for twenty years at twenty percent (20%) per anum.

THE SUBMISSIONS ON BEHALF OF THE APPELLANTS

It is an established principle that taxing statutes must be construed strictly.

In disputes involving the liability to pay taxes, the adjudicator may look at the substance of a transaction.

Parties are entitled to arrange their affairs so as to avoid or reduce their liability to tax.

By virtue of Section 3 (2) of the Transfer Tax Act, the transfer in dispute is exempt from tax.

In the instant case no further proof that a trust was created is necessary.

There is no requirement that property must be held by trustees as joint tenants and not as tenants in common.

The date which appears in a document such as the transfer in this case is *prima facie* its true date - Malpas v Clements [1850] 19 LJ QB 435. There was no further onus on the appellants to prove the date of execution. The onus is on the respondent to prove that the date on the document is not the true date of its creation!

The respondent having already stamped the document is estopped from challenging the date in the Declaration of Trust.

The Transfer Act and the Stamp Duty Act do not contain provisions which seek to invalidate the date on a document because it is produced for stamping late.

The endorsement on the certificate of Title to the effect that the appellants held the property as tenants in common was an error.

The fact that the property was mortgaged has nothing to do with the creation or existence of a trust.

There is no provision requiring trusts to be registered under the Registration of Titles Act.

The schedule to the Stamp Duty Act indicates that only a conveyance or transfer of property on a sale attracts Stamp duty. Oughtred v IRC [1960] AC 206 and Fitch Lovell Ltd v IRC [1962] 3A11 ER 685 support this contention.

The transfer in the instant matter is not pursuant to a sale and is therefore not subject to stamp duty.

THE SUBMISSIONS ON BEHALF OF THE RESPONDENT

By Section 26(2) of The Transfer Tax Act, the onus of proving that the decision of the respondent is erroneous lies on the appellants. (See also Chantier v Dickenson (1843) LR 6CP 253.

In the circumstances of the instant case the respondent cannot be said to have erred. The relevant circumstances are:

The lateness of the presentation of the trust.

A prudent taxpayer would have deposited a copy of the trust instrument with the Registrar of Titles. This is a common practice.

No mention is made of the "trust" in transfer no 460127 from Sherbourne Limited to the appellants.

The appellants were not authorized to mortgage the property.

It is usual for trustees to hold property as joint tenants not tenants in common.

There are many cases of alleged inadvertence in the conduct of the appellants or their advisors.

Further, there is authority which seems to suggest that estoppel cannot be used to challenge the exercise by a statutory body of its statutory duty.

The affidavit of Maurice Courtenay Robinson is in breach of Section 408 of the Judicature Civil Procedure Code.

In assessing whether the appellants have discharged the onus placed on them, the Court should apply the principle in Associated Provincial Picture Houses Ltd. v Wednesday Corporation [1947] 2 ALL ER 680 at 682 D - F, that is, whether the respondents decision can be said to be so unreasonable that no reasonable tribunal could have arrived at it.

The cases of W T. Ramsay Ltd. v IRC [1981] STC 174 and Pan Jamaican Trust v Stamp Commissioner 16 JLR 467 suggest that the court should look at the substance of the transaction.

THE SUBMISSIONS IN REPLY TO THE RESPONDENT'S ARGUMENTS

The provision in Section 26(2) of the Transfer Tax Act has nothing to do with Section 3(2) of that Act.

The Respondent cannot rely on what a prudent tax payer might have done, she must look to the letter of the law.

Cavendish v Dacres Vol. xxx1 Ch.D 466 shows that having made an election the respondent cannot go back on it. She cannot approbate and reprobate.

The cases of Ramsay v IRC and Pan-Jamaican Trust, (supra) are distinguishable from the instant case.

THE COURT'S ANALYSIS AND CONCLUSION

The Argument Regarding Estoppel

A major plinth of Miss Lambert's submissions was that the Respondent:

> "having accepted the Declaration of Trust and stamped same with the necessary duties the Stamp Office is now estopped from seeking in anyway to challenge or question the date stated in the document. It is interesting to note that they proceeded to stamp the Declaration despite the fact that no further documents to corroborate its date had been provided."

This statement overlooks an important and long standing principle of law that an "estoppel cannot be raised to prevent the exercise of a statutory discretion or to prevent or excuse the preformance of a statutory duty": per Megaw L.J. in Western Fish Products Ltd. v Penwith District Council and another. [1981] 2 All E R 204 at 219C.

In R v Lambert Borough Council, exp. Clayhope Properties Ltd. (1986) 18 HLR 541 a local authority was held not to be estopped from asserting that notices it had served under what is now the Housing Act 1985, were invalid. It was held that as the notices were invalid the local authority was entitled to resist a claim to, otherwise mandatory repair, grants.

Yabbicom v King [1899] 1 QB 444 lends further support to this principle. In that case Mr. King deposited plans for a house with the urban district council which revealed that when the house was built it would fail to comply with the bye-laws made by the council under the Public Health Act 1875 S. 157. Somehow the plans were nevertheless approved by the council. It was held that the approval was no defence to a subsequent prosecution for breach of the bye-laws by the council's successor, Bristol Corporation. Day J said at 488: "The district council could not control the law, and byelaws

properly made, have the effect of laws; a public body cannot anymore than private persons dispense with laws........."

In cases prior to the Western Fish Case (supra) Lord Denning did make statements in conflict with the general principle stated above. He did so notably in Robertson v Minister of Pensions [1949] 1 KB 227 at 232. He said:

> "In my opinion, if a government department in its dealings with a subject takes it upon itself to assume authority upon a matter with which he is concerned, he is entitled to rely upon it having the authority which it assumes. He does not know and cannot be expected to know the limits of its authority."

In Howell v Falmouth Boat Construction Co. [1950] 2 KB 16, he again expressed a similar opinion. But when the case reached the House of Lords his statement was disapproved. See especially Lord Simmonds at [1951] AC 837 at 845.

By 1967 his position had softened and in Wells v Minister of Housing and Local Government [1967] 1 WLR 1000 at 1007 he said:

> "Now I know that a public authority cannot be estopped from doing its public duty but I do think it can be estopped from relying on technicalities ...." (emphasis mine)

In Graham v Secretary of State for the Environment [1993] J.P.L. 333 it was held that the council could not be estopped by its officers from its duty to exercise unfettered discretion regarding the enforcements of planning controls. Other cases in keeping with the principle that a public authority cannot be estopped from doing its duty, are: Southend on Sea Corporation v Hodgson (Wickford) Ltd. [1961] 1 QB 416; Norfolk County Council v Secretary of State for the Environment [1973] 1 WLR 1400. Chapman v Michaelson [1908] 2 CH 612 [1909] 1 Ch 238 and Maritime Electric v General Dairies [1937] 1 All ER 748.

This principle has been adopted in Australia and New Zealand Chapman v Michaelson was applied in Australia in Longman v Handover (1929) 46 WN (WSW) 139, and Rogers v Resi - Statewide Corporation Ltd. (1991) 105 ALR 145. See also David Jones v Leventhal (1927) 40 CLR 357.

Maritime Electric v General Dairies was applied in Australia in at least four cases including State of South Australia v ATSA Ply Ltd. (1980) 29 ALR 367, and in New Zealand in Europe Oil (NZ) Ltd. v Commissioner of Inland Revenue [1970] NZLR 321, and Smith v Attorney General [1973] 2 NZLR 393 in which Southend-on-Sea v Hedgson was also followed.

I am aware that an authority's subsequent failure to take account of an earlier undertaking or representation may amount to a failure to take account of a relevant consideration, and in that way may be an abuse of discretion and be held to be irrational or unreasonable in the sense laid down in Associated Provincial Picture Houses Ltd. v Wednesbury Corportion (supra). But I find that the decision of the Respondent which forms the basis of this appeal cannot be so categorized. In the circumstances I hold that the respondent is not estopped from challenging the authenticity of the date on the document called a Declaration of Trust.

The Nature of These Proceedings

In her presentation Counsel for the appellant paid insufficient regard to the nature of these proceedings. This is an appeal by way of re hearing, and both by a large body of case law and by statute - Section 26(2) of the Transfer Tax Act, the appellant is required to prove that the respondent came to the wrong decision.

Section 26(2) of the Transfer Tax Act reads thus:

> "(2) The onus of proving that the assessment or other decision of the Commissioner complained of is excessive or erroneous shall be on the person complaining."

Further, it is not always appreciated that in any litigation every point of law exists within a factual matrix. Hence, these appellants must prove that on the evidence presented to the respondent, she came to a wrong conclusion. As in any other court of appellate jurisdiction, the Revenue Court Rules recognise this principle.

Thus rule 13 provides as follows:

> "13. Subject to Rule 12 (which provides for the amendment of pleadings) it shall not be competent on the hearing of the Appeal, for the Appellant or the Respondent to rely upon any facts not set out in

> <u>the Notice of Appeal, Statement of Case or Reply</u> as the case may be." (emphasis supplied)

The flawed approach of counsel for the appellant is exemplified in the appellants' "supplementary grounds" of appeal especially paragraph 2 thereof which states:

> "On the 10th day of March 1987 the Appellants executed Declaration of Trust in respect of the property which stated that they held the property on trust for Michael Rodwell Lake, and Caprice Marie Josephs as joint tenants."

She is there asserting as a ground of appeal the very <u>fact</u> which is in issue between the parties! This can be seen from a reading of paragraph (iv) of the Amended Statement of Case which reads thus:

> "The Respondent was entitled on the material available to her, to come to the decision that the Declaration of Trust was not executed on the date alleged by the Appellants and does not substantiate the claim that a trust existed at the date of purchase of the property."

Similarly, the first "ground" of appeal is no ground at all, but a mere assertion of <u>fact</u> that:

> "The Appellants purchased the property pursuant to an Agreement for Sale dated March 1987."

Counsel's approach betrays a failure to appreciate fully the distinction between questions of law and questions of fact. The distinction is vital. Hence a distinction is often made between findings of 'primary facts' and 'conclusions' or 'inferences' which may be findings of fact, of law, or 'mixed' findings <u>of fact and law.</u>

In <u>British Launderers' Research Association</u> v <u>Borough of Hendon Rating Authority</u> [1949] 1KB 462 Denning LJ., as he then was, explained the nature and importance of this difference. He said at pages 471-472:

> ".... 'On this point it is important to distinguish between primary facts and the conclusions from them. Primary facts are facts which are observed by witnesses and proved by oral testimony or facts proved by the production of a thing itself such as original documents. Their determination is essentially a question of fact for the tribunal of fact

> and the only question of law that can arise on them is whether there was any evidence to support the finding. The conclusions from primary facts are however, inferences deduced by a process of reasoning from them. <u>If and in so far as these conclusions can as well be drawn by a layman (properly instructed on the law) as by a lawyer, they are conclusions of fact for the tribunal of fact: and the only questions of law which can arise on them are whether there was a proper direction in point of law ; and whether the conclusion is one which could reasonably be drawn from the primary facts:</u> See <u>Brucegridle</u> v <u>Oxley</u> [1947] KB349. If and in so far, however, as the correct conclusion to be drawn from the primary facts requires, for its correctness, determination by a trained lawyer - as for instance, because it involves the interpretation of documents or because the law and the facts cannot be separated, or because the law on the point cannot properly be understood or applied except by a trained lawyer - the conclusion is a conclusion of law on which an appellate tribunal is as competent to form an opinion as the tribunal of first instance......" (emphasis mine)

I respectfully adopt the above dictum and in particular the portion emphasized. I hold that the decision of the respondent is a question of fact and consequently the only questions of law which arise are "whether there was a proper direction in point of law; whether the conclusion is one which could reasonably be drawn from the primary facts," and whether the appellants have discharged the onus which rests on them by Section 26(2) of the Transfer Tax Act quoted above to show that the respondent's decision is erroneous.

So strong is the rule that the onus is on the appellant to show that the decision of the lower tribunal is wrong, that it is a rule of law that a respondent in an appeal may justify the lower tribunal's decision by reasons other than those given by the tribunal. The reasoning behind this principle is that as the respondent did not choose to appeal, it is thought that he is taken to court unwillingly. Denning LJ., as he then was, put it this way in <u>Erington</u> v <u>Erington</u> [1952] 1KB 290 at 300:

> "[I]t is always open to a respondent to support the judgment on any ground."

In contrast an appellate court will not usually allow an appellant to raise for the first time a point he did not take in the Court below - Wilson v United Counties Bank [1920] AC 102.

This illustrates the further principle that an appeal is against the judgment of the lower court and not the reasons for judgment. The reasons are only relevant to show whether the tribunal misapprehended the facts or the law applicable to the case.

For a discussion of and authorities for the principle that matters of fact are left to the lower Court see Halsbury's Laws of England 4th Edition Vol. 37 para, 696 and the Supreme Court Practice para. 59/1/50.

Hearsay in Affidavits

Section 408 of the Judicature (Civil Procedure) Rules reads as set out below:

> "408. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except that on interlocutory proceedings or with leave under section 272A or section 367 of this law, an Affidavit may contain statements of information or belief, with the sources and grounds thereof."
>
> The costs of every affidavit which shall unnecessarily set forth matter of hearsay, or argumentative matters or copies of extracts from documents, shall be paid by the party filing the same." (emphasis mine)

The affidavits filed by the appellants and sworn by Michael Lake and especially Maurice Courtenay Robinson offend against this rule. The further affidavit of Christine Webb wrongly contains argumentative matter, and her earlier affidavit of 21st January, 1999 at paragraph 9 contains inadmissible material as to what the respondent did without stating that she was present or was the person who actually took the decision on behalf of the respondent.

I shall deal with the further affidavit of Christine Webb, first. In the her last paragraph she states:

> "That the Commissioner was not in a position to read the intention of the Appellant to acquire land in trust for his girlfriend to surprise her in future unless this intention was documented and presented

> along with the Sale Agreement to the Commissioner at the time of purchase of the property."

This is an agrument which should come only from counsel's lips or written submissions.

THE AFFIDAVITS IN THE APPELLANTS' CASE

The affidavit of Michael Lake contains ten paragraphs. Paragraphs 4 to 10 inclusive are in breach of the rule 408 (supra).

The first sentence of paragraph 4 reads as follows:

> "4 I am advised by my attorneys Myers Flecther and Gordon that the Agreement for Sale was duly stamped with Stamp duty and transfer tax on or about March 18, 1987...."

The rest of the paragraph is not offensive.

Paragraphs 5 reads:

> "5 On or about January 1997, I instructed my said Attorneys to see to the transfer of the property to the two persons named as beneficiaries of the property in the Declaration of the Trust. At that time it was discovered that the Declaration of Trust dated March 10, 1987 was through oversight was (SIC) not stamped with the necessary stamp duties on or about March 1987."

The first sentence is clearly hearsay. The second must also be similarly offensive unless he was present when the alleged discovery was made, and if so he should clearly say so. It seems to me that the use of the passive voice ".... it was discovered .." is a clever but unsuccessful attempt to circumvent the rule.

The same applies to paragraph 6. which reads:

> "6 The Declaration of Trust was presented to the Stamp Office by my Attorneys to be stamped on or about February 1997. Exhibited hereto and marked "ML3" is a copy of my attorneys letter dated February 21, 1997 to the Stamp Commissioner."

Further, it is his attorney and not the deponent who should exhibit the letter.

Paragraphs 7,8,9 and 10 continue this trend. Paragraphs 7, 8 and 10 begin with the solemn incantation. "I am advised by my attorneys and do verily believe..." but this is insufficient to exorcise the devil of hearsay.

Paragraph 9, speaks of the presentation of the transfer to the Stamp Commissioner; but as there is no indication that the deponent witnessed this, this is inadmissible.

The result of all this is that only paragraphs 2 and 3 are relevant. Paragraph 2 merely states that the appellants bought the property, and paragraph 3 states that they signed the declaration of trust on or about March 10, 1989.

I now turn to the affidavit of Maurice Courtenay Robinson. Here again is an affidavit which repeatedly breaches the rules.

It contains hearsay, argument, opinion, sheer irrelevance and is Prolix. Of the two and one half pages (13 paragraphs) only paragraphs 1,2 and 6 are free from fault. Paragraph 10 is amazing. We are favoured with a glimpse into the deponent's social activities - his attendance at the wedding of the alleged beneficiaries!

I now summarise the glaring irregularities which mark (or rather mar) the rest of the affidavit.

Paragraph 3 - In over one half of this paragraph one is regaled with alleged conversations between the deponent and the male appellant; and in this as in the other paragraphs containing hearsay there arises the mysteriously impressive formula "I verily believe(d)."

Paragraph 4 - Apart from one sentence the entire paragraph is hearsay - alleged conversations with Michael Lake - the appellant.

Paragraph 5 - The entire paragraph is hearsay - more alleged communications with the male appellant.

Paragraph 7 - One half contains more talk of advice together with an expression of legal opinion.

Paragraph 8 - The first sentence contains opinion on a question of fact relevant to the very issue this court has to devide; then what appears to be an explanation of the delay in stamping the Declaration and finally a statement of legal principle.

Paragraph 9 - This paragraph is totally dedicated to expressing the opinion or advancing the argument that the respondent had no good ground for her decision.

Paragraph 11 - More "verily believing" - an opinion that the mortgage was made with the knowledge and approval of the beneficiaries, followed by more opinion as to their legal rights.

Paragraph 12 - The last sentence is pure naked opinion - as to whether the deposit of copies of mortgage documents with the Registrar of Titles is discretionary.

Paragraph 13 - Puts forward the legal argument that the respondent is estopped from questioning the validity of the alleged declaration of trust.

In short, paragraphs 9,10,11 and 13 are entirely worthless. The proper portions of the other paragraphs make the following statements:

1. The deponent is an Atorney-at-Law, aged 66 years and upwards, having been admitted to practice in July 1959.

2. He has known both appellants for upwards of thirty years. From time to time they have sought his advice. They are brother and sister.

3. Michael Lake, the male appellant showed him a form of agreement for the sale to him of the property in this case.

4. After discussions with Lake, he caused the form of agreement to be amended by adding the name of the female appellant as one of the transferees.

5. The agreement for sale and the declaration of trust, both dated 10th March 1987, were presented to him sometime between March 10 and March 18, 1987.

6. He caused the agreement to be impressed with Stamp duty and transfer tax on the 18th day of March 1987.

7. He prepared the instrument of Transfer of the said property to the appellants and saw to its execution by the parties thereto in his presence as witness on the 11th day of June 1987.

8. Through inadvertence the said property was transferred to the appellants as tenants in common rather than as joint tenants.

9. When he discovered that the Declaration of trust had not been stamped he "did not regard the non stamping as ... a matter of great moment."

10. As regards the statement in the affidavit of the respondent, that there is a long established practice to submit "trust documents to the Registrar of Titles contemparaneously with their execution so that no question of the date on which the documents come into existence can arise," he states:

> "I have been a practicing Attorney-at-Law for almost forty (40) years and I have over the years been involved in the preparation and completion of trust documents and to the best of my recollection, I have never deposited a duplicate or attested copy of such documents with the said Registrar for safe custody and reference in pursuance of Section 60 or any other section of the Registration of Titles Act."

THE AFFIDAVITS IN THE RESPONDENT'S CASE

I have already pointed out the two breaches in two of these affidavits. I now set out a summary of the facts stated therein.

The Affidavits of Christine Webb, Acting Director of Assessments in the respondents office

1. In the affidavit dated 21 January, 1999 a copy of Transfer No. 460127 dated 11th June 1987 in the names of the appellants is exhibited. This shows that they hold the property in fee simple as tenants in common in equal shares.

2. Also exhibited is instrument of mortgage No. 654895 dated 7th February 1991, and in the names of both appellants as borrowers - the sum borrowed being one million dollars ($1,000,000.00).

4. That these two documents were at no time produced to the respondent or exhibited in the affidavit of the male appelant.

In the further Affidavit dated 15th March , 1999

The view of the respondent that the late presentation of the declaration of trust for stampting "did not substantiate the claim that the Trust was created at the date of purchase of the property" was communicated to the appellants and evidence requested, whereupon the respondent received in

reply a letter from the appellants' attorneys stating that the request was "out of order and should be withdrawn."

The Affidavit of Madge Thompson

1. The respondent's department has on a daily basis to contend with documents that are not what they purport to be, or that were not executed on the dates on which they purport to have been executed.

2. That in past years the department faced, in particular, a problem of documents purporting to be declarations of trust, and other trust documents, not being what they seem on the face of them, or in light of other evidence, not being executed on dates on which they purported to have been executed.

3. It is a long establised practice that most attorneys-at-law and legal firms submit trust documents to the Registrar of Titles contemporaneously with their execution so that no question of the date on which the documents come into existence can arise.

4. That in cases where Attorneys-at-Law have submitted such Trust documents to the Registrar of Titles, they have always been accepted unquestioningly by the respondent.

5. That in coming to her decision the respondent took into account the time at which the declaration of trust was presented, and the fact of the mortgaging of the premises by the appellants.

6. The fact that the appellants were related did not assume any significance in her consideration of the matter.

THE COURT'S FINDINGS OF PRIMARY FACTS

I accept as a fact each statement made in the two affidavits of Christine Webb and that of Madge Thompson, as noted above.

AN ANALYSIS OF THE EVIDENCE AND THE RESPONDENTS DECISION

I have already held that the respondent is not estopped from challenging the authenticity of the date on the document called a Declaration of Trust. In light of the affidavits submitted by the appellant which state that the Declaration of Trust and the transfer were executed contemporaneously the respondent's Attorney has sought to support her decision by indicating circumstances which in his submission point in the opposite direction. Miss

Lambert on the other hand has implied that in the absence of direct evidence the court should accept the appellants' contention as they have put forward evidence which is *prima facie* proof of their case, and she has cited various authorities which indicate that prima facie the date on a document is the date of its execution.

I have no quarrel with that statement. But the operative words are *prima facie*, which means merely "Of first appearance; or, "on the face of it." Such evidence as only conclusive, if there is no evidence to counter it. The *prima facie* position may be displaced by direct evidence, or circumstancial evidence as described in a quotation in Cross and Tapper on Evidence, the eight edition, page 23 note 6. There the learned authors cite a dictum of Pollock CB in R v Exall (1866) 4F & F 922 at 929. It reads thus:

> 'It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link breaks, the chain would fall. It is more like the case of a rope comprised of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion; but the three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of.'

I find the arguments on behalf of the respondent convincing. Taken together and looked at as a whole, the circumstances point forcefully in favour of the respondent's contention, and indicate that the appellants have not discharged the onus on them to show that the respondent's decision is wrong.

These circumstances are :-

1. The lateness of the application to stamp the "declaration of trust."

2. The failure to submit a copy of the trust document to the Registrar of Titles pursuant to Section 60 of the Registration of Titles Act and in keeping with what I accept as the long established practice.

3. The fact that the land was transferred to the alleged trustees as tenants in common rather than joint tenants which would be the more logical step to provide for the event of death of either "trustee."

4. Although there is no requirement that this be done, the fact that no mention is made of the trust on transfer 460127 to the appellants from Sherbourne Ltd.

5. All the surrounding circumstances of the mortgage of the property. I accept as a correct statement of the law the following passage at page 220 of the tenth Edition of Fisher and Lightwood; Law of Mortgage:

> "Trustees have no power to raise money on mortgage unless they are expressly or implicitly authorized to do so by the instrument creating the trust, or unless power is conferred on them by statute."

No evidence of such authority has been tendered. Hence I find that no such power exists.

I also accept the law as stated at page 221 of Fisher and Lightwood; Law of Mortgage (supra): It reads thus:

> "A trustee or other fiduciary owner who mortgages the trust estate does not usually covenant to pray the money borrowed. If there is such a covenant it should be limited to the payment only out of money coming into the trustee's hands as trustee. .....where the trustees are not the same persons as those beneficially entitled the mortgage should contain a provision excluding liability ......"

In the instant case all these principles are breached. The alleged trustees have covenanted to pay the money borrowed and their personal liability is not excluded.

6. As pointed out by Mr. Williams, contrary to the facts the document "Transfer of Land by Trustees" states at paragraph B that the transferors have no beneficial interest in the property, but that is untrue for Michael Lake has a beneficial interest.

7. The affidavits submitted by the appellants, for which their counsel should have sought leave, in keeping with rule 13 of the Revenue Court Rules cited above, do nothing to effectively deal with the points noted above. Maurice Courtenay Robinson's affidavit says that through

inadvertence the trust instrument was not submitted for stamping at the same time as the transfer (460127) from Sherbourne Ltd. to the appellants. Let me assume this somehow happened, would not all these documents be kept together so that when the transfer was returned it would be noticed that the trust instrument was not stamped?

I find it odd that by inadvertence the property should be transferred to the appellants as tenants in common, and then again by inadvertence though created contemporaneously one of two documents should not be stampted.

Further the conduct of these proceedings calls for comment. At first in their reply the appellants admitted that the property was transferred to them as tenants in common, yet at the hearing they withdrew the reply which so states.

In all the circumstances I reject the evidence in the appellants case. The appeal is dismissed, the decision of the respondent made on the 9th day of June 1998, is confirmed. The matter is remitted to the respondent to assess the Stamp duty and Transfer tax payable.

Before parting with this matter I wish to make a few observations on the matter of the law governing affidavits, as they relate to this matter.

Section 408 of the Judicature Civil Procedure Code quoted earlier does not expressly prohibit arguments opinions (other than expert opinion) in affidavits. But it does so impliedly, for it states "Affidavits shall be confined to facts."

The comments of Browne LJ in Alfred Dunhill v Sunoptics SA [1979]F.S.R. 337 at 352 indicate the mischief of this failing and offer an interesting solution to the problem. He said:

> "There is one feature of this barrage and counter-barrage of affidavits on which I think that comment ought to be made. Some of the affidavits, in particular the second defendant's first affidavit, have been made the vehicle for numerous submissions of law and for forensic argument, wholly out of place in an affidavit, as it would be in the oral evidence of the witness. If such a document were to be admitted at all, there might be much to be said for giving the Court power (perhaps the Court has inherent power) to treat the

> affidavit as though it were a party's brief to the Court in United States procedure: with the consequence that Counsel's time for oral argument would be drastically restricted." (emphasis supplied)

As regards hearsay, Peter Gibson J outlined the rationale for allowing such statements in affidavits in interlocutory proceedings. In Savings and investment Banks Ltd. v Gusco Investments (Netherlands) B.V. [1984] 1 WLR 271 at p. 282 F-G he said:

> "To my mind the purpose of rule 5(2) is to enable a deponent to put before the court in interlocutory proceedings, frequently in circumstances of great urgency, facts which he is not able of his own knowledge to prove but which, the dependent is informed and believes, can be proved by means which the deponent identifies by specifying the sources and grounds of his information and belief."

Rigby L.J. at the start of the century spoke strongly about the problem of irregular affidavits. In Re Young JL Manufacturing Co. Ltd. [1900] 2 Ch 753 he said at pp. 754-5:

> "[I]n my opinion, the only way to bring about a change in that irregular practice is for the judge, in every case of the kind, to give a direction that the costs of the affidavit, so far as it relates to matters of mere information or belief, shall be paid by the person responsible for the affidavit. At any rate, speaking for myself, I should be ready to give such a direction in any case. The point is a very important one indeed. I frequently find affidavits stuffed with irregular matter of this sort. I have protested against the practice again and again, but no alteration takes place. The truth is that the drawer of the affidavit thinks he can obtain some proper advantage by putting in a statement on information and belief, and he rests his case upon that." (emphasis supplied)

The Court has the power to strike out improper hearsay - on the ground of manifest inconvenience - Savings and Investment Bank Ltd. v Gusco Investments, and in future this Court shall consider doing so and exercising the option suggested by Browne LJ., of limiting counsel to the arguments contained in the improper affidavits he or she has relied on.

The respondent shall have her costs, to be taxed if not agreed.