THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2007-02831

BETWEEN

VISHNU ANDREW SAGAR

Claimant

AND

BISSOONDAYE MUNGROO
RAJESH SAGAR

Defendants

Before The Honourable Madam Justice Rajnauth-Lee

Appearances:
Mr. Yaseen Ahmed for the Claimant
Mr. Shiv A. Sharma for the First Defendant
Ms. Lesley-Ann Lucky-Samaroo for the Second Defendant

Dated the 9th June, 2011

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JUDGMENT

INTRODUCTION

1. This action was commenced by Vishnu Andrew Sagar, the Claimant, ("Vishnu") on the 2nd August 2007 by a fixed date claim form which the Court ordered be treated as an ordinary claim. By his Amended Statement of Case filed on the 17th October 2007, Vishnu claimed

against Bissoondaye Mungroo, the First Defendant, ("Bissoondaye") and Rajesh Sagar, the Second Defendant ("Rajesh") the following reliefs:

1. *An Order of Specific Performance of Agreement made in the month of August, 2003 for the transfer of ownership from the Second Defendant to the Claimant of a parcel of land situate in the Ward of Turure comprising One Acre 3 roods and 25 perches and abutting on the North partly upon lands of Maurice Quesnel and partly upon the Old Manzanilla Road on the South partly on the lands of the heirs of Robert Wells and partly upon lands of Priscilla Ramsay on the East partly upon the Old Manzanilla Road and partly land of Priscilla Ramsay and on the West partly upon lands Maurice Quesnel and partly upon the lands of the heirs of Robert Wells which said parcel of land is marked "**F**" and coloured pink in the Plan marked "**A1**" to the Deed dated 28th September, 1928, registered as No. 3282 of 1928 and also marked "**C3**" in the Plan annexed to the said Deed.*

2. *An Order for possession of the above parcel of land namely the 1 acre 3 roods and 25 perches parcel together with buildings thereon.*

3. *An Order that the Second Defendant do prepare Deed of Conveyance of the above parcel of land 1 acre 3 roods 25 perches and to execute same in favour of the Claimant within 21 days of the date of the Order herein in default that the Deed of Conveyance be prepared by the Attorney at Law for the Claimant and be executed by the Registrar of the Supreme Court on behalf of the Second Defendant.*

4. *Mesne Profits at $1,000.00 per month from September, 2004 to date.*

5. *Alternatively to (1) damages for breach of contract as a result of Agreement entered into in or about August, 2003.*

6. *A declaration that the Defendants are estopped from denying the Claimant the ownership of the said 1 acre 3 roods 25 perches parcel.*

7. *Costs.*

8. *Such further and /or other reliefs.*

HISTORICAL BACKGROUND

2. Vishnu was the son of Lalan Sagar and Vernon Sagar. Lalan and Vernon had four children from their marriage which ended in divorce. Subsequently, Lalan entered into a common law relationship with Bissoondaye. Bissoondaye and Lalan had three other children; among them were Rajesh and Sanjay Sagar ("Sanjay"). Rajesh was the youngest of Lalan's children.

3. During Lalan's lifetime, he worked and purchased several parcels of land including a 16 acre parcel of land situate in the ward of Tururе ("the 16 acre parcel") and the 1 acre, 3 roods and 25 perches parcel of land also situate in the ward of Tururе ("the subject parcel of land"). On the 16 acre parcel were planted cocoa, coffee, banana trees and citrus trees. There were also cedar trees, mahogany trees and applemart trees. It is disputed by the parties whether Bissoondaye assisted Lalan in the acquisition of these parcels of land. Vishnu contended that Bissoondaye did not play any part in the purchase or acquisition of the several parcels of land and alleged that it was Lalan alone who acquired the several parcels. Nevertheless, the lands purchased were put into the various names of the children and into Bissoondaye's name on occasion. The 16 acre parcel was placed in the names of Sanjay, Vishnu and Rajesh while the subject parcel of land was placed in the names of Sanjay and Rajesh. It is not disputed that Lalan's children did not contribute towards the purchase price of any of these parcels and that most of these parcels were purchased when they were quite young.

4. Lalan was a successful businessman who engaged in estate work, chicken rearing and the rental of stores in the Pioneer Plaza which he owned in Sangre Grande. A large estate house was also built upon St. Pelagie Estate which Lalan owned and which comprised about 120 acres. Vishnu claimed that in or about early 1999 he moved into this house to live at the request of his father. There together with Sanjay and one or two workers, he assisted his father

with the daily operations of the chicken farm. Vishnu testified that in or about July 1999 his father commenced construction of the two (2) bedroom house which is located on the subject parcel of land. As noted earlier, the subject parcel of land was jointly owned by Sanjay and Rajesh. It comprised the two (2) bedroom house, 1 chicken pen and a large grass area.

5. Lalan died in 1999 and Rajesh, with the consent of his siblings, obtained Letters of Administration to Lalan's estate. Vishnu testified that after Lalan's death he continued to reside and work on the St. Pelagie Estate with Sanjay. Vishnu also testified that at the time of Lalan's death the two (2) bedroom house on the subject parcel of land was incomplete. He further said that in or about September, 2002, Sanjay and Rajesh fell out badly and Sanjay left the estate house where he had lived and the business. According to Vishnu, Rajesh took control of the business and placed more responsibilities on him since he alone knew about the rearing of chickens. Vishnu also said that from August 2002 up to June 2004, he received cheques from Rajesh for batches of chickens.

6. Vishnu further said that in or about 2003, he moved into the two (2) bedroom house situate on the subject parcel of land. Although Vishnu acknowledged that he was aware that it was jointly owned by Sanjay and Rajesh, he claimed that he assumed the responsibility of completing this house after his father passed away. He stated that he completed the kitchen cupboards, tiled the kitchen counter and bathroom, and finished the garage. He also painted the entire inside and outside of the house and maintained the surrounding lands. Vishnu stated that neither of the Defendants objected to his completing the house and that they even brought a worker to assist him with the installation of the roof on the garage and to cast the garage floor. He claimed that they did not object to his moving into the two (2) bedroom house when it was finished. The parties agreed that they enjoyed a good relationship during this time. According to Vishnu in or about Easter 2003 his common law wife, Sharmilla and her daughter came to live with him at the two (2) bedroom house.

7. There was no dispute over the ownership and control of the various parcels of land until after the death of Lalan Sagar in 1999. In the year 2003 Sanjay filed a number of actions brought under the Partition Ordinance in respect of various parcels of land which were held jointly in the names of Sanjay and other members of the family. He also brought a number of other

claims in respect of businesses being conducted on the lands. Vishnu accepted that he was aware of these actions and testified that it was his understanding from the beginning that there was a general agreement among all his siblings and himself that the lands would have to be divided up and that they did not intend to fight each other in court over any of these lands.

8. The following matters were filed before the High Court:

(a) H.C.A. 1721 of 2003 Sanjay Sagar & Vashela Sagar v Nito Sagar & ors.;
(b) H.C.A 1722 of 2003 Sanjay Sagar v Rajesh Sagar;
(c) H.C.A 1723 of 2003 Sanjay Sagar v Vishnu Sagar and Rajesh Sagar; and
(d) H.C.A. 1925 of 2003 Sanjay Sagar v Rajesh Sagar & Bissoondaye Mungroo.

H.C.A 1722 of 2003 was filed by Sanjay against Rajesh claiming partition or sale in lieu of partition of the subject parcel of land. Whilst in H.C.A 1723 of 2003, Sanjay claimed against Vishnu and Rajesh partition or sale in lieu of the said 16 acre parcel. In addition to the several parcels of land which were before the court, Vishnu admitted that there was a 16 acre parcel of land in Manzanilla which had been purchased by his father Lalan and which had been put in his name only.

9. Vishnu alleged at paragraph 8 of his Amended Statement of Case that whilst there were pending before the court several matters between Sanjay, Vishnu, Rajesh and Bissoondaye involving several parcels of land belonging to Lalan Sagar and family "*the Defendants approached the Claimant and requested of him whether he would be prepared to give up his 1/3 share in the 16 acres parcel to Sanjay Sagar in return for the entire 1 acre 3 roods 25 perches parcel including the two bedroom house. The Claimant agreed to this, Rajesh Sagar the Second Defendant also agreed to transfer his 1/3 share in the 16 acre parcel to Sanjay Sagar. The Defendants further agreed to get Sanjay Sagar to transfer his half share in the 1 acre 3 roods 25 perches parcel to Rajesh Sagar prior to transferring the entire 1 acre 3 roods 25 perches parcel to the Claimant."*

10. At paragraph 22 of his witness statement Vishnu testified as follows:

*"Some time in June 2003 the date I cannot recall Rajesh came to visit me at home (in the 2 bedroom house) and he asked me if I can give up the Brigand Hill land to Sanjay. Rajesh said he was thinking about transferring his share in these lands to Sanjay. He also stated when Sanjay took his name from the house (meaning the 2 bedroom house) and the land (meaning the **1 Acre, 3 Roods, 25 Perches parcel**) in return for my giving my share in the **16 Acres parcel** they would transfer this parcel to me. I told him I will think about it*."
[The Court understands the Brigand Hill land to be the 16 acre parcel].

11. At paragraph 23 of his witness statement Vishnu continued:

*"I discussed the above proposal with my wife Sharmilla and it was sometime after in the month of August Rajesh and Bissoondaye came to visit me at home. We sat down in the garage area that day my wife was in the kitchen area. The proposals were put to me again. They said that they will get Sanjay to transfer his portion of the house and the 1 acre parcel of land to Rajesh and then Rajesh will give me the whole parcel of land and the house. They did not use the words '**1 Acre, 3 Roods, 25 Perches**' but referred to this as the 1 acre parcel and the house was on which I knew to mean the 1 Acre, 3 Roods, 25 Perches. Also there is 1 Deed for the entire **1 Acre, 3 Roods, 25 Perches parcel**. I told them I will agree to this. This conversation lasted about half an hour. They also told me that I will go down to Mrs. Lucky-Samaroo's office to sign some documents. I also agreed to this.*

12. By letter dated the 11th June, 2004 Mr Yaseen Ahmed, acting on behalf of Sanjay and Vashala Sagar forwarded a proposal to Ms. Lesley-Ann Lucky-Samaroo to settle the matter. Mr. Ahmed proposed the outright transfer of three (3) properties for a cash payment. The said letter sought an urgent reply. According to Vishnu, sometime after, he was told by Rajesh that he had to go to the office of Ms. Lucky-Samaroo the following morning. According to his evidence, the next day Bissoondaye, Rajesh, Nito (his sister) and Vishnu went to Ms. Lucky-Samaroo's office. According to him, he met the Attorney. She spoke to him for a few minutes and he was given instructions to sign giving up his share in the 16 acre parcel to Sanjay. He admitted that his alleged agreement with Bissoondaye and Rajesh was not

discussed with Ms. Lucky-Samaroo. He said that he never received a copy of these instructions and that this was the only time that he had gone to the Attorney's office.

13. By letter dated the 15th June 2004 Ms. Lucky-Samaroo, Attorney for Rajesh, Vishnu, Bissoondaye and Nito Sagar, accepted Mr. Ahmed's proposals. This is a convenient stage to record that prior to the commencement of the trial, the Court raised with Attorneys the propriety of Ms. Lucky-Samaroo's appearing for Rajesh and against Vishnu. Mr. Ahmed has made it clear that he had spoken to Vishnu quite early in the proceedings and that Vishnu had no objection to her so appearing. The Court has also noted that Vishnu has made no allegations of any kind of impropriety against Ms. Lucky-Samaroo throughout these proceedings.

14. Based on the agreement reached as set out in the letters of 11th and 15th June, 2004 the consent orders in H.C.A Nos. 1721, 1722, 1723, 1925 of 2003 were entered. By the consent order entered in H.C.A 1722 of 2003 Sanjay agreed inter alia to transfer his half share and/or interest and/or claim in the subject parcel of land to Rajesh. The consent order entered in H.C.A 1723 of 2003 disposed of the 16 acre parcel as well as a parcel of land comprising 6 acres 3 roods and 25 perches which was also owned by Vishnu, Rajesh and Sanjay. In effect, Vishnu and Rajesh agreed inter alia to transfer their shares and/or interests in the two parcels to Sanjay. The consent orders in H.C.A Nos. 1722 and 1723 were both dated the 16th June, 2004 and made before the same judge. The deed of conveyance and the memorandum of transfer were not finalised pursuant to these consent orders until the 20th May, 2005 and 24th January 2006 respectively. The deed of conveyance was prepared by Ms. Vashti Narinesingh, Attorney at Law, and the memorandum of transfer was prepared by Mr. Ahmed, and the relevant consent orders were annexed to them.

15. According to Vishnu's witness statement, everything was normal after the consent orders were made, but in or about late 2004 he went to enquire of the Rajesh and Bissoondaye when he would be getting his deed since he had heard that Sanjay got what the Court understands to be the two (2) parcels of land referred to in H.C.A. 1723 of 2003 and that Vashela got some quarry lands also. Vishnu said that Rajesh and Bissoondaye both informed him that they had

nothing for him yet. According to his witness statement, Vishnu said that he told them that Sanjay already got his deed and he wanted to know why he had not gotten his. He said that Rajesh and Bissoondaye got angry and asked him why he was in such a hurry. According to him, their conversation got heated and they told him that he had nothing to get and that he could leave the place if he so desired. Vishnu stated in his witness statement that after this heated argument, he was stopped from working on the farm the next day. He said that Rajesh or Bissoondaye began to lock the big gates to enter the estate and since this was the only way for his family and him to reach their home this caused them great inconvenience. According to him, they also stopped his money for the work on the farm. According to Vishnu two (2) weeks after the argument, he and his family moved out of the two (2) bedroom house to live elsewhere. At the time he made the witness statement, Vishnu claimed that he and his family were living in their own home in Manzanilla but that prior to that they were renting a house for $1,200.00 per month. Vishnu's contention was that he was forced out of the two (2) bedroom house whilst the Defendants have contended that he vacated the premises of his own free will.

16. By September 2005, Vishnu was no longer represented by Ms. Lucky-Samaroo and had retained Mr. Ahmed as his Attorney. He instructed him to institute legal proceedings on his behalf. On the 13th September, 2005 H.C.A. 2157 of 2005 was filed against Rajesh (as Administrator of the Estate of Lalan Sagar, deceased) claiming inter alia as a lawful child of Lalan Sagar a beneficial interest in the estate of the deceased described in the inventory.

17. At paragraph 10 of his Amended Statement of Case, Vishnu alleged that further to the agreements described at paragraphs 8 and 9 of his Amended Statement of Case, in or about the year 2006, he attended the offices of Mr. Ahmed for the purpose of executing the memorandum of transfer for the 16 acre parcel to Sanjay. On the other hand, it was submitted on behalf of Rajesh, in his written submissions filed on the 31st March, 2010, that the memorandum of transfer itself purported to be made pursuant to the consent order made in H.C.A. 1723 of 2003. It was further submitted that a copy of the order was annexed to the memorandum of transfer and that did not refer to any other agreement between these parties.

18. As noted earlier, by deed of conveyance dated the 20th May, 2005, Sanjay transferred his share and/or interest in the subject parcel of land to Rajesh. Rajesh is now the sole owner of the subject parcel of land.

19. On the 3rd January, 2007, Mr. Ahmed acting for Vishnu sent two (2) identical letters addressed to Bissoondaye and to Rajesh. According to Mr. Ahmed he was instructed by Vishnu that whilst Vishnu was residing on the subject parcel of land in the two (2) bedroom house, Bissoondaye and Rajesh promised and agreed with him in return for giving up his one third share in the 16 acre parcel to Sanjay, that they would transfer the entire subject parcel of land in Vishnu's name alone. Mr. Ahmed contended that Vishnu had duly complied but that they had not. The letter also warned the Defendants that Vishnu intended to issue legal proceedings against them if they did not make the necessary arrangements to have the subject parcel of land transferred to him within 21 days. These letters were the first indication that Vishnu was alleging that there was an oral agreement made in August 2003 between the parties. The letters dated the 3rd January, 2007 were followed by letters dated 27th March, 2007 again addressed to Bissoondaye and Rajesh and in identical terms. By the said letters, Mr. Ahmed noted that there had been no reply to his earlier letters and informed the Defendants that Vishnu also intended to claim loss of use of the house on the subject parcel of land at $1,000.00 per month from January 2004 to date and loss of earnings from the chicken pen at $4,000.00 per month from January 2004 to date.

20. On the 2nd August, 2007, Vishnu commenced this claim against the Defendants. The Defence of both Defendants was filed on the 30th January, 2008. They denied Vishnu's claim that the parties had entered the oral agreement alleged. The Defendants indicated their reliance on section 4(1) of the **Conveyancing and Law of Property Ordinance** Chapter 27 No. 12 and contended that at all material times they had no authority, express or implied, to enter into the alleged agreement for and on behalf of Sanjay. A Reply was filed on the 28th March, 2008. Vishnu indicated inter alia his intention to rely on the doctrines of estoppel, acquiescence (on the part of the Defendants), part performance and the reliefs of specific performance in relation to the alleged agreement.

21. The Court notes that, at the commencement of the trial, Mr. Ahmed conceded that Issue No. (5) of the Agreed Statement of Issues filed on the 27th November, 2008, was not being pursued. That issue concerned who had control of the chicken farm after the death of Lalan Sagar.

ISSUES

22. The main issue is whether Vishnu is entitled to specific performance of the alleged oral agreement. In determining this issue, other issues fall to be determined:

    (i) Were there sufficient acts of part performance on the part of Vishnu for the purpose of section 4 of the **Conveyancing and Law of Property Act** Chap. 56:01.

    (ii) Are the Defendants estopped from denying Vishnu's claim to the ownership of or entitlement to the subject parcel of land.

    (iii) Did Vishnu unreasonably delay in bringing this action to enforce his rights and therefore was his claim barred by the equitable doctrine of laches.

23. Mr. Ahmed has also argued with conviction that the Defendants failed to put their case directly to Vishnu and accordingly that failure would properly entitle the Court to reject any challenge to Vishnu's evidence. I will deal with this issue first since it fundamentally affects the Court's consideration of the evidence adduced by the parties.

The Defendants' failure to put their case directly to Vishnu

24. Mr. Ahmed has contended in his written submissions filed on the 14th April, 2010 that the alleged oral agreement between the parties upon which Vishnu relied was not challenged

during cross- examination by Attorneys for the Defendants. Mr. Ahmed submitted further that this was the material difference between the two cases. Mr. Ahmed contended that there was a fundamental principle of cross-examination that an advocate must challenge the material parts of the evidence of a witness called by the opposing side and that he must put his case to the witness demonstrating that he does not accept the other side's case. Mr. Ahmed submitted that failure to do so would properly entitle a judge to reject any challenge to the evidence presented by the advocate. Mr. Ahmed has relied on several authorities to support his contention, including the learning in **Phipson's on Evidence** (16th edition) (2005) para. 12-12 where the author stated that:

> "*In general, a party is required to challenge in cross examination the evidence of any witness of the opposing party if he wishes to submit to the Court that the evidence should not be accepted on that point. The rule applies in civil cases as it does in criminal. In general, the CPR does not alter that position. This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If on a particular important point, he will be in difficulty in submitting that the evidence should be rejected."* (emphasis mine.)

25. Additionally, Mr. Ahmed referred the Court to an extract from **Cross and Tapper on Evidence** (10th edition) (2004) page 333, where it is stated that:

> *"Any matter upon which it is proposed to contradict the evidence-in-chief given by the witness must normally be put to him so that he may have an opportunity of explaining the contradiction, and failure to do this may be held to imply acceptance of the evidence-in-chief, but is not an inflexible rule and has been held to be unsuitable to proceedings before lay justices, and less applicable to parties, including the complainant in a sexual case."*

26. Mr. Ahmed also referred to **Halsbury's Laws of England** (4th edition) para. 278, where the principle is stated as follows:

"Where the Court is to be asked to disbelieve a witness, the witness should be cross-examined, and failure to cross-examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence."

27. Mr. Ahmed submitted that this rule of evidence was established by the House of Lords in the case of **Browne v Dunn** (1893) 6 R. 67 (H.L.) which was explained in the Australian case of **Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation** (1983) 44 ALR 607. At page 624 of his judgment, Hunt J. considered the dicta of Lord Herschell LC in **Browne v Dunn** as follows:

"Lord Herschell LC said (at 70-71): 'Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.' "

28. With respect to the same issue, at p. 624 of his judgment, Hunt J. went to quote Lord Halsbury:

"Lord Halsbury said (at 76-77): 'My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts, they have deposed to.'"

29. On the other hand, Ms. Lucky-Samaroo cited **Halsbury's Laws of England** (4th edition) Reissue Vol. 17(1) and submitted that paragraph 1017 suggested that the following paragraphs (dealing with the cross-examination of witnesses) must be read in light of the Court's general discretionary powers under the **Civil Proceedings Rules, 1998**, as amended ("the C.P.R."). Ms. Lucky-Samaroo argued that it was noted at paragraph 1017 that "the general rule in civil proceedings is that the evidence of witnesses is given orally at trial…" She therefore submitted that the statements on the state of the law on cross-examination in civil proceedings as set out in **Halsbury's Laws** were relevant to trials in which the evidence was given orally. She contended that this was to be distinguished from the instant case in which all the evidence-in-chief of all parties was given to the opposing side, in advance, in writing.

30. Although Ms. Lucky-Samaroo initially argued that the authority of **Browne v Dunn** was not as relevant today as it was prior to the introduction of the C.P.R, she eventually accepted that the rule in **Browne v Dunn** was still applicable after the introduction of the C.P.R. although she pointed out that the rule may sometimes be relaxed in practice. Ms. Lucky-Samaroo cited **Phipson on Evidence** (17th edition) (2010) at paragraph 12-12 where it is stated:

"In general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the Court that the evidence should not be accepted on that point. The rule applies in civil cases as it does in criminal. <u>In general the CPR does not alter that position</u>.

This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross examine on a particular important point, he will be in difficulty in submitting the evidence should be rejected.

However, the rule is not an inflexible one. For example if there is a time limit imposed by the judge on cross examination it may not be practicable to cross-examine on every minor point, particularly where a lengthy witness statement has been served and treated as evidence-in-chief. Thus, in practice there is bound to be at least some relaxation of the rule.

Failure to put a relevant matter to a witness may be most appropriately remedied by the Court permitting the recall of that witness to have the matter put to him."

31. It is uncontroverted that there was no cross-examination of the Claimant's witnesses by Mr. Sharma on behalf of Bissoondaye. It is also undisputed that there was no cross-examination of Vishnu by Ms. Lucky-Samaroo on the alleged oral agreement on which Vishnu has grounded his claim and certainly Ms. Lucky-Samaroo did not put her case to Vishnu.

32. The rule in **Browne v Dunn** was also considered in the Canadian case of **R v Werkman** 2007 ABCA 130, where Justice Côté of the Alberta Court of Appeal said at paras. [7] and [8]:

*"[7] The rule in **Browne v. Dunn** requires that counsel put a matter to a witness involving the witness personally if counsel is later going to present contradictory evidence, or is going to impeach the witness' credibility..... Though it is not necessary to cross-examine upon minor details in the evidence, a witness should be provided with an opportunity to give evidence on "matters of substance" that will be contradicted..... The purpose of the rule is to ensure that parties and witnesses are treated fairly; it is not a general or absolute rule..... The rule also has exceptions. (emphasis mine)*

[8] In this case, the trial judge concluded the Crown witnesses were not cross-examined on a number of significant points which formed the entire basis of Werkman's defence..... Werkman contends that these were just details, but a review of the record belies that characterization. So the trial judge had an appropriate bases on which to apply the rule in ***Browne v. Dunn****."*

33. The Court has also considered the English authority of **EPI Environmental Technologies Inc and another v Symphony Plastic Technologies plc and another** [2005] 1 WLR 3456 where Peter Smith J. addressed the issue of "putting one's case" to a witness of the opposing side. The learned judge stated at paragraph 74 of the judgment that:

> *"Third, I regard it as essential that witnesses are challenged with the other side's case. This involves putting the case positively. This is important for a judge to enable him to assess that witness' response to the other case orally, by reference to his or her demeanour and in the overall context of the litigation. A failure to put a point should usually disentitle the point to be taken against a witness in a closing speech. This is especially so in an era of pre-prepared witness statements. A judge does not see live in-chief evidence, thereby depriving the witness of presenting himself positively in his case".*

34. In **Cross on Evidence, Australian Edition** (2004), the impact of the rule in **Browne v Dunn** as it operates in Australia is highlighted at page 538 para. [17435]:

> *"And if a Court is to be invited to disbelieve a witness, the grounds upon which the evidence is to be disbelieved should be put to the witness in cross-examination so the witness may have an opportunity to offer an explanation."*

Exceptions to the rule were set out at page 541 para. [17445]. The first exception considered was the following:

> *"The rule does not apply where the witness is on notice that the witness' version is in contest. The notice may come from the pleadings, or a pre-trial document*

indicating issues, or the other side's evidence, or the other side's opening; it may come from the general manner in which the case is conducted. In general, however, this exception to the rule should only operate where the issue is a fairly clear and obvious one."

35. At paragraph 16.181 of the text **The Law of Evidence in Canada** (2009) the learned authors stated that:

> *"The rule is one designed to accord fairness to witnesses and the parties. It is, therefore, not absolute, and the extent and manner of its application will be determined by the trial judge in all the circumstances of the case. The factors which may be taken into account include:*
>
> *(1) Notice is given beforehand to the witness that his or her credibility is in issue.*
>
> *(2) The testimony is of such a nature that it is obvious that credibility is in issue.*
>
> *(3) Failure to cross-examine is based on concern for the witness, as in the case of children of tender years.*
>
> *If the trial judge's discretion is exercised to enforce the rule, it would follow, logically that it be applied throughout the adjudicative process. Credibility should therefore not be subject to attack by evidence or argument. Furthermore, the trier of fact should not consider credibility as a factor. To do so would be to decide a matter in the absence of an explanation of the matter by evidence and argument."*

36. The learned authors continued at para. 16.182:

> "*The Supreme Court of Canada in R. v. Lyttle confirmed that the rule in Browne v. Dunn remains a sound rule of general application. As the rule is not absolute and is grounded in common sense and fairness to the witness and to the parties, it is a matter of discretion as to how a trial judge deals with the failure on the part of*

counsel to confront a witness in cross-examination before impeaching the witness by contradictory evidence."

37. The Court accepts that the rule in **Browne v Dunn** is applicable in this jurisdiction even after the introduction of the C.P.R. The Court adopts the reasoning of Peter Smith J. in **EPI Technologies** (supra). The rule is not absolute, however, and in order to determine the extent and manner of its application, the Court has to consider all the circumstances of the case. The Court has therefore considered the following factors:

    (1) The main issues in the case were fairly clear and obvious. The issues were agreed in advance by all the parties prior to the commencement of the trial [See pre-trial document - the Claimant's Statement of Issues filed on the 27th November, 2008 to which all Attorneys agreed].

    (2) The main issues were clearly gleaned from the Amended Statement of Case, the Defence and the Reply filed on behalf of the parties and in the witness statements filed on behalf of the parties. The Court had ordered that witness statements stand as evidence-in-chief.

    (3) Ample notice has been given beforehand that the credibility of the Claimant's witnesses were in issue.

    (4) The testimony was of such a nature that it was obvious that credibility was in issue. Indeed, the case was conducted on that basis.

38. In the case of **Raben Footwear Pty Ltd v Polygram Records Inc & Anor** [1997] FCA 370, the Federal Court of Australia considered the rule in **Browne v Dunn**. In the reasons for judgment of the court given by Tamberlin J., the court observed that the rule in **Browne v Dunn** was one of procedural fairness and whether the court below should have taken any action in relation to the failure to put certain disputed words called for the exercise of a discretionary judgement on the part of the court below. Tamberlin J. further stated that in commercial litigation (including intellectual property matters) where issues were clearly defined, there would often be no point in formally challenging every aspect of the evidence which was contested. There would often be a large number of matters in respect of which it would be apparent from the pleadings and particulars that there was clearly a contest. Where

this was the case, the court need not apply the principle in an unduly technical way. Tamberlin J. concluded that he was not satisfied that there was any procedural unfairness.

39. The Court adopts the reasoning in the **Raben Footwear** case. Having regard to the factors that the Court has considered, and in order to accord fairness to the parties in the circumstances of this case, the Court will not enforce the rule in **Browne v Dunn**, but will consider the totality of the evidence on a balance of probabilities. It is apparent from all the pre-trial documents that there was clearly a contest on the alleged oral agreement on which Vishnu relied. In the judgment of the Court, to apply the rule in **Browne v Dunn** in an unduly technical way would not do justice in all the circumstances of this case.

Specific Performance and Acts of Part Performance

40. Section 4 of the **Conveyancing and Law of Property Act** Chap. 56:01 requires all contracts for the sale or other disposition of and/or any interest in land to be in writing and signed by the party to be charged or by some other person lawfully authorized by him to do so. Failure to satisfy these requirements would render the agreement unenforceable at law. Nonetheless the Act does not preclude a claimant from establishing and seeking the enforcement of an oral agreement where there are sufficient acts of part performance. Section 4 of the Act provides:

> ***4.*** *(1) No action may be brought upon any contract for the sale or other disposition of and or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised.*
>
> *(2) This section applies to contracts whether made before or after the commencement of this Act and does not affect the law relating to part performance, or sales by the Court.*

41. It is common ground that there is no agreement in writing for the transfer to the subject parcel of land to Vishnu. Accordingly by virtue of section 4(1) of the Ordinance, the alleged oral agreement is prima facie unenforceable.

42. In general, when the Statute of Frauds or similar legislation renders a contract unenforceable at law, it is unenforceable equally in equity. There are two categories of cases, however, in which equity will not allow the statute to be used as an instrument of fraud and will order specific performance despite the lack of writing. They are:

(i) Where the lack of writing is due to fraud or dishonesty on the part of the defendant. [1]

(ii) Where there have been sufficient acts of part performance. [2]

43. It is on the second exception that Mr. Ahmed relied. With regard to section 4(1) of the Ordinance, Mr. Ahmed submitted that the law is that where there was no contract in writing or there was no evidence of the contract in writing but the claimant has partly performed on an oral contract which he expected the defendant would perform also, the courts of equity would not sit by and allow the defendant to escape from his liability under the contract because the statute required it to be in writing. To allow the defendant to evade liability would allow him to commit a fraud upon the Statute, it was argued.

44. In the leading case of **Maddison v Alderson** (1883) 8 App. Cas. 467**,** the defendant was induced to continue as housekeeper to Alderson by a promise by Alderson that he would leave her a life estate in certain land. Alderson died, having made a will in which he gave the defendant a life estate in the land. However, this will was deemed to be invalid for want of due attestation. Alderson's heir brought proceedings against the defendant seeking possession of the land. The defence was that Alderson had agreed, in consideration of the defendant's otherwise gratuitous services, to leave her a life estate and that that agreement was specifically

[1] Equity Doctrines and Remedies by Meagher, QC, Gummow and Lehane para. 2035.
[2] Ibid. para. 2036

enforceable; the agreement was one for the disposition of an interest in land and therefore within the Statute of Frauds, and although there was no sufficient memorandum in writing to enable the defendant to bring an action at law, yet the agreement was enforceable in equity because of the defendant's acts in part performance of the agreement. It was contended that the defendant had performed her obligations under the agreement by acting as Alderson's housekeeper. The House of Lords held that the defendant had not established that there was a contract such as she alleged. Their Lordships also held that, even if such there had been such an oral contract, the defendant's alleged acts of part performance were not sufficient to entitle her to specific performance. Lord Selborne L.C. set out the test to be applied by the courts at pp. 479 and 480:

> *"All the authorities shew that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged.....*
> *The law deductible from these authorities is, in my opinion, fatal to the appellant's case. Her mere continuance in Thomas Alderson's service, though without any actual payment of wages, was not such an act as to be in itself evidence of a new contract, much less of a contract concerning her master's land. It was explicable, without supposing any such new contract, as easily as the continuance of a tenant in possession after the expiration of a lease."*

45. In **Maddison v Alderson**, Lord O'Hagan stated at page 485:

> *"… there is no conflict of judicial opinion, and in my mind no ground for reasonable controversy as to the essential character of the act which shall amount to a part performance, in one particular. It must be unequivocal. It must have relation to the one agreement relied upon, and to no other. It must be such, in Lord Hardwicke's words, 'as could be done with no other view or design than to perform that agreement.' It must be sufficient of itself, and without any other information or evidence, to satisfy a court, from the circumstances it has created and the relations it has formed, that they are only consistent with the assumption of the existence of a contract the terms of which equity*

requires, if possible, to be ascertained and enforced."

46. The House of Lords considered the learning of **Maddison v Alderson** in the case of **Steadman v Steadman** [1976] AC 536 and ushered in what is considered a relaxation of the rigour of the requirements of the doctrine[3].

47. **Steadman v Steadman** concerned an oral agreement between a husband and wife whose marriage was dissolved. The wife had agreed to transfer her interest in the house to the husband for £1500.00 in settlement of her claim under section 17 of the Married Women's Property Act 1882. The parties also agreed that the maintenance order in favour of the wife should be discharged and the maintenance order in favour of the child should continue, while the arrears of maintenance would be remitted save for the sum of £100 which was to be paid by the husband by the 30th March, 1972.

48. The justices were informed of the agreement and they thereupon approved the agreement, implemented it by varying the maintenance order and adjourned the proceedings with regard to the arrears. The husband subsequently paid the £100 and his solicitors prepared the deed of transfer and sent it to the wife's solicitors for signature. The wife refused to sign the transfer and, on the hearing of her application under section 17 of the Act of 1882, which were restored for hearing, the wife contended that the agreement, being an agreement for the disposition of land, was unenforceable under section 40 of the Law of Property Act 1925 in that there was no note or memorandum in writing and no act of part performance.

49. The matter eventually came before the House of Lords who were called upon to consider the requirements to establish part performance. Their Lordships held inter alia that the alleged acts of part performance had to be considered in their surrounding circumstances and, if they pointed on a balance of probabilities to some contract (per Lord Salmon, for the disposition of an interest in land) between the parties and either showed the nature of or were consistent with the oral agreement alleged, then there was sufficient part performance of the agreement for the purpose of section 40(2) of the Law of Property Act 1925. Viscount Dilhorne addressed the

[3] Spry's Equitable Remedies, 8th Edition, pp. 263-264.

issue as to the proper interpretation of the word "unequivocal" as used by Lord Selborne LC in **Maddison v Alderson**. He stated at p. 556:

> *"I think it does not mean any more than that the acts of part performance which are alleged to have taken place must point to the existence of some such contract as alleged."(emphasis mine)*

50. In relation to the doctrine of part performance, Lord Reid observed at pages 541-542:

> *"I am aware that it has often been said that the acts relied on must necessarily or unequivocally indicate the existence of a contract. It may well be that we should consider whether any prudent reasonable man would have done those acts if there had not been a contract but many people are neither prudent nor reasonable and they might often spend money or prejudice their position not in reliance on a contract but in the optimistic expectation that a contract would follow. So if there were a rule that acts relied on as part performance must of their own nature unequivocally show that there was a contract, it would be only in the rarest case that all other possible explanations could be excluded.*
>
> *In my view, unless the law is to be divorced from reason and principle, the rule must be that you take the whole circumstances, leaving aside evidence about the oral contract, to see whether it is proved that the acts relied on were done in reliance on a contract: that will be proved if it is shown to be more probable than not."*(emphasis mine).

51. Further Lord Simon of Glaisdale said at page 564:

> *"I am therefore of opinion not only that the facts relied on to prove acts of part performance must be established merely on a balance of probability, but that it is sufficient if it be shown that it was more likely than not that those acts were in performance of some contract to which the defendant was a party."*(emphasis mine)

52. Viscount Dilhorne (at page 553) also cited the judgment of Upjohn L.J. in **Kingswood Estate Co. Ltd. v Anderson** [1963] 2 Q.B. 169. Upjohn L.J. had rejected the contention that the acts of part performance had to be referable to no other title than that alleged, saying at p. 189 of the judgment that that was "a long exploded idea" and:

> *"The true rule is in my view stated in Fry on Specific Performance, 6th ed., p. 278, section 582: 'The true principle, however, of the operation of acts of part performance seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one; that they prove the existence of some contract, and are consistent with the contract alleged.'"*

53. The Court also notes the observation of the author in **Spry's Equitable Remedies** (8th edition) that the acts of part performance must be sufficiently unequivocal. The learned author emphasised at pages 280-281 of the text that:

> *"It should also be emphasised that, as has long been established, an act of part performance must be judged, not in the abstract, but in the light of all the material circumstances, in order to establish whether it is sufficiently unequivocal. So it must not be thought that what is not itself an act of part performance should be disregarded. In order to establish whether a particular act is sufficiently unequivocal, 'it is necessary to exclude from consideration the evidence of the alleged parol agreement between the parties and to look at the act relied upon in the light of the surrounding circumstances as revealed by the rest of the evidence'. This matter is of importance, not only in the cases that have been discussed here already, but also when executed documents that do not contain the alleged contract, or the entry into collateral contracts either between the parties to the proceedings or with third persons, or any other such matters, are to be considered."*(emphasis mine)

54. In the light of the above cited authorities, it is sufficient that the material acts of part performance should indicate, on a balance of probabilities, entry into a contract by the parties and should not be inconsistent with the contract in fact entered into[4]. Furthermore, in **Spry's Equitable Remedies** (supra) the learned author noted that a number of their Lordships [in **Steadman v Steadman**] indicated that it is sufficient in any particular case that the events that have taken place render it more probable than not that a contract has been entered into, so that the ordinary rules of evidence whereby determinations are made on a balance of probabilities apply accordingly.

55. Ms. Lucky-Samaroo also cited the dicta of Lord Reid in **Steadman v Steadman** (supra) where he made the important observation at page 541 that you must not first look at the oral contract and then see whether the alleged acts of part performance are consistent with it. You must first look at the alleged acts of part performance to see whether they prove there must have been a contract and it is only if they do so prove that you can bring in the oral contract. In the light of the above authorities, the Court proposes to examine the acts of part performance alleged by Vishnu.

56. In his written submissions filed on the 14th April, 2010, Mr. Ahmed referred to the following acts of part performance:

    1. Vishnu visited the office of Ms. Lucky-Samaroo, his then attorney-at-law, prior to the hearing of H.C.A 1723 of 2003 in June 2004 to give his instructions to enter the consent order in H.C.A. 1723 of 2003 whereby he gave up his one third share in the 16 acre parcel to Sanjay. Vishnu got nothing in return. The consent order was entered on the 16th June, 2004 before Madame Justice Tiwary-Reddy.
    2. Vishnu's eventual signing and execution of the memorandum of transfer in January 2006 whereby he transferred his one third share in the 16 acre parcel to Sanjay.
    3. The signing over of Sanjay's half share in the subject parcel of land by Sanjay to Rajesh.

[4] Spry's Equitable Remedies p. 281

4. Vishnu's vacating of the two (2) bedroom house on the subject parcel of land as a result of the alleged dispute in September 2004.

57. The Court notes that the first two acts of part performance were alleged in the Claimant's Amended Statement of Case. In my judgment, however, the third alleged act of part performance, that is, that Sanjay signed over his share in the subject parcel of land, does not qualify as an act of part performance upon which Vishnu can rely because it is not an act which was done by him. The Court concurs with the statement of Brooks J. in the unreported case of **Knight and Ors v Bastien** H.C.A. 5807 of 1985 that the acts of part performance relied on must be done by the person relying on the same. This is affirmed by the learning in **Chitty on Contract** Volume 1 (28th edition) (1999) where it was stated at para. 4-039 that:

> *"The acts of part performance relied on must have been done by the person seeking to enforce the contract or on his behalf."*

58. It therefore follows that Vishnu cannot rely on the third alleged act of part performance because he did not perform it. As to the fourth alleged act of part performance, in my view, it is inconsistent with the alleged oral agreement. The Court finds it difficult to fathom how Vishnu's departure from the two (2) bedroom house situate on the subject parcel of land can amount to part performance of the alleged oral contract by which he was promised ownership of the subject parcel of land, but I will come back to this later. Accordingly, the Court will consider the alleged acts of part performance in the light of the surrounding circumstances as revealed by the rest of the evidence. The question which the Court must determine is whether it is more probable than not that Vishnu entered the consent order in H.C.A 1723 of 2003 and subsequently executed the memorandum of transfer in January 2006 in reliance on some contract as the kind alleged.

59. Ms. Lucky-Samaroo submitted that on a balance of probabilities the transfer of Vishnu's one third share of the 16 acre parcel to Sanjay was referable to the consent order in H.C.A. 1723 of 2003 and not to any alleged oral agreement made in 2003. She further submitted that even if the alleged act of part performance is equally referable to either the consent order or the

alleged oral agreement, Vishnu's case must fail since he has failed to tip the scales in his favour and the onus is on him to do so. She contended that based on the authority of **Steadman v Steadman** (supra) the acts of part performance (if any are in fact alleged or found) do not definitively prove that there was any contract at all as they are equally referable to the settlement of H.C.A. 1723 of 2003.

60. The terms of the consent order entered in H.C.A 1723 of 2003 (which dealt with the 16 acre parcel and another parcel of land comprising 6 acres 3 roods and 25 perches and referred to at paragraph 14 of this judgment) were as follows:

1. That the Defendants/Respondents do transfer their share and/or interest and/or claim in the property described in the First Schedule of the said Plaintiff's/Petitioner's Originating Summons to the Plaintiff/Petitioner herein;

2. That the Defendants/Respondents do transfer their share and/or interest and/or claim in the property described in the Second Schedule of the said Plaintiff's/Petitioner's Originating Summons to the Plaintiff/Petitioner or to such persons as he shall nominate;

3. That the Attorney at law for the Plaintiff/Petitioner prepare both Conveyances and/or Memoranda of Transfer within 60 days of the date of this Order and do present same to the Attorney at Law for the Defendants/Respondents for execution by the Defendants/Respondents within 30 days thereafter and in default of such execution the Registrar of the Supreme Court is hereby authorised to sign and/or execute the said Memorandum of Transfer in place of the Defendants/Respondents;

4. That the said Plaintiff/Petitioner do bear the costs and expenses of preparing and registering the said Conveyances and/or Memoranda of Transfer;

5. That each party bear their own costs of this action.

61. The terms of the Consent Order entered in H.C.A 1722 of 2003 (which dealt with the subject parcel of land) were as follows:

    1. That the Plaintiff/Petitioner do transfer his share and/or interest and/or claim in the properties described in the First and Second Schedule respectively of the said Plaintiff/Petitioner's Originating Summons to the Defendant/Respondent herein;

    2. That the Attorney at Law for the Defendant/Respondent prepare the respective Conveyances and/or Memorandum of Transfer within 60 days of the date of this Order and do present same to the Attorney at Law for the Plaintiff/Petitioner for execution by the Plaintiff/Petitioner within 30 days default of such execution the Registrar of the Supreme Court is hereby authorized to sign and/or execute the said Memorandum of Transfer in place of the Defendant/Respondent;

    3. That the Defendant/Respondent do bear the costs and expenses of preparing and registering the said Conveyances and/or Memorandum of Transfer;

    4. That each party bear their own costs of this action.

62. The terms of the consent orders were clear and unambiguous and did not refer to the existence of any oral agreement between the Vishnu and Bissoondaye and Rajesh at all or with respect to the 16 acre parcel of land and the subject parcel of land. On the face of the consent orders, there was no indication that Rajesh intended to transfer ownership of the subject parcel of land to Vishnu in return for Vishnu's transfer of his one third share in the 16 acre parcel of land to Sanjay.

63. Further, Vishnu never informed Ms. Lucky-Samaroo, his then Attorney, of the alleged oral agreement either prior or subsequent to the making of the consent order, although the oral agreement was alleged to have been made in 2003 and the consent orders entered in 2004. There was no allegation against Ms. Lucky-Samaroo that she ignored Vishnu or misled him into giving his instructions to enter the consent order in H.C.A 1723 of 2003. There was no allegation that Vishnu did not understand what he was doing when he gave Ms. Lucky-Samaroo instructions to enter the consent order

64. Moreover, Vishnu offered no explanation at all as to why he still executed the memorandum of transfer of his one third share in the 16 acre parcel to Sanjay without first securing a transfer to himself of the subject parcel of land. It must be noted that at the time Vishnu executed the memorandum of transfer, he had changed attorneys and Mr. Ahmed was then acting for him. It is reasonable to expect that Vishnu would have objected to signing the memorandum of transfer. In fact, there was nothing in the Amended Statement of Case or in Vishnu's witness statement which indicated that Vishnu objected to executing the memorandum of transfer. Surprisingly, however, during cross-examination, when pressed as to his signing the memorandum of transfer without objection, Vishnu said that he had objected, but he went ahead and signed it. In these circumstances, the Court does not accept Vishnu's evidence that he objected to signing the memorandum of transfer.

65. Additionally, at the time Vishnu signed and executed the memorandum of transfer in January 2006 whereby he transferred his one third share in the 16 acre parcel to Sanjay, the alleged dispute of September 2004 had already occurred, and he had already been told by the Defendants that they had nothing for him, and, when Vishnu pressed the matter and the conversation got heated, they told him that he had nothing to get and if he wanted he could leave the place [see paragraph 29 of Vishnu's witness statement]. Further, according to Vishnu he and his family were forced out of their home on the subject parcel of land by the actions of the Defendants [see paragraph 31 of Vishnu's witness statement]. According to Vishnu's witness statement [paragraph 30], the Defendants locked the big gates thereby preventing their access to their home and his monies for his work on the farm stopped. In the Court's view, it must have been very clear to Vishnu that the Defendants did not intend to keep their end of the bargain. Nevertheless, he signed the memorandum of transfer. In my view, Vishnu ought to have provided a reasonable explanation for signing the memorandum of transfer in these circumstances.

66. Moreover, the Court notes that at the time of signing the memorandum of transfer, Mr. Ahmed was already acting for Vishnu in a matter commenced in 2005 against Rajesh as the administrator of his father's estate and referred to at paragraph 16 of this judgment. Accordingly, the Court agrees with Ms. Lucky-Samaroo that at that time Vishnu would have been familiar with enforcing what he perceived to be his rights through redress in the courts.

Further, the first indication that Vishnu was alleging that there was an oral agreement made between the parties was when Mr. Ahmed sent the letters of the 3rd January, 2007 to the Defendants on behalf of Vishnu. A considerable length of time, therefore, had elapsed between the time of the alleged oral agreement, and, firstly, the signing of the memorandum of transfer, and, secondly, the letters of the 3rd January, 2007. Despite the fact that Vishnu had alleged that the oral agreement had been unequivocally repudiated by the Defendants, there was unexplained inaction on his part.

67. The Court wishes to make some observations on Vishnu's allegation that he was forced out of his home and the subject parcel of land in September, 2004. The Court notes that Vishnu merely left the subject parcel of land which had been his home for some time without objection. He did not give instructions to an attorney to write to the Defendants recording his objection to their actions and calling upon them to desist. He did not commence any proceedings against them. In fact, although he alleges that he had to pay rent for a property for his family to live in and that the monies he was entitled to for his work on the chicken farm were stopped, he did none of these things. He simply left the very property that he was promised, that is the subject parcel of land.

68. Although Mr. Ahmed argued that, as to the consent orders entered in the High Court Actions, Vishnu received nothing in return for transferring his one third share in the 16 acre parcel to Sanjay, it is undisputed that Bissoondaye transferred her share in a 15 acre parcel of land in Plum Mitan without any reciprocal transfer. [see Bissoondaye's cross-examination]. The Court also notes that Vishnu had admitted that he was the owner of a 16 acre parcel of land in Manzanilla which had been purchased by his father Lalan and put in his name only and referred to earlier in paragraph 8 of this judgment. The Court has also considered Vishnu's evidence in his witness statement [paragraph 21] that, as to the several actions filed by Sanjay, he understood from the beginning that there was a general agreement between Lalan's children that the lands would be divided up and that they did not intend to fight each other in court over any of these lands. In addition, in cross-examination, Vishnu conceded that what motivated him to get involved in the settlement of the cases was that there was a general understanding among Lalan's children that they would not fight each other for these lands.

69. Looking at the above matters considered by the Court, and having regard to the circumstances of the case, I am not satisfied that it is more probable than not that Vishnu performed the alleged acts in reliance on some agreement as the kind alleged between himself and the Defendants. Further, the alleged acts of part performance are on a balance of probabilities and in the circumstances of this case not consistent with the oral agreement alleged. In my judgment, in all the circumstances of the case, and on a balance of probabilities, the acts of part performance relied upon by Vishnu are more referable to and consistent with the consent order entered in H.C.A 1723 of 2003 and to Vishnu's understanding that Lalan's children would not fight each other in court, than to an agreement of the kind alleged by Vishnu. Accordingly, the Court finds that Vishnu's alleged acts are not sufficient acts of part performance and therefore Vishnu is not entitled to specific performance of the alleged oral agreement. Accordingly, the Court will not allow parol evidence of the alleged oral agreement.

70. In the circumstances of this case, therefore, and having regard to the findings of the Court, I do not consider it necessary to determine the remaining issues. The Court wishes to point out, however, for the removal of doubt, that I do not regard Vishnu as a witness of truth and I do not accept Vishnu's evidence of the alleged oral agreement in the light of all the matters considered by the Court. In addition, in my view, Mr. Sharma has rightly submitted that Vishnu could not sustain a claim in specific performance against Bissoondaye. As to Vishnu's claim for mesne profits, which must necessarily fail, the Court wishes to say that no supporting evidence has been advanced. As to the case of **Doreen Rambharose v Richard Bovell** [2009] UKPC 7 cited by Mr. Ahmed, the Court does not agree that it is applicable to the facts of this case. **Rambharose** is based on wholly different facts. The issue of estoppel by representation must also necessarily fail in all the circumstances of the case. As to the issue of costs, the Court is of the view that an order for prescribed costs would be fair and appropriate in the circumstances of this case.

ORDER

1. The Claimant's claim is hereby dismissed.

2. The Claimant shall pay to each of the Defendants prescribed costs of the claim in the sum of $14,000.00.

.....

MAUREEN RAJNAUTH-LEE

JUDGE